











THE  
LAW-DICTIONARY,

EXPLAINING THE  
RISE, PROGRESS, AND PRESENT STATE

OF THE

**British Law:**

DEFINING AND INTERPRETING

THE TERMS OR WORDS OF ART,

AND COMPRISING ALSO

COPIOUS INFORMATION ON THE SUBJECTS

OF

TRADE AND GOVERNMENT.

BY

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OF THE INNER TEMPLE, BARRISTER AT LAW.

WITH EXTENSIVE ADDITIONS.

EMBODYING THE WHOLE OF THE RECENT ALTERATIONS IN THE LAW.

BY

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# THE LAW DICTIONARY.

GAG

**GABEL**, *gabella, gablum, gablagium*, in Fr. *gabelle*, i. e. *vectigal*.] This word hath the same signification among our ancient writers, as *gabelle* had formerly in France; it is a tax; but hath been variously used; as for a rent, custom, service, &c. And where it was a payment of rent, those who paid it were termed *gablatores*. *Domesday. Co. Lit.* 213. It is by some authors distinguished from tribute; *gabel* being a tax on moveables, tribute on immoveables. When the word *gabel* was formerly mentioned in France without any addition to it, it signified the tax on salt; though afterwards it was applied to all other taxes.

**GABLE-END**, *gabulum*.] The head or extreme part of a house or building. *Paroch. Antiq.* 286.

**GABULUS DENARIORUM**. Rent paid in money. *Selden on Tithes*, p. 321.

**GAFOLD-GILD**, Sax.] The payment of tribute or custom; it sometimes denotes usury.

**GAFOLD-LAND**, or **GAFUL-LAND**, *Terra censualis*.] Land liable to taxes; and rented or let for rent. *Sax. Dict.*

**GAGE**, Fr. Lat. *vadium*.] A pawn or pledge. *Glanv. lib.* 10 c. 6.

**GAGER DE DELIVERANCE**, is where he that hath taken a distress being sued, hath not delivered the cattle &c. that where distrained; then he shall not only avow the distress, but *gager deliverance*, i. e. put in surety, or pledges, that he will deliver them. *F. N. B.* 67. 94. This *gager de deliverance* is had on suing out *replevins*, upon the plaintiff's paying the same: and it is said the parties are to be at issue, or there is to be a demurrer in law, before *gager deliverance* is allowed; and if a man claim any property in the goods, or the beasts are dead in the pound, the party shall not *gage*, &c. *Kitch.* 145. See this *Dict. tit. Distress, Replevin*.

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GAI

**GAGER DEL LEY**, *Wager of Law*. See that title.

**GAINAGE**, *gainagium*, i. e. *plaustrum apparatus*, Fr. *gaignage*, viz. *lucrum*.] The gain or profit of tilled or planted land, raised by cultivating it; and the draught, plough, and furniture for carrying on the work of tillage, by the baser kind of *soke-men* or *villeins*. *Gainage* was only applied to arable land, when they that had it in occupation, had nothing thereof but the profit raised by it from their own labour, towards their sustenance, nor any other title but at the lord's will; and *gainer* is used for a *soke-man*, that hath such land in occupation. *Bract. lib.* 1. c. 9: *Old. Nat. Br.* 117. The word *gain* is mentioned by *West. Symb. par.* 2. sect. 3. where he says land in demesne, but not in *gain*, &c. And in the stat. 51. H. 3. st. 4. there are these words; "no man shall be distrained by his beasts that *gain* the land."—In the statute of *Magna Charta*, c. 14. by *gainage* is meant no more than the plough-tackle, or implements of husbandry, without any respect to *gain* or profit; where it is said of the knight and freeholder, he shall be amerced *salvo contenemento suo*; the merchant or trader, *salvo merchandisa sua*; and the villein or countryman *salvo gainagio suo*, &c. In which cases it was, that the merchant and husbandman should not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his *wainage*, to the end that the plough might not stand still; for which reason the husbandmen at this day are allowed a like privilege by law, that their beasts of the plough are not in many cases liable to distress. See *tit. Distress*.

**GAINERY**, Fr. *Gaignerie*.] Tillage, or the profit arising from it, or of the beasts employed therein. *Stat. Westm.* 1. cc. 16, 17.



**GALEA.** A galley, or swift sailing ship. *Hoved.* p. 682. 692.

**GALLETI.** According to *Somner* were *virī Galeati*; but *Knighton* says they were Welchmen.

**GALLIGASKINS.** Wide hose or breeches having their name from their use by the Gascoigns. *Dict.*

**GALLI-HALFENCE.** A kind of coin which, with *suskins* and *doitkins*, were forbidden by the stat. 3. *H.* 5. c. 1. It is said they were brought into this kingdom by the Genoese merchants, who, trading hither in galleys, lived commonly in a lane near Tower-street, and were called *galley-men*, landing their goods at Galley-key, and traded with their own smallsilver coin termed *galley halfpence*. *Stow's Survey*, 137. See tit. *Coin*.

**GALLIMAWFERY.** A meal of coarse victuals given to galley slaves. *Dict.*

**GALLIVOLIUM** (from *gallus*, a cock). A cock-shoot or cock-glade. *Dict.*

**GALOCES**, Fr.] A kind of shoe, worn by the Gauls in dirty weather; mentioned in the stat. 14 and 15 *H.* 8. c. 9.

**GAMBA, GAMBERIA, GAMBRIA**, Fr. *jambiere*.] Military boots or defence for the legs. *Dict.*

**GAMBEYSON**, *gambesonum*.] A horseman's coat used in war, which covered the legs: or rather a quilted coat, *cento vestimentum ex coactili lanā confectum*, to put under the armour, to make it sit easy. *Fleta*, lib. 1. c. 24.

**GAME**, *aucupia*, from *auceps*, *aucupis* i. e. *avium captio*.] Birds or prey got by fowling and hunting.

THE GAME-LAWS are a system of positive regulations introduced and confirmed by statute.

These laws have been the subject of much discussion; they have been stiled even from the bench (see 1 *Term Rep.* 49), an oppressive remnant of the ancient arbitrary forest laws, under which, in darker ages, the killing one of the king's deer was equally penal with murdering one of his subjects. See this *Dict.* tit. *Forest*, and 4 *Comm.* c. 33. II. 2. On the other hand, the object of them has been well defined to be, the preservation of the several species of those animals which would soon be extirpated by a general liberty: and the prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank. 2 *Comm.* 411. b. 2. c. 27.

The game laws have been materially altered by the 1 and 2 *W.* 4. c. 32. which has repealed all the former statutes on the subject, abolished the system of qualification, allowed the sale of game, and introduced other new provisions. The effect of this act, and of the

9 *G.* 4. c. 69. against night poaching, may be stated under the following heads:—

- I. *What shall be deemed, Game and when it may be taken.*
- II. *Of the Right to kill Game.*
- III. *Of the Penalties for unlawfully killing Game.*
- IV. *Of the Certificate.*
- V. *Of Gamekeepers.*
- VI. *Of buying and selling Game.*
- VII. *Of Trespasses under the Act.*
- VIII. *Of Poaching by Night.*

I. *What shall be deemed Game, and when it may be taken.*—By § 2. of the new act (1 and 2 *W.* 4. c. 32.) the word “game” shall, for the purposes of the act, include *hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards*. And the words “lord of a manor,” &c. shall, throughout the act, be deemed to include a lady of the same, respectively.

By § 3. if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument for that purpose, on a Sunday or Christmas-day, he shall, on conviction before two justices, forfeit for every such offence not exceeding 5*l.* together with costs. And if any person shall kill or take any partridge, between the 1st of February and the 1st of October in any year, or any black game (except in the county of Somerset or Devon, or in the New Forest, in the county of Southampton), between the 10th of December in any year, and the 20th of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the 10th of December in any year, and the 1st of September in the succeeding year; or any grouse, commonly called red game, between the 10th of December in any year and the 12th of August in the succeeding year, or any bustard between the 1st of March and the 1st of September in any year; every such person shall, on conviction of any such offence before two justices, forfeit for every head of game so killed or taken not exceeding 1*l.*, together with costs.

And if any person, with intent to destroy or injure any game, shall put, or cause to be put, any poison or poisonous ingredients, on any ground, open or enclosed, where game usually resort, or in any highway, he shall, on conviction before two justices, forfeit not exceeding 10*l.* together with costs.

§ 4. If any person licensed to deal in game by the act, shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive)

from the respective days in each year on which it shall become unlawful to kill or take such birds of game; or if any person not so licensed, shall buy or sell any bird of game after the expiration of such ten days; or shall knowingly have in his house, possession, or control, any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days (one inclusive, and the other exclusive) from the respective days in each year, on which it shall become unlawful to kill or take such birds of game respectively, every such person shall, upon conviction before two justices, forfeit for every head of game so bought or sold, or found in his house, &c., not exceeding 1*l*. together with costs.

§ 24. If any person not having the right of killing game upon any land, nor having permission from the person having such right, shall take out of the nest, or destroy in the nest upon such land, the eggs of any bird of game, or of any swan, wild duck, teal, or widgeon, or shall knowingly have in his house, shop, possession, or control, any such eggs so taken; every such person shall, on conviction before two justices, forfeit for every egg so taken or destroyed, or so found in his house, &c. not exceeding 5*s*. together with costs.

**II. Of the Right to kill Game.**—The repeal of the former acts does away with all qualifications in respect of estate, or personal dignity; and every one is now at liberty to kill game on his own land, or on that of another person, with the leave of the person entitled to the game, provided he takes out the necessary certificate for that purpose.

By § 5. nothing in the act contained shall affect or alter (except as therein mentioned) any act or acts in force, by which any person using any dog, gun, net, or any other engine, for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, are required to have annual game certificates. And all regulations and provisions contained in any act or acts relative to game certificates, so far as they relate to gamekeepers of manors, and to the amount of duty for game certificates to be charged upon or in respect of gamekeepers of manors, in the cases specified in such act or acts, shall extend to gamekeepers of lands appointed under the new act.

By § 6. every person who shall have obtained an annual game certificate (see *stat. post*, IV.) is authorized to kill and take game; subject, however, to any action, or such other proceedings as are afterwards specified in the act, for any trespass committed in search or pursuit of it. But it is provided, that no certificate, on which a less duty than 3*l*. 13*s*. 6*d*. is chargeable under the acts relating to game

certificates, shall authorize any gamekeeper to kill or take any game, or to use any dog, gun, or net, or other engine or instrument for the purpose of killing or taking it, except within the limits included in his appointment as gamekeeper; but that if a gamekeeper kill or take any game, or use any dog, &c., for the purpose of killing or taking it, beyond such limits as aforesaid, he may be proceeded against under the act, or otherwise, in the same manner as if he had no certificate.

By § 7. in all cases where any person shall occupy any land under any lease or agreement made previously to the new act, except in the cases thereafter next excepted, the lessor or landlord is to have the right of entering upon such land, or of authorizing any other person having certificate to enter upon such land, for the purpose of killing or taking the game thereon. And no person occupying any land under any lease or agreement, either for life or years, made previously to the act, is to have the right to kill or take the game on such land; except where the right of killing the game upon such land is expressly granted or allowed to him by such lease or agreement; or except where, upon the original granting or renewal of such lease or agreement, a fine or fines shall have been taken; or except when, in the case of a term for years, such lease or agreement shall have been made for a term exceeding twenty-one years.

§ 11. Where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, he may authorize any other person having a certificate to enter thereon to kill it.

§ 12. Where the right of killing the game upon any land is by the act given to the lessor or landlord, in exclusion of the right of the occupier of the land; or where such exclusive right has been or shall be specially reserved by or granted to, or does or shall belong to the lessor, landlord, or any person other than such occupier; then, if the occupier shall pursue, kill, or take any game upon such land, or give permission to any other person so to do, without the authority of the person having the right of killing it, such occupier is liable, upon conviction before two justices, to forfeit for such pursuit, not exceeding 2*l*.; and for every head of game so killed or taken, not exceeding 1*l*., together with the costs.

§ 8. Nothing in the act shall authorize any person seized or holding any land to kill the game, or to permit any other person so to do, in any case where by deed, grant, lease, or written or parol demise or contract, a right of entry upon such land, for the purpose of killing or taking game, has been, or shall be, reserved, or given, by any grantor, lessor, landlord, or other person; nor shall anything in



the act defeat or diminish any reservation, exception, covenant, or agreement, already contained in any private act of parliament, deed, or other writing, relating to the game upon any land, nor prejudice the rights of any lord or owner of any forest, chase, or warren, or of any lord of any manor, &c., or of any steward of the crown of any manor, &c., appertaining to his Majesty.

By § 9. it is also provided, that nothing in the act shall alter or affect the prerogative rights or privileges of his Majesty, nor the powers nor authorities vested in the commissioners of his Majesty's woods and forests and land revenues, relating to any of his Majesty's forests; nor relating to the appointment of any stewards, gamekeepers, or other officers of any of his Majesty's forests, parks, or chases, or of any hundred, manor, or lordship, being part of the possessions and land revenues of the crown, nor the rights, privileges, or immunities, of any chief justices in eyre; or any other of the royal forest rights.

§ 10. Nothing in the act contained shall give any owner of cattle-gates, or rights of common upon or over any wastes or commons, any interest or privilege which he was not possessed of before the act; or authorize him to kill the game found on such wastes or commons; and nothing shall defeat or diminish the rights or privileges which any lord of any manor, &c., or any steward of the crown of any manor, &c. appertaining to his Majesty, may before the act have exercised over such wastes or commons. And the lord or steward of the crown of every manor, &c., shall have the right to kill the game upon the wastes or commons within such manor, &c., and to authorize any other person, having a certificate, to enter thereon to kill the game.

### III. Penalties for unlawfully killing Game.

—By § 23. if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument, for the purpose of searching for or killing or taking game, such person not being authorized so to do for want of a game certificate; he shall, on conviction before two justices, forfeit for every such offence not exceeding 5*l.* Provided, that no person so convicted shall, by reason thereof, be exempted from any penalty or liability under any statute or statutes relating to game certificates; but that the penalty imposed by the new act shall be deemed to be a cumulative penalty.

From the wording of this last section of the new statute, which does not give a penalty for every head of game killed, it would seem, consistently with former decisions, that the going in pursuit of game with a dog and a gun on the same day would only incur a single penalty, notwithstanding several birds or hares may be

killed. *Marriott v. Shaw*, 1 *Com.* 275; *Reg. v. Matthews*, 10 *Mod.* 26; *R. v. Lovett*, 7 *T. R.* 152. And see *Crepps v. Durden*, *Cowp.* 640. And though several persons may join in using a greyhound, or killing a hare, this is still but one offence; for there is, in reality, but one act done by all. *Burnard v. Gosling*, 1 *T. R.* 251; *R. v. Clark*, *Cowp.* 612. But where two or more persons shoot or course together, each using a gun or a dog, or where each person sets a snare for taking game, then they will all be liable to a separate penalty. *Christ. Game Laws*, 161: *Star. on Ev. id.* tit. *Game*. So if a man kill game on several days, or uses a gun for that purpose, if it be properly laid in the conviction, that he on such a day killed or took game, or used the dog or gun for that purpose, and then again that he on another day killed game or used the dog or gun for the same purpose; by thus laying the acts of sporting severally they constitute separate and distinct offences, and the party will then be liable to two penalties. *Deacon's Game Laws*, 14.

IV. *Of the Certificate.*—As the new act contains an express reservation, that all the provisions contained in any former acts relating to game certificates shall still continue in force, and the 20th section also declares that the penalty thereby imposed shall be cumulative to the penalty imposed by any former statute, it will be proper to examine how the law at present stands on this subject.

By 52 *G. 3. c.* 93. the duties on game certificates are placed under the arrangement of the commissioners of the assessed taxes; and by Schedule L. a duty of 3*l.* 13*s.* 6*d.* is imposed upon an annual certificate, which is required to be taken out by every person who shall use any dog, gun, net, or other engine, for the purpose of taking or killing any game whatsoever, or any woodcock, snipe, quail, or landrail, or any conies; or who shall take or kill by any means whatsoever, or shall assist (this part of the statute is repealed by the subsequent act of 54 *G. 3. c.* 141; see *post*), in any manner in the taking or killing, by any means whatsoever, any such game, or other animals as aforesaid, and a duty also of 1*l.* 5*s.* is imposed upon gamekeepers who are servants to persons charged with the higher duty. But if the gamekeeper is not a servant for whom the duties on servants are chargeable, he is then liable to the duty of 3*l.* 13*s.* 6*d.*

There are, however, two exceptions to these duties:—1st, the taking of woodcocks and snipes with nets or springs; 2d, the taking or destroying of conies by the proprietors of warrens, or on any enclosed ground whatever, or by the tenants of lands, either by themselves or by their direction or command.

By the 11th of the rules for charging these

duties which are contained in the schedule (L.) to the above act it is declared, if any person is discovered doing any act, in respect whereof he shall be chargeable with the game-duty, any assessor or collector of the parish, or any commissioner for the county, or any lord or gamekeeper of the manor, or any inspector or surveyor of taxes for the district, or any person duly assessed to the game duties, or the owner, landlord, lessee, or occupier of the land in which such person shall then be, may demand the production of his certificate; which he is bound to produce, and permit to be read, and a copy of it, or of any part, to be taken. In case no such certificate shall be produced, the person making the demand may require the other to declare his christian and surname, and place of residence, and the parish and place in which he shall have been assessed to the duties granted by the act. And if any one, after such demand made, shall wilfully refuse to produce and show his certificate, or in default thereof to give his christian and surname, &c., or shall produce any fictitious, or give any false name, &c., he shall forfeit 20*l.*, to be recovered and applied in the manner thereafter directed.

By 54 *G. 3. c. 141* it is enacted that such of the duties, provisions, and penalties contained in the schedule to the 52 *G. 3. c. 93.* as relate to persons aiding or assisting, or intending to aid or assist, in the taking or killing of any game, or any woodcock, snipe, quail, land-rail, or coney, in the manner thereafter mentioned, shall cease; provided that the act for aiding and assisting shall be done in the company or presence, and for the use of another person, who shall have duly obtained a certificate, and who shall, by virtue of such certificate, then and there use his own dog, gun, net, or other engine for the taking or killing of such game, &c., and who shall not act therein by virtue of any deputation or appointment.

If an uncertificated person goes out with his own dog, or gun, for the purpose of sporting, and, meeting with a certificated person, joins him, it would seem, from analogy to the cases decided with respect to the qualification under the old law, that he will not be exempt from the penalty for sporting without a certificate, either under the above provision of the 54 *G. 3. c. 141.*, or by reason of anything contained in the new act. See 15 *East, note (a.): 16 East, 50 per Lord Ellenborough: Molton v. Rogers, 4 Esp. 215.*

The penalty imposed on a party for not producing his certificate, does not attach by the simple refusal to produce it, unless he also refuse to give his christian and surname, and place of residence, and the parish or place in which he shall have been assessed to the duties on game certificates; for the default of not

producing the certificate is done away with, if the party, on being required, communicate these further particulars; and a person merely assisting another is not bound either to produce his certificate or to give his name. *Molton v. Rogers, supra.*

The demand need not be on the land, but must be made so immediately after the party has left it as to form one transaction. The person making the demand need not show his own certificate: the party refusing is liable to the penalties of the act if the other is really entitled to make the demand. 5 *C. & P. 38.*

**V. Of Gamekeepers.**—A gamekeeper is one who has the care of keeping and preserving the game, being appointed thereto by a lord of a manor.

Gamekeepers were first introduced by the 22 and 23 *Car. 2. c. 25.* and various regulations were made respecting them by subsequent statutes; the last of which (9 *Anne, c. 25. § 1.*) restricted the appointment to one for each manor.

By 1 and 2 *W. 4. c. 32. § 13.* any lord of a manor or lordship, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, by writing under hand and seal, or, in case of a body corporate, then under the seal of such body corporate, may appoint one or more person or persons as a gamekeeper or gamekeepers, to preserve or kill the game within such manor, &c., for the use of such lord or steward thereof; and may authorize such gamekeeper or gamekeepers, within the said limits, to seize and take for the use of such lord or steward all such dogs, nets, or other engines and instruments for the killing or taking of game, as shall be used within the said limits by any person not authorized to kill game for want of a certificate.

§ 14. Any lord of a manor, &c., or any steward of the crown of any manor, &c., appertaining to his Majesty, may depute any person whatsoever, whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male-servant of any other person or not, to be a gamekeeper for any such manor, &c., or for such division or district of such manor, as such lord or steward of the crown shall think fit; and may authorize such person, as gamekeeper, to kill game within the same, for his own use, or for the use of any other person or persons who may be specified in such appointment or deputation; and may also give to such person all such powers and authorities as may by virtue of the act be given to any gamekeeper of a manor. But no person so appointed gamekeeper, and empowered to kill game for his own use, or for the use of any other person so specified as afore-



said, and not killing any game for the use of the lord or steward of the crown of the manor, &c., or for which such deputation or appointment shall be given, shall be deemed to be or paid for as the gamekeeper or male-servant of the lord or steward making such appointment or deputation.

By §. 15. every person entitled to kill the game upon any lands in Wales of the clear annual value of 500*l.*, whereof he shall be seised in fee, or as of freehold, or to which he shall otherwise be beneficially entitled in his own right, if such lands shall not be within the bounds of any manor, lordship, or royalty, or if, being within the same, they shall have been enfranchised or alienated therefrom, may appoint, by writing under his hand and seal, a gamekeeper or gamekeepers to preserve or kill the game over and upon such his lands, and also over and upon the lands in Wales of any other person, who, being entitled to kill the game upon such last-mentioned lands, shall by licence in writing authorize him to appoint a gamekeeper or gamekeepers to preserve or kill the game thereupon, such last-mentioned lands not being within the bounds of any manor, lordship, or royalty, or having been enfranchised or alienated therefrom. And the person so appointing a gamekeeper or gamekeepers may authorize him or them so seize and take, for the use of the person so appointing, upon the lands of which he or they shall be appointed gamekeeper or gamekeepers, all such dogs, nets, or other engines and instruments for the taking or killing of game as shall be used upon the said lands by any person not authorized to kill game, for want of a certificate.

§ 16. No appointment or deputation of a gamekeeper, by virtue of the act, shall be valid, until it shall be registered with the clerk of the peace for the county, &c., wherein the manor, &c., or the lands shall be situate, in respect of which such gamekeeper shall have been appointed. And in case the appointment of any gamekeeper shall expire, or be revoked, by dismissal or otherwise, all powers and authorities given to him by virtue of the act shall cease.

A gamekeeper having a certificate on which a less duty than 3*l.* 13*s.* 6*d.* has been paid, is not authorized to kill game except within the limits of his appointment. See § 6. *ante*, II.

Under the former laws it was held, that the lord of a hundred or wapenstake could not grant a deputation to a gamekeeper. *Earl of Ailesbury v. Patteson*, 1 *Doug.* 28. And the same principle upon which that case was decided, would seem to apply to any case arising under the 13th section of the new

act; namely, that the word "royalty," being used in that section after the word manor, must mean a royalty of the same nature with a manor; for if a royalty of a higher nature had been meant, the word "royalty" would have been mentioned before the term "manor" in the statute. It is said, however, in *Comyns's Digest* (4 vol. tit. *Justices of the Peace*, B. 46. referring to *Lutw.* 1506.) that a hundred with a leet was a royalty within the 22 and 23 *Car.* 2. c. 25.

The power of appointing a gamekeeper cannot be conveyed by a lord of the manor without a conveyance also of the manor itself; for such a power is held to be a mere emanation of, and inseparable from, the manor. *Per Ld. Kenyon*, 5 *T. R.* 20. But under the 15th section of the new act it has been seen that any person entitled to kill the game upon any lands in Wales of the clear annual value of 500*l.* may, under certain restrictions, appoint a gamekeeper, as well as the lord of a manor. And it seems also that a devisee in trust of a manor may appoint a gamekeeper; though such an appointment would operate merely for the preservation of the game, and not for the purposes of an establishment for pleasure to the trustee. *Webb v. Earl of Shaftesbury*, 7 *Ves. jun.* 488.

Although a gamekeeper has, by virtue of his deputation under the 13th section of the new statute, power to seize dogs, nets, and all other engines and instruments, which are used for the killing and taking of game within the manor by an uncertificated person, yet he has only authority to do this at the time the party is using them for that purpose (1 *Wils.* 315: 2 *Str.* 1098.); and before the new statute he had no right whatever to seize the game itself in the possession of the party. 7 *Taunt.* 560: 1 *Moore*, 290. But now, by § 36. of the new act, a gamekeeper has authority to seize game from trespassers, on their not delivering it up when demanded from them. See *post*. When a gamekeeper, however, makes a seizure of a dog or gun, as he does this at the risk of an action of trespass, it would be prudent in these cases to demand the certificate of the person using the dog or gun, according to the directions of the 52 *G.* 3. c. 93. *Schedule L. rule* 11. (see *ante*), which if the party failed or refused to produce, he would then be liable to the cumulative penalty inflicted by that act.

It seems somewhat doubtful, however, whether a gamekeeper can shoot the dog of a mere trespasser in pursuit of game, notwithstanding his authority to seize it when used for that purpose by a person who has no certificate. If he is justified in doing so, it must be on the ground that the destruction

of the dog was absolutely necessary for the preservation of the hare, or other game, which the dog was following, unless it plainly appears that the dog belong to an uncertificated person. For a case of this kind, which occurred under the former laws, where it did not appear that the owner of the dog was an unqualified person, nor that there was any necessity for killing the dog to save the hare, *Lord Ellenborough* observed—"The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground. And if there be any precedent of that sort, which outrages all reason or sense, it is no authority to govern other cases. The gamekeeper had no right to kill the plaintiff's dog for following the hare." 11 *East*, 568.

It was held in one case under the 22 and 23 *Car.* 2. c. 25. that a gamekeeper could not seize hounds in the manor, as these dogs were not specified by name among those prohibited by that statute. *Grant v. Hutton*, 1 *B. & A.* 134. But the 13th section gives a power of seizing all dogs, indiscriminately, which are used within the limits of the manor by any uncertificated person.

The new statute, we have seen, confines the power of a gamekeeper to kill game within the limits of the manor for which he is appointed gamekeeper; and the 6th section (see *ante*) expressly provides, if he kill or take game, or use a dog or gun for that purpose, out of the limits of the manor, he may then be proceeded against as any other person who has no certificate. But one gamekeeper cannot seize the dog of another gamekeeper for merely trespassing out of his proper manor (2 *Wils.* 387.); for the dogs are generally not the keeper's, but those of his master; and it does not seem to be the intent of the statute, that the property of a lord of a manor should be put in the power of his gamekeeper to forfeit it whenever he might please to exceed his authority under the deputation.

If a gamekeeper is guilty of disobedience, or other misbehaviour, he may be discharged without any notice, unless there has been a special agreement to the contrary. *Moore*, 8. 9. In like manner his residence in a house, which he is permitted by the lord of the manor to occupy, merely in consequence of his employment as gamekeeper, is lawful only whilst he is retained in that capacity; and he requires no right of occupation as tenant. 16 *East*, 33.

**VI. Of buying and selling Game.**—By the old acts all persons, whether qualified or not to kill game, were prohibited from buying or selling it; and, in many instances, the mere

possession of game by a person unqualified in amount of property was made highly culpable. But now, by the 17th section of the new statute, every person who shall have obtained an annual game certificate may sell game to any person licensed to deal in it according to the provisions of the act. But no certificate on which a less duty than 3*l.* 13*s.* 6*d.* is chargeable under the acts relating to game certificates, will authorize a gamekeeper to sell any game except on the account, and with the written authority, of the master whose gamekeeper he is; but any gamekeeper so selling any game may be proceeded against as if he had no certificate.

By § 18. the justices of the peace of every county, riding, division, liberty, franchise, city, or town, are directed to hold a special session in the division or district for which they usually act, in every year in the month of July, for the purpose of granting licences to deal in game; of the holding of which session seven days' notice must be given to each of the justices acting for such division or district. The majority of the justices assembled at such session, or at some adjournment thereof, not being less than two, are authorized (if they think fit) to grant to any person being a householder, or keeper of a shop or stall, within such division or district, and not being an innkeeper or victualler, or licensed to sell beer by retail, nor being the owner, guard, or driver of any mail coach, or other vehicle employed in the conveyance of the mails of letters, or of any stage coach, wagon, van, or other public conveyance, nor being a carrier or higgler, nor being in the employment of any of the above mentioned persons, a licence to buy game at any place from any person who may lawfully sell game by virtue of the act, and also to sell the same only at one house, shop, or stall kept by him. But every person while so licensed is required to affix to some part of the outside of the front of his house, shop, or stall, and to keep so fixed, a board with his christian name and surname, together with the words, "licensed to deal in game." Every licence granted in any year after that in which the act passed is to continue in force for one year.

§ 19. Every person who shall have obtained any licence to deal in game must annually, during the continuance of his licence, obtain a certificate according to the form annexed to the act on payment of the duty of 2*l.*, which certificate will be in force for the same period as the licence. Any person obtaining a licence, and purchasing, or otherwise dealing in game, before he shall obtain a certificate, is liable to the penalty of 20*l.*

§ 20. The collectors of the assessed taxes

in every parish, township, or place, wherein any person shall reside who shall have obtained such annual licence and certificate, are directed, in each year, to make out a list, to be kept in their possession, containing the name and place of abode of every such person, and at all seasonable hours to produce such list to any person making verbal application to inspect the same, on payment of 1s.

§ 21. Persons being in partnership, and carrying on their business at one house, shop, or stall only, are not obliged to take out more than one licence in any one year to authorize them to deal in game, at such house, shop, or stall.

§ 22. If any person licensed to deal in game shall, during the period of such licence, be convicted of any offence against the act, such licence shall become void.

§ 25. If any person not having obtained a game certificate (except such person shall be licensed to deal game according to the act), shall sell, or offer for sale, any game to any person whatsoever; or if any person authorized to sell game under the act by virtue of a game certificate, shall sell, or offer for sale, any game to any person, except a person licensed to deal in game according to the act, every such offender shall, on conviction before two justices, forfeit for every head of game so sold, or offered for sale, not exceeding 2*l.*, together with costs.

§ 26. Any innkeeper or tavernkeeper may, without any such licence for dealing in game, sell game for consumption in his own house, such game having been procured from some person licensed to deal in game by virtue of the act, and not otherwise.

By § 27. if any person not being licensed to deal in game shall buy any game from any one except from a person licensed to deal in game, or *bonâ fide* from a person affixing to the outside of the front of his house, shop, or stall, a board purporting to be the board of a person licensed to deal in game; every such offender shall, on conviction before two justices, forfeit for every head of game so bought not exceeding 5*l.*, together with costs.

By § 28. if any person, being licensed to deal in game, shall buy or obtain any game from any person not authorized to sell game for want of a game certificate, or for want of a licence to deal in game; or if any person being so licensed shall sell, or offer for sale, any game at his house, shop, or stall, without such board as aforesaid being affixed to the outside of the front of such house, &c. at the time of such selling, &c.; or shall affix, or cause to be affixed, such board to more than one house, &c.; or shall sell any game at any place other than his house, &c. where such

board shall have been affixed; or if any person not licensed shall pretend, by affixing such board as aforesaid, or by exhibiting any certificate, or by any other device, to be a person licensed to deal in game, every such offender, on conviction before two justices, shall forfeit not exceeding 10*l.*, together with costs.

§ 29. The buying and selling of game by any person employed by a licensed dealer, and acting in the usual course of his employment, and upon the premises where such dealing is carried on, shall be a lawful buying and selling, in every case where the same would have been lawful if transacted by such licensed dealer himself. And nothing in the act shall prevent any licensed dealer from selling game sent to him to be sold on account of any other licensed dealer.

#### VII. Of Trespasses under the Act.—By

§ 30. if any person shall commit any trespass by entering, or being in the daytime on any land in pursuit of game, or woodcocks, snipes, quails, landrails, or conies, he may be summarily convicted before a justice in the penalty of 2*l.*, together with costs; and where the trespassers amount to five in number they may be each fined 5*l.*

The words "enter and be" in the above section constitute only one offence. The place may be described as "certain land," without giving it a name, and setting it out by abutals. 2 *D. P. C.* 173.

§ 31. Where any person shall be found on any land, or upon any of his Majesty's forests, parks, chases, or warrens, in the daytime, in pursuit of game, or woodcocks, &c., persons having the right of killing the game upon such land, or the occupier thereof, or any gamekeeper or servant of either of them, or any person authorized by either of them, or for the warden or other officer of such forest, may require the party so found to quit the land, and also to tell his christian and surname, and abode. In case such party refuses to tell his name or abode, or wilfully continues or returns upon the land, he may be apprehended by the person making the requisition, and conveyed before a justice, and on conviction (and whether apprehended or not) fined 5*l.* and costs. No party apprehended is to be detained more than twelve hours before he is brought before a justice, and if he cannot be so brought within that time he is to be discharged, but may be proceeded against by summons or warrant.

§ 32. Where five or more persons shall be found on any land, or in any of his Majesty's forests, &c. in the daytime in pursuit of game, or woodcocks, &c. any of such persons being armed with a gun, and they, or any of them, shall by violence or menace



prevent, or endeavour to prevent, any party authorized as before mentioned from approaching them for the purpose of requiring them to quit the land, or tell their names, &c., every person so offending, and every person aiding or abetting such offender, shall, on conviction before two justices, forfeit not exceeding 5*l.*, together with costs, which shall be in addition to any other penalty incurred under the act.

§ 33. Persons trespassing in the daytime in any of his Majesty's forests, &c. in pursuit of game, on conviction before a justice, shall forfeit not exceeding 2*l.* besides costs.

§ 34. For the purposes of the act the day-time shall commence at the beginning of the last hour before sun-rise, and conclude at the expiration of the first hour after sun-set.

By § 36. game may be demanded, and if not delivered up, taken, from persons trespassing, whether by day or night, upon any land, or in any of his Majesty's forests, &c.

By § 46. persons may proceed by action to recover damages for trespasses upon their lands; but proceeding under the act for any trespass shall be a bar to an action for the same trespass brought by the same party instituting the proceedings.

VIII. *Of Poaching by Night.*—All the statutes relating to this offence, with the exception of the 7 and 8 G. 4. c. 29. § 30. and the 9 G. 4. c. 69. are repealed by the new game act.

By the 7 and 8 G. 4. c. 29. § 30. any person in the night-time taking or killing any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, and whether inclosed or not, is declared guilty of a misdemeanor, punishable with imprisonment at the discretion of the court, to which, under the fourth section, may be added hard labour and solitary confinement.

By § 63. offenders may be apprehended without a warrant, and taken before a neighbouring justice.

By 9 G. 4. c. 69. it is enacted that if any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or by night enter or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction before two justices, be committed for the first offence to the common goal or house of correction for not exceeding three calendar months, there to be kept at hard labour, and shall find sureties by recognizance, or in Scotland by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.* for not offend-

ing again for one year, and in case of not finding sureties, shall be further imprisoned and kept to hard labour for six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and be convicted before two justices, he shall be committed for not exceeding six calendar months, and be kept to hard labour, and shall find sureties by recognizance or bond, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.* for not offending again for two years: and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted, shall be liable to be transported for seven years, or to be imprisoned and kept to hard labour for not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner.

§ 2. Where any person shall be found upon any land committing any such offence as before mentioned, the owner or occupier of such land, or any person having a right or reputed right of free warren or free chase thereon, or the lord of the manor wherein such land may be situate, and also any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, may apprehend such offender upon such land, or in case of pursuit, in any other place to which he may have escaped, and deliver him into the custody of a peace officer, in order to his being conveyed before two justices; and in case such offender shall assault or offer any violence with any gun, or any other offensive weapon, towards any person hereby authorized to apprehend him, he shall be guilty of a misdemeanor, and being convicted, shall be liable to be transported for seven years, or to be imprisoned and kept to hard labour for not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

§ 3. Where any person shall be charged on oath of a credible witness, or in Scotland on the application of the procurator fiscal of court, before any justice, with any offence punishable upon summary conviction by this act, the justice may issue his warrant for apprehending such person, and bringing him before two justices.

§ 4. The prosecution for every offence punishable upon summary conviction by the act shall be commenced within six calendar months; and the prosecution of every offence punishable upon indictment, or otherwise than

upon summary conviction, within twelve calendar months after the commission of such offence.

§ 6. Gives a power of appeal to the next quarter sessions to persons thinking themselves aggrieved by any summary conviction.

§ 9. If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any such persons being armed with any gun, or other offensive weapon, each of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable to be transported for not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner.

§ 12. For the purposes of this act the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

§ 13. For the purposes of the act the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Under § 2. of the above act a keeper, &c. may apprehend poachers, though there are three or more, and armed; for though that section only authorize an apprehension for offences under § 1, and when there are three or more parties armed they are punishable under § 9; yet what is punishable under the latter is an offence under the former section, though made liable to a heavier punishment. *Moor. C. C. R.* 330. So a person authorized under the act may apprehend offenders without giving notice of his purpose. *Id.* 378.

*Of pursuing Game into or over another person's Grounds.*

—If a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself. 11 *Mod.* 75. And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren, this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man starts game on another's private

grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there, the property arising *ratione soli*. *Lord Raym.* 251. Whereas if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local, nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it; though guilty of a trespass against both the owners. *Lord Rayn. ib.* 7 *Mod.* 18. See 2 *Comm. c.* 419, and *Mr. Christian's* note there; in which he observes that these distinctions never could have existed, if the doctrine were true, that all the game was the property of the king, for in that case the maxim in *æquali jure potior est conditio possidentis*, must have prevailed. 2 *Comm. c.* 27. II. *ad fin.*

An action was brought against a person for entering another man's warren; the defendant pleaded that there was a pheasant on his land, and his hawk pursued it into the plaintiff's ground; it was resolved that this doth not amount to sufficient justification, for in this case he can only follow his hawk, and not take the game. *Poph.* 162. Though it is said to be otherwise where the soil of the plaintiff is not a warren. 2 *Rol. Abr.* 567.

If a man in hunting starts a hare upon his own ground, and follows and kills it on the ground of another, yet still the hare is his own, because of the fresh suit: but if a man starts a hare upon another person's ground, and hunts it, and kills it there, he is subject to an action. *Cro. Car.* 553.

The plaintiff's dog having hunted and caught in the defendant's land a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for taking up the hare. 14 *East*, 249.

But one who finds game on his own ground cannot justify pursuing it in the land of another. 7 *Taunt.* 489.

The common law allows the hunting of foxes, and other ravenous beasts of prey, in the ground of another person; though a man may not dig and break the ground to unearth them without licence: if he doth, the owner of the ground may maintain an action of trespass for it. 2 *Rol.* 558: *Cro. Jac.* 321.

And a person may justify a trespass in following a fox with hounds over the grounds of another, if he do no more than is necessary to kill the fox; because foxes are noxious animals. 1 *Term Rep.* 334.

But in the *Earl of Essex v. Capel*, at *Hertford Assizes*, 1809, *Lord Ellenborough* directed the jury to find for the plaintiff, if they thought



from the evidence that the defendant pursued the fox for his own pleasure and amusement, and if they thought the good of the public was not his sole governing motive.

By § 35. of the 1 and 2 W. 4 c. 32. persons in fresh pursuit of any deer, hare, or fox, with hounds or greyhounds, on another's land, are exempted from the penalties against trespassers under the act; but they are still liable to an action of trespass.

For further matter connected with this subject, see this Dict. *Chase, Deer, Fish, Forest, Park, Pigeons, Swans, Warren*, and other apposite titles: and for the preservation of game in Scotland the 13 G. 3. c. 54. and 39 G. 3. c. 34; and tit. *Hunting*. And see *Deacon on the Game Laws*.

**GAMING, or GAMES UNLAWFUL, ludi vani.** The playing at tables, dice, cards, &c.

King Edward III., in the 39th year of his reign, enjoined the exercise of shooting and of artillery, and forbade the casting of the bar, the hand and foot-balls, cock-fighting, *et alios ludos vanos*; but no effect followed from it, till they were some of them forbidden by act of parliament. 11 Rep. 87. In the 20th of Henry VIII. proclamation was made against all unlawful games, and commissions awarded into all the counties of England, for the execution thereof; so that in all places, tables, dice, cards, and bowls, were taken and burnt. *Stow's Annals*, 527.

At length by 33 H. 8. c. 9. the legislature interfered; and justices of peace, and head officers in corporations, are by that act empowered to enter houses suspected of unlawful games; and to arrest and imprison the gamesters, till they give security not to play for the future: also the persons keeping unlawful gaming houses, may be committed by a justice, until they find sureties not to keep such houses; who shall forfeit 40s. and the gamesters 6s. 8d. a time: and if the king license the keeping of gaming houses, it is against law and void. The same statute also provides that no artificer, apprentice, labourer, or servant, shall play at any tables, tennis, dice, cards, bowls, &c. out of Christmas time, on pain of 20s. for every offence; and at Christmas, they are to play in their master's house or presence: but any nobleman or gentleman having 100*l.* *per annum* estate, may license his servants or family to play within the precincts of his house or garden, at cards, dice, tables, or other games, as well among themselves, as others repairing thither. This act is to be proclaimed once a quarter, in every market-town, by the respective mayors, &c., and at every assizes and sessions.

By the 16 Car. 2. c. 7. § 2. if any person, of what degree soever, shall by fraud, deceit,

or unlawful device, in playing at cards, dice, tables, bowls, cock-fighting, horse-races, foot-races, or other games or pastimes, or bearing a share in the stakes, betting, &c. win any money, or valuable thing, he shall forfeit treble the value, one moiety to the crown, and the other to the party aggrieved, if he shall sue within six months; in default whereof, the last mentioned moiety is to go to such other person as will prosecute in one year, &c. By § 3. if any person shall play at cards, &c. other than for ready money; or bet, and shall lose above 100*l.* at one time or meeting, upon tick, (*i. e. ticket*) he shall not be bound to make it good, but the contract or tick and security shall be void, and the winner shall forfeit treble the value.

By the 9 Anne, c. 14. § 1. all notes, bills, bonds, judgments, mortgages, or other securities, given for money, won by playing at cards, dice, tables, tennis, bowls, or other games; or by betting on the sides of such as play at any of those games, or for the repayment of money knowingly lent for such gaming or betting, shall be void; and where lands are granted by such mortgages or securities, they shall go to the next person who ought to have the same as if the grantor were actually dead, and the grants had been made to the person so intitled after the death of the person so incumbering the same.

§ 2, 3. If any person playing at cards, dice or other game, or betting, shall lose the value of 10*l.* at one time, to one or more persons, and shall pay the money, he may recover the money lost by action of debt within three months afterwards; and if the loser do not sue, any other person may do it, and recover the same, and treble the value with costs, one moiety to the prosecutor, and the other to the poor: and the person prosecuted shall answer upon oath, on preferring a bill to discover what sums he had won.

§ 5. Persons by fraud or ill practice, in playing at cards, dice, or by bearing a share in the stakes, &c. or by betting, winning any sum or valuable thing whatever, or winning at one sitting, above 10*l.* shall, being convicted thereof on indictment or information, forfeit five times the value of the sum or thing won; and in case of such ill practice, shall be deemed infamous and suffer such corporal punishment as in case of wilful perjury; the penalty to be recovered by action, by such persons as will sue for the same.

§ 6, 7. Any two or more justices of peace may cause such persons to be brought before them as they suspect to have no visible estate, &c. to maintain them; and if they do not make it appear that the principal part of their expences is got by other means than

gaming, the justices shall receive securities for the sum of 50*l.* or upwards. 2 *Campb.*  
for their good behaviour for a twelvemonth; 438.

to prison until they find it: and playing or 220: 2 N. & M. 428.

broughting it to the foot of the stairs. So is a foot race; and a man running against  
 shall lead a good, cheerful, and obedient life, that is a foot race; but to bring it within the  
 and a thousand other things, that is a foot race; that is, it must appear that the person running

But he, having no school and but, or was engaged in such game, and a wager was exchanged to fifty days' imprisonment, on a school had on his side. 2 Wils. 36.

of the young by gaming, upon conviction. Under the second section of 9 Anne, c. 14, if a man is found guilty of gaming, and the loser cannot recover his goods or money for more than a fortnight; but this section after three months, though the winner can recover his money, the loser is not bound to return it, except what arises from the game.

tion was repealed by the Act of 1791. But it is now no more to them except what arises from a having won them at play. 2 *New Rep.* 413. bill of exchange, or promissory note, given for a game of cards, is void, even if it is made on a day but at play, it may be recovered *absolutely* before 2 *Str.* 1156. But a recovery for payment under a void security cannot be supported; nor does the limitation of the time of such a debt is void, not be supported; nor does the limitation of the time of a *voidable* debt before 4 *Tunst.* 200 months within which, since the loser of the money actually paid at the time it is lost

And in an action against the drawer of a note making his action to recover it back, exhibit, as is no defence that the bill was accepted and to payments on account of such void security for a gaming debt, if it was indorsed by the curities. *Ambl.* 269.

for a gaming debt, if it was induced by the parties. *Simon*, 203. Money fairly won at play cannot be recovered for a gaming debt, even if the action is brought before the expiration of an action of debt, for money had and received would be to put the plaintiff in the position he would have been in if he had received, not founded on the statute. 1 *Atty. Gen. v. M'Call*, 12 *Q. B.* 339. *Mauls & Sew. Rep.* 500.

Where a bill was received and delivered by — Where two persons played at cards from the tower in contravention of a gambling Monday evening to Tuesday evening without doing it's within the above statute, till it is interrupted, except for an hour or two at dinner drawn for a gambling card table, and it is, and one of them won a balance of seven pounds he entered against the exception. Section 4, as it was held to be one sitting under Part 241. The court will not sit to see a order the 2d section of the above act. 2 Bl. judgment on the ground that the warrant of Rep. 1226.

[illegible][illegible]

Betting on horses is a violation of the general prohibition that, at any time to come, the words of the § Anne, c. 14. (other game play at any unlawful game.

whatsoever; 2 Burr. 1173; 2 Wils. 303. By 13 G. 2. c. 11. the game of passage, and although the rules for a legal plate. 2 all other games with one or more dice, or any *Buchst.* 7. 6. A. c. 8. d. would seem are all tating in that nature, having figures or num- way is allowed, or on tables, or pancy bers thereon, back-gammon and games now to be played on tables, excepted, shall be deemed games or lotteries by dice, within 4 T. R. 1; 6 T. R. 49; 3 B. & P. 51.

But an act on a wager on a horse-race, stat. 12 G. 2 c. 28. And such as keep any race, if neither of the sums betted by the parties, office or table for the said game, &c., or play, ties amounts to 10*l*., and the race itself is run thereat, are subject to the penalties in that act.

The stat. 27 *G. 3. c. 1.* which took away the summary jurisdiction of magistrates over offences concerning the lottery, only extended to *state lotteries*, and does not repeal their power over games of chance, or lotteries prohibited by 12 *G. 2. c. 28.* 5 *T. Rep.* 338.

By 18 *G. 2. c. 34. § 1.* keeping any house or place for, or playing at the game of roulette, otherwise roly-poly, or any other game with cards, or dice, already prohibited, incurs the penalties in 12 *G. 2. c. 28.*

By § 4. the persons who have jurisdiction to determine informations on the statutes against gaming, may summon witnesses, who, on refusing to appear and give evidence, shall forfeit 50*l.* § 7. No privileges of parliament shall be allowed on prosecution for keeping a gaming house.

By § 8. persons losing or winning 10*l.* at one time, or 20*l.* in twenty-four hours, may be indicted and fined five times the value, to be paid to the poor.

If a defendant be convicted on this last section (on indictment as thereby required,) the court cannot set the fine, but an action must be brought on the judgment to recover the penalty. 2 *Stra* 1048: and see 1 *Starkie*, 359: 6 *T. R.* 265.

By § 11. horse races for a plate or sum of money amounting to 50*l.* are declared lawful.

The true construction of the 9 *Anne, c. 14. § 3*, in reference to the 18 *G. 2. c. 34.*, is that persons who lose their money at play are the only persons entitled under it to file a bill for a discovery, and not a mere common informer, in aid of a *qui tam* action. 13 *Price*, 376. and 1 *Mac. Clel. & Y.* 185. overruling 3 *Anstr.* 843.

By 5 *Geo. 4. c. 83. § 2.* persons playing or betting in any street, road, &c., or open and public place, at or with any table or instrument of gaming, at any game, or pretended game, of chance, are punishable summarily as rogues and vagabonds.

From the above statutes and the several determinations in the books, it may be observed that at common law, the playing at cards, dice, &c., when practised innocently, and as a recreation, was not unlawful. 2 *Vent.* 175. But common gaming houses were always considered as nuisances in the eye of the law; 1 *Hawk. P. C. c. 75 § 6*; and as the practice was found to encourage idleness and debauchery, the 33 *H. 8. c. 9.* was passed to restrain it among the inferior sort of people. And on this statute *Noy* had a writ to remove bowling alleys as common nuisances. 3 *Keb.* 465. Gentlemen were, however, still left free to pursue their pleasure in this way, until the stat. 16 *Car. 2. c. 7.*, the preamble of which states the inconveniences to be remedied as arising from the immoderate use of gaming. The provisions of this statute, however, were soon found to be insufficient; and the stat. 9 *Ann. c. 14.* was made for the more effectually suppressing this pernicious vice. The subsequent statutes, already enumerated above, superadded further penalties to restrain this fashionable crime; which may show, says *Blackstone*, that our laws against gaming are not so deficient as ourselves and our magistrates in putting these laws in execution. 4 *Comm.* 173.

The statutes against gaming have rendered it now less frequently necessary to resort to courts of equity, which appear to have often interposed, prior to the stat. 16 *Car.*, for the purpose of restraining the winner from proceeding at law against the loser upon the security which he had obtained for the money won. See 14 *Vin. Abr. 8. pl. 1. c. 3: 2 Eq. Abr.* 184: *Chanc. Rep.* 47.

For further matter relative to gaming, see *titls. Lottery, Nuisance, Wager.*

GAMING HOUSES. Independently of their being prohibited by the statute of 33 *Hen. 8. c. 9. § 11.* it is clearly agreed that all the common gaming houses are nuisances in the eyes of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and entice numbers of persons to idleness, whose time might be otherwise employed for the good of the community. 1 *Hawk. c. 75. § 6: 10 Mod.* 336.

But if the guests in an inn or tavern call for a pair of dice or tables, and for their recreation play with them, or if any neighbours play at bowls for their recreation, or the like, these are not within the statute, if the house be not kept for gaming, nor the gaming be for lucre or gain. *Dalt. c. 46.*

The keeping of a cock-pit is an indictable offence at common law; and as a cock-pit is also considered as a gaming house, within the 33 *Hen. 8. c. 9. § 11.*, which imposes a penalty of 40*s.* a day upon such houses, the court will, on a conviction at common law, measure the fine on the defendant, by inflicting a fine of 40*s.* for each day, according to the number of days the cock-pit was kept open. 3 *Keb.* 510: 1 *Hawk. c. 92. § 29.*

So an indictment, alleging that the defendant did, for his lucre, cause and procure certain persons of ill name to frequent his house, and permitted them to remain there fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, was held good. 2 *Burr.* 1233.

So also an indictment, charging that the defendant kept a common gaming house, and for lucre and gain unlawfully caused and procured divers idle and evil disposed persons to frequent such house, and come to play together



there at a game called *rouge et noir*, and permitted such persons to remain playing at the said game for divers large and excessive sums of money, was held to be good at common law. 1 B. & C. 272. And it seems sufficient, if the indictment for such an offence merely allege that the defendant kept a common gaming house. *Per Holroyd J. Ibid.* And see 10 Mod. 336: *Leach's C. C.* 548: 2 Hawk. c. 25. § 59: 3 B. & C. 502.

A feme covert may be indicted for keeping a common gaming house; for she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose. 5 Bac. Abr. Nuisance (A.): 10 Mod. 335: 1 Hawk. c. 92. § 30.

By 25 G. 2 c. 36. § 5. (made perpetual by 28 G. 2. c. 29.) two inhabitants of any parish may require the constable, in the manner therein mentioned, to prosecute any person for keeping a gaming house. And by 58 G. 3. c. 70. § 7. a copy of the notice to the constable is to be served upon the overseer.

By 42 G. 3. c. 119. games and lotteries, called little-gones are declared public nuisances; and persons keeping a place for any such game, or any such lottery, not authorised by law, shall forfeit 50*l.*, and be deemed rogues and vagabonds.

By 3 G. 4. c. 114. persons convicted of keeping a common gaming house may be sentenced to imprisonment with hard labour, in addition to, or in lieu, of any punishment which might previously have been inflicted.

GANG DAYS, *dies lustrationes*.] And gang weeks are mentioned in the laws of king Athelstan. See *Rogation Week*.

## GAOL AND GAOLER.

GAOL, *Fr. geole*, i. e. *caveola*, a cage for birds; used metaphorically for a prison.] A strong place or house for keeping of debtors, &c., and wherein a man is restrained of his liberty to answer an offence done against the laws.

By 4 G. 4. c. 64. (amended by 5 G. 4. c. 12 and 5 G. 4. c. 85.) all the former statutes for building, repairing, and regulating gaols and houses of correction in England and Wales, are repealed; and a variety of new provisions substituted.

### I. Of Erecting and Repairing Gaols, &c.

- II. 1. *As to the Commitment of Offenders;*
2. *As to the Removal of Prisoners;*
3. *As to their Support and Employment;*
4. *As to Allowance to Prisoners on Discharge.*

### III. Of Prison breaking; and see tit. Rescue.

### IV. Of the Gaoler, and the Duties and Restraints imposed on him; with the Regulations to be observed in Prisons.

I. GAOLS are of such universal concern to the public, that none can be erected by any less authority than an act of parliament. 2 Inst. 705. All prisons and gaols belong to the king, although the subject may have the custody or keeping of them. 2 Inst. 100. 589. It is said that none can claim a prison as a franchise unless they have also a gaol delivery; and that therefore the Dean and Chapter of Westminster, though they have the custody of the Gatehouse prison, yet as they have no gaol delivery, must send a calendar of their prisoners to Newgate. 1 Salk. 243: 7 Mod. 31.

By 14 Ed. 3. c. 10. it is enacted, that the sheriffs shall have the custody of the gaols as before, and shall put in under-keepers, for whom they will answer. This statute is confirmed by 19 H. 7. c. 10.

Although divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the king's *pro bono publico*; and therefore it is to be repaired at the common charge. 2 Inst. 589.

The lord of a franchise is not as such bound to repair a gaol within it, but he may be subject to such a charge by immemorial usage. 6 Term. Rep. 373.

By 4 G. 4. c. 64. § 2. there shall be one common gaol in every county, and at least one house of correction. Where a county is divided into ridings, having distinct commissions of the peace, or distinct rates in the nature of county rates, there must be a house of correction for each riding. And see 5 G. 4. c. 12. and 5 G. 4. c. 85.

By §§ 45. and 46. the justices at sessions, on report or presentment of two of their number, of the insufficiency of any prison, may contract for enlarging, repairing, or rebuilding, the same, and purchase houses, &c., for that purpose.

By § 47. if a prison becomes unsafe, two justices may order repairs, and report them to the next sessions.

By § 50. the justices at sessions may remove the site of any prison upon express presentment that the old site was unfit and inconvenient, and alter, &c., courts of justice attached thereto.

By 7 G. 4. c. 18. the justices are empowered to sell the sites of gaols which have become unnecessary.

By 7 G. 4. c. 64. § 15., in indictments or informations for felony or misdemeanor committed in respect to any gaol, house of correction, &c., erected or maintained at the expense

of any county, riding, or division, the property shall be committed to any prison, or in custody of any officer, for any criminal or supposed criminal matter, he shall not be removed into the custody of any other; unless it be by a *habeas corpus*, or other legal writ; or where the prisoner is delivered to the constable, &c., to be carried to some common goal; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse, or house of correction; or where the prisoner is removed from one prison to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved 100*l.* for the first offence, 200*l.* for the second, &c."

II. 1. *As to the commitment of offenders.*—Justices of peace may not commit felons, and other criminals, to the counters in London, or other prisons, but the common gaols, for legally they cannot imprison any where but in the common gaol. *Co. Lit.* 9. 119. But the house of correction, and the counters of the sheriffs of London, are the common prisons for offenders for the breach of the peace, &c.

By stat. 5 *H. 4 c.* 10. it is enacted, "that none shall be imprisoned by any justice of the peace, but only in the common gaol, saving the lords and others, who have gaols, their franchise in this case." This statute is only declaratory of the common law, 2 *Inst.* 43.

But the Court of King's Bench may commit to any prison in the kingdom which they shall think most proper, and the offender so committed or condemned to imprisonment cannot be removed or bailed by any other court. *Moor*, 666. *pl.* 913: 1 *Sid.* 145. See stat. 31 *C. 2. c.* 2. § 12.

By stat. 11 and 12 *Will. 3. c.* 10. all murderers and felons shall be imprisoned in the common gaol, and the sheriffs shall have the keeping of the gaol.

All the prisons in the kingdom are the king's prisons. Thus it was determined that the house of correction for the county of Middlesex, built under stat. 26 *G. 3. c.* 55., and adapted to the solitary and separate confinement of felons, according to the direction of 22 *G. 3. c.* 64., and other acts, (which were repealed by 4 *G. 4. c.* 64. § 19.), was a legal prison for the safe custody of persons charged with high treason. 8 *T. R.* 172.

By 4 *G. 4. c.* 64. § 7. rogues and vagabonds shall be committed to the house of correction, and not the gaol.

Offenders committed to prison are to bear the charges of their conveyance to gaol; or, on refusal, their goods shall be sold for that purpose, by virtue of a justice of peace's warrant; and if they have no goods, a tax is to be made by constables, &c., on the inhabitants of the parish where the offenders were apprehended. *Stat.* 3 *Jac.* 1. *c.* 10. And by stat. 27 *G. 2. c.* 3. the expence of conveying poor offenders to gaol, or the house of correction, shall be paid by the treasurer of the county, except in Middlesex.

2. *As to the removal of prisoners.*—As prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases. For which purpose it is enacted, by the 31 *C. 2. c.* 2. § 9. "that if any subject of this realm

And by 4 *G. 4. c.* 64. § 51. *et seq.* the justices in session (or, where the necessity is immediate, the visiting justices) may remove prisoners to some other place of confinement within their jurisdiction, in case of want of repair, &c., of the house of correction or prison, or of any contagious disease, &c.

3. *As to the support and employment of prisoners.*—For the relief of prisoners in gaols, justices of peace in sessions have power to tax every parish in the county, not exceeding 6*s.* 8*d.* per week, leviable by constable, and distributed by collectors, &c. 14 *Eliz. c.* 5. See also stat. 12 *C. 2. c.* 29.

The justices in general sessions may provide a convenient stock of materials for setting poor prisoners to work, to be paid for by the treasurer out of the general county rate; and may provide persons to oversee and set such prisoners on work; and make the orders needful as to regulating the accounts, for punishing the abuses, and for bestowing the profits of their labour for the relief of the prisoners. *Stat.* 12. *C. 2. c.* 29.

By 52 *G. 3. c.* 160., for enabling justices of the peace to order parochial relief to prisoners for debt in gaols, not being county gaols, one justice may order parochial relief to poor debtors in such gaols, by the overseers where the gaols in which such pauper is confined shall be situate, which shall be repaid by the parish to which such pauper belongs. If the pauper debtor has

no place of settlement in England or Wales, the allowance shall be paid out of the county rate.

By 4 *G. 4. c.* § 37. one of the visiting justices may, with the consent of the prisoners committed for trial, authorize their employment in any work or labour. But by 5 *G. 4.*

c. 85. § 16. such consent must be freely given, and not extorted, and no prisoner, before conviction, shall under any pretence be employed on the tread-wheel.

By 5 G. 4. c. 85. § 17. prisoners committed for trial, and unable to maintain themselves, shall be allowed sufficient food without being obliged to work.

By 4 G. 4. c. § 38. prisoners sentenced to imprisonment without being sentenced to hard labor, except such as shall maintain themselves, may be ordered by two visiting justices to be set to some work or labour not severe; and no such prisoner, of ability to earn or otherwise provide for his own subsistence, shall have any claim to be supported by the county.

By 5 G. 4. c. 84. § 18. prisoners under sentence of transportation may, by the written order of one of the visiting justices, be kept to hard labour while they remain in prison.

4. *As to allowance to prisoners on discharge.*—By 4 G. 4. c. 64. § 16., prisoners whose confinement has been shortened on the recommendation of the justices in quarter sessions, shall, on being discharged, together with necessary clothing, receive not exceeding 20s. or less than 5s., where the offender shall be confined a year, and so in proportion for any shorter period.

§ 39. empowers the visiting justices to supply discharged persons with the means of returning home, &c.

And by 5 G. 4. c. 85. § 22. discharged prisoners are to be afforded the means of returning to the places of settlement; and for that purpose two visiting justices may take their examination as to places of settlement.

As to the escape of prisoners, see *post*, III., and *tit. Escape*. And as to the punishment of such as are refractory, *post*, IV.

All fees formerly payable by prisoners are now abolished. See *tit. Fees*.

III. The offence of prison breaking, by the common law, was no less than felony; and this whether the party were committed in a criminal or civil case, or whether he were actually within the walls of the prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the king's prison, or one belonging to a lord, or franchise. 2 *Inst.* 589: *Staundf. P. C.* 31: *Cro. Car.* 210.

But by the stat. 1 *Ed. 2. stat. 2. de frangentibus prisonam*, "None from henceforth that breaketh prison shall have judgment of life, or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm; albeit in

times past it hath been used otherwise." So that to break prison and escape, when one is lawfully committed for any treason or felony, remains still felony, as at the common law; and to break prison (whether it be the county gaol, the stocks, or other usual places of security), when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment. 4 *Comm.* 130.

The offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others who were committed for treason, for that will make him a principal in the treason. 2 *Hawk. P. C. c.* 18.

Any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common gaol, or the house of a constable, or private person, or the prison of the ordinary, is a prison within the statute. 2 *Inst.* 589: *Dyer*, 99. *pl.* 60: *Crom.* 38: *Cro. Car.* 210: *Hale's P. C.* 107.

If the imprisonment be for any offence made capital by a subsequent statute, the breach of prison is as much within the act of 1 *Ed. 2. stat. 2.* as if the offence had always been felony; but if the offence for which a man is committed were but a trespass at the time when he breaks the prison, and afterwards become felony by a subsequent matter; as where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the fiction of law (which to many purposes makes the offence felony *ab initio*) shall not be carried so far as to make the prison-breach also a felony, which, at the time when it was committed, was but a misdemeanor. *Hale's P. C.* 108: 2 *Inst.* 591: *Plowd.* 258.

It seems the better opinion, that if the offence for which the party was committed be in truth but a trespass, the calling it felony in the *mittimus*, will not make the breaking of the gaol amount to felony; and that, on the other side, if the offence were in truth a capital one, the calling it a trespass in *mittimus* will not bring it within the statute; for the cause of imprisonment is what the statute regards, and that is the offence, which can neither be lessened nor increased by a mistake in the *mittimus*. But for this, see 2 *Hawk. P. C. c.* 18.

There must be an actual breaking, for the words *felonice fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the ne-



gligence or consent of the gaoler, or if he escape through a breach made by others without his privity, he is guilty of a misdemeanor only, and not of felony. 2 *Inst.* 589: *Hale's P. C.* 108: *Staundf. P. C.* 31.

Nor will the breaking of prison, which is necessitated by any accident, happening without any default of the prisoner, as where the prison is fired by lightning, or otherwise, without his privity, and he breaks out to save his life, come within the statute. *Plowd.* 136: 2 *Inst.* 590: *Hale's P. C.* 108. Nor is it felony to break a prison, unless the prisoner escape. *Keihr.* 87. a.

But there need not be any actual intent to break to constitute the offence. Where, therefore, the prisoner escaped from a house of correction by tying two ladders together and placing them against the wall of the yard, and, in making his escape threw down some of the bricks of the wall, it was held a sufficient breaking. *R. & R.* 458.

He that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independent offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man, without an indictment. 2 *Hawk. P. C. c.* 18.

But if he be first indicted and acquitted of the principal felony, he shall not be indicted for the breach of prison afterwards; for it being clear that he was not guilty of the felony; he is in law as a person never committed for felony, and so his breach of prison is no felony, 1 *Hale*, 612.

It is not sufficient to indict a man generally, for having feloniously broken prison; but the case must be set forth specially, that it may appear he was lawfully in prison, and for a capital offence. *Hale's P. C.* 109: 2 *Inst.* 591.

If A. arrests B. for suspicion, and carry him to the common gaol, and there deliver him; if he breaks prison and be indicted on it, there must be the following averments in the indictment: that there was a felony done, and that A. having probable cause to suspect B., had arrested and committed him, and that he broke the prison; all which must be proved on the trial. But where a felon is taken by *capias* and committed, and breaks prison, there needs no such averment, &c., because all appears by matter of record. 2 *Inst.* 590: *Hal. Hist. P. C.* 10.

By stat. 59 *G. 3. c.* 136. for the better regulation of the general Penitentiary for convicts at Milbank, near Westminster, established by stat. 56 *G. 3. c.* 63. (see tit. *Transportation*), convicts breaking prison or escaping, are in like manner punishable by three years further

confinement; as capital felons, on a second escape; and by six months confinement for any attempt at escape.

By the 4 *G. 4. c.* 64. § 43. any person conveying, or causing to be conveyed, into any prison to which the act extends, any mask, visor, or other disguise, or instrument or arms, proper to facilitate the escape of any prisoner, and the same delivering, or causing to be delivered, to any prisoner, or other person there for his use without the privity of the keeper of such prison, shall be deemed to have delivered such visor, &c., with intent to assist such prisoner to escape; and any person, by any means whatever, assisting any prisoner to escape, and whether an escape be actually made or not, shall be guilty of felony, and liable to fourteen years' transportation.

The felony of breach of prison was within clergy, though the offence for which the party was committed was excluded clergy. 1 *Hal. H. P. C.* 612. And where it is a felony it is now punishable under the 7 and 8 *G. 4. c.* 28. § 8. with transportation for seven years, &c.

For further matter relative to gaols and prisoners, see this Dict. tits. *Arrest, Commitment, Debtor, Escape, Execution, False Imprisonment, Insolvent, Marshalsea, Rescue.*

IV. A gaoler is the master of a prison; one that hath the custody of the place where prisoners are kept. Sheriffs must make such goalers for which they will answer. But if there is a default in the gaoler, action lies against him for an escape, &c. 2 *Inst.* 592. In common cases, the sheriff, or gaoler, is chargeable at the discretion of the party; though the sheriff is most usually charged. He who hath the custody of the gaol wrongfully, or of right, shall be charged with the escape of prisoners: and if he that hath the actual possession be not sufficient, his superior shall answer. 2 *Hawk. P. C. c.* 2 *Inst.* 381.

In regard to the great power gaolers and their officers have over their prisoners, the law watcheth with a jealous eye over their conduct. *Fost.* 331.

The common law also subjects gaolers to fine and imprisonment, and forfeiture of their offices, for gross and palpable abuses in the execution of their offices, such as suffering prisoners to escape, barbarously ill-using them, or the like. 9 *Co.* 50: 2 *Ld. Raym.* 216: 2 *Bac. Ab.* 630.

Also gaolers are punishable by attachment for gross misbehaviour or contempts, and for disobeying writs of *habeas corpus*, and not bringing up the prisoners on the day prefixed by such writ. 2 *Hawk. c.* 22. § 31.

And if the gaoler keep the prisoner more strictly than he ought of right, whereof the



prisoner dieth, this is felony in the gaoler by the common law. And this is the cause that if a prisoner die in gaol, the coroner ought to sit upon him: and if the death was owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, it will be deemed wilful murder in the person guilty of such duress. 3 *Inst.* 91: *Fost.* 321, 322. See two particular instances of cruelty by gaolers which were holden to be murders, 3 *Str.* 856. 884: *Ld. Raym.* 1578. But if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Hawk. P. C.*: 1 *H. H.* 496. See *tit.* *Escape, Homicide*, III.

If any person assault a gaoler, for keeping a prisoner in safe custody, he may be fined and imprisoned. 1 *Hawk. P. C.* Where a goal is broken by thieves, the gaoler is answerable; not if it be broken by enemies. 3 *Inst.* 52.

It seems clearly agreed, that a gaoler, by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol, after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently. *Co. Lit.* 233: 9 *Co. 5*: 3 *Mod.* 143.

It hath been resolved, that a forfeiture by a gaoler who hath but a particular interest, as of him who hath custody of a gaol for life, or years, does not affect him in remainder, or reversion, who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the king. *Poph.* 119; 2 *Lev.* 71: *Raym.* 216: 3 *Lev.* 288.

By stat. 3 *G. 1. c.* 15. none shall purchase the office of gaoler, or any other office pertaining to the high sheriff, under pain of 500*l.*

By the 4 *G. 4. c.* 64. § 10. the following rules are enacted for regulating the duties of gaolers, &c., and the government of every prison:—

1st. The keeper of every prison must reside therein; he must not be an undersheriff or bailiff, or concerned in any occupation or trade whatever; nor is he, or any other officer of the prison, allowed to sell any article to any prisoner, nor have any interest, directly or indirectly, in any contract or agreement for the supply of the prison.

2d. A matron must be appointed to superintend the female prisoners.

3d. The keeper must, as far as may be practicable, visit every ward, and see every prisoner, and inspect every cell, once at least in every twenty-four hours; and, in visiting the female prisoners, he shall be accompanied by the matron, or by some female officer of the prison.

4th. The keeper must keep a regular journal of all occurrences of importance within the prison, which must be laid before the justices at every quarter-sessions.

5th. Due provision must be made in every prison for the enforcement of hard labour, in cases where prisoners shall be sentenced to it.

6th. The male and female prisoners must be confined in separate buildings or parts of the prison, so as to prevent them from seeing, conversing, or holding any intercourse with each other; and the prisoners of each sex must be divided into the following classes:

*First.* Debtors, and persons confined for contempt of court in civil process.

*Second.* Prisoners convicted of felony.

*Third.* Prisoners convicted of misdemeanors.

*Fourth.* Prisoners committed on charge or suspicion of felony.

*Fifth.* Prisoners committed on charge or suspicion of misdemeanors, or for want of sureties.

*Sixth.* Vagrants.

Prisoners intended to be examined as witnesses for the crown must also be kept separate.

But the justices may authorise the employment of any prisoner in any menial office within the prison, or for the purpose of instructing others. And the keeper may confine a prisoner with another class, if he shall deem it improper for him to associate with others of the class to which he belongs.

7th. Female prisoners must in all cases be attended with female officers.

8th. Every prisoner sentenced to hard labour must, unless prevented by sickness, be employed not exceeding ten hours in every day, except on Sundays, Christmas-day, and Good Friday.

9th. Prayers selected from the Liturgy of the Church of England must be read every morning by the chaplain, the keeper, or some other person.

10th. Provision shall be made for the instruction of prisoners of both sexes in reading and writing.

11th. Prisoners shall attend divine service on Sundays, and on other days when performed.

12th. No prisoner shall be put in irons by the keeper except in case of urgent necessity, and then not longer than four days, without an order in writing from a visiting justice, specifying the cause. See further, *tit. Fetters*.

13th. Every prisoner shall be allowed a sufficient quantity of plain and wholesome food, to be regulated by the justices in session; and prisoners under the care of the

surgeon shall be allowed such diet as he shall direct.

14th. Prisoners before trial who shall not receive any allowance from the county, may procure for themselves, and receive at proper hours, any food or other necessaries, subject to a strict examination.

15th. But no prisoner who is confined under the sentence of any court, or in pursuance of any conviction before a justice, shall receive any food or necessaries other than the gaol allowance, except under special circumstances.

16th. Due provision shall be made for the admission, at proper times, of persons with whom prisoners committed for trial may desire to communicate; and rules and regulations shall be made by the justices at sessions for the admission of the friends of the convicted prisoners.

17th. The surgeon must examine every prisoner before he is passed into the proper ward; and no prisoner shall be discharged if labouring under any acute or dangerous distemper, unless he himself requires it. No prisoner before trial shall be compelled to wear a *prison dress*, unless his clothes be deemed insufficient, or necessary to be preserved for the purposes of justice. But no prisoner, not convicted of felony, shall be clothed in a party-coloured dress.

18th. Every male prisoner shall be provided with a separate bed, hammock, or cot, either in a separate cell, or in a cell with not more than two other male prisoners.

19th. The walls and ceilings of the wards, cells, rooms, and passages, used by the prisoners, must be scraped and limewashed at least once in the year, and the rooms, passages, and sleeping cells, shall be cleansed once a-week, or oftener if requisite.

20th. All prisoners shall be allowed as much air and exercise as shall be deemed proper for the preservation of their health.

21st. Forbids the admission of spirituous liquors for the use of prisoners; and by § 40. a penalty of 20*l.* is inflicted on persons carrying or attempting to carry spirituous or fermented liquors into any prison. And any gaoler selling, lending or giving away any such liquor, is liable to forfeit 20*l.*

22d. No gaming shall be permitted; and the keeper may seize and destroy all cards, dice, or other instruments of gaming.

23d. No money under the name of *gar-nish* shall be taken from any prisoner, on his entrance into the prison, under any pretence whatever.

24th. Upon the death of a prisoner notice shall be given by the keeper forthwith to one of the visiting justices, as well as to the co-

roner of the district, and to the nearest relative of the deceased where practicable.

By § 11. none of the prisoners can serve upon the coroner's inquest.

By § 12. the court of lord mayor and aldermen may make further regulations, with the sanction of the two chief justices, for the management of the prisons in London; and five justices may do the like in regard to those of any county. Copies of these rules must be put up in a conspicuous part of the prison, and such rules shall be binding upon the sheriff, so as not to interfere, however, with his right or duty to appoint or remove any keeper of a county gaol.

By § 15. the chairman of the Michaelmas quarter-sessions shall transmit to the Secretary of State copies of the rules and regulations then in force for the government of every prison in the county, together with plans of any additions to the building of the prison.

By § 24. a general report is required to be prepared at such sessions by the clerk of the peace, and signed by the chairman, and by him transmitted to the Secretary of State, to be laid before parliament. By 5 G. 4. c. 85. § 8. the chairman must also at the same time transmit a correct statement of any increase or diminution in every such establishment of officers and servants, or in their respective salaries or emoluments.

By § 16. visiting justices shall be appointed by the sessions, and their duties are prescribed by this and the following sections.

By § 14. the gaoler must attend every quarter-sessions, and make a report in writing of the actual state and condition of the prison, and of the number of the prisoners. By § 19. he must also make a return at every assizes of the persons sentenced to hard labour. By § 20. he must, under the penalty of 20*l.*, on the second day next after the termination of every sessions or assizes, transmit to the Secretary of State a calendar containing the names, crimes, and sentences of every prisoner tried, distinguishing with respect to all prisoners capitally convicted such of them as may have been reprieved by the court, and stating the day on which execution is to be done upon those who have not been reprieved. By § 21. he must deliver to every court of quarter-sessions a certificate how far the rules for the government of the prison have been observed, under the penalty of 10*l.* And by § 22. he must, one week before every Michaelmas sessions, make a return of the state of the prison to the clerk of the peace.

By § 41. the keeper of every prison has power to hear all complaints touching any of the following offences:—1. Disobedience of the rules of the prison. 2. Assaults when no

dangerous wound or bruise is given. 3. Profane cursing and swearing. 4. Any indecent behaviour, and irreverent behaviour at chapel. 5. Absent from chapel without leave. 6. Idleness or negligence in work, or wilful mismanagement of it. For any of these offences the keeper may punish the offender by ordering him to close confinement in the refractory or solitary cells, and by keeping him upon bread and water only, for any term not exceeding three days.

By § 42. any criminal prisoner guilty of any repeated offence against the rules of the prison, or of any greater offence than the gaoler is empowered to punish, any one of the visiting, or any other justices of the county or district, may inquire upon oath and determine the offence, and may order the offender to be punished by close confinement not exceeding one month; or by personal correction in case of prisoners convicted of felony or sentenced to hard labour.

By § 28. and 33. the justices at quarter-sessions are to appoint a chaplain and a surgeon to each prison within their jurisdiction, the latter of whom is to keep a regular journal.

By the 4 *G. 4. c. 64.* § 76., and the 5 *G. 4. c. 88.* § 27. those acts are declared not to extend to the prisons of the King's Bench or the Fleet, Bridewell, the Marshalsea, the Penitentiary at Milbank, or that at Gloucester.

As to gaolers permitting prisoners to escape, see tit. *Escape*.

**GAOL-DELIVERY.** The administration of justice being originally in the crown, in former times our kings in person rode through the realm once in seven years, to judge of and determine crimes and offences; afterwards *justices in eyre* were appointed; and since *justices of assize and gaol delivery, &c.* A commission of gaol-delivery is a patent in nature of a letter from the king to certain persons, appointing them his justices, or two, or three, of them, and authorising them to deliver his gaol, at such a place, of the prisoners in it; for which purpose it commands them to meet at such a place, at the time they themselves shall appoint; and informs them that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the gaol, and their attachments, before them, at the day appointed. *Crompt. Jurisd.* 125: 4 *Inst.* 168.

By stat. 3 *H. 7. c. 3.* those that have the custody of gaols must certify the names of all the prisoners to the justices of gaol-delivery, in order to their trial or discharge, on pain of 5*l.*

Justices of gaol-delivery are empowered by the common law to proceed upon indictments of felony, trespass, &c. and to order execution or reprieve. And they have power to discharge

such prisoners as upon their trials shall be acquitted; also all such against whom, upon proclamation made, no evidence appears to indict them; which justices of *oyer and terminer, &c.* may not do. 2 *Hawk. P. C.* But these justices have nothing to do with any person not in custody of the prison, except in some special cases; as if some of the accomplices to a felony be in such prison, and some of them out of it, the justices may receive an appeal against those who are out of the prison, as well as those who are in it; which appeal, after the trial of such prisoners, shall be removed into B. R. and process issue from thence against the rest. *Fitz. Coron.* 77: *S. P. C.* 64. Such justices have no more to do with one let to mainprise, than if he were at large; for such person cannot be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody. And where any person is bailed, there he is in the custody of his sureties, and they may detain him where they please. 2 *H. P. C.* 25. Though *per Holt, C. J.* if a person be let to bail, yet he is in law in prison, and his bail are his keepers; and therefore the justices of

gaol-delivery may take an indictment against him, as well as if he was actually in gaol. And they may take indictments not only of felony, but also of high treason, if the offenders are in prison, and try and give judgment upon them, like unto commissioners of *oyer and terminer*; though it has been formerly held otherwise. 2 *Hale's Hist. P. C.* 35. Justices of gaol-delivery may punish those who unduly bail prisoners; as being guilty of a negligent escape. *S. P. C.* 77: 25 *Ed.* 3. 39. They also have authority to punish many particular offences by statute.

The granting a new commission of gaol-delivery, or of the peace, in a town corporate, shall not avoid the former commission. 2 and 3 *Ph. & Mar. c.* 18. Justices of gaol-delivery may act in their counties. 12 *G. 2. c.* 27. See tit. *Assize, Circuits, Judges, Justices*.

**GARB, Garba,** from the Fr. *Garbe*, alias *Gerbe*, i. e. *fascis*.] A bundle or sheaf of corn. *Chart. Forest. cap.* 7. And in some places it is taken for a handful, viz. *Garba aceris sit ex triginta pecnis. Fleta, lib.* 2. *cap.* 12. *Garba sagittarum* is a sheaf of arrows containing twenty-four. *Skene*.

**GARBALES DECIMÆ.** Tithes of corn.

**GARBLE.** Is to sever the dross and dust from spice, drugs, &c. *Garbling* is the purifying and cleansing the good from the bad; and may come from the Italian *garbo*, i. e. finery or neatness; and thence probably we say, when we see a man in a neat habit, that he is in a handsome *garb*. *Cowel*.



**GARBLER** or **SPICES**. An officer of antiquity in the city of London, who may enter into any shop, warehouse, &c. to view and search drugs and spices, and *garble* and make clean the same, or see that it be done. And anciently all druggs, &c. were to be cleansed and girdled before sale, on pain of forfeiture, or the value. By stat. 6. Hen. 6. c. 16. this officer is to be appointed by the court of lord mayor, aldermen and common council, to garble spices at the request of the owner, but not otherwise.

**GARCIO**, Fr. *Garcion*. A groom or servant. *Pla. Cor.* 21. *Ed.* 1. *Garcion stole*, groom of the stole to the king, and in the Irish language (according to *Toland*), *garson* is an appellation for any menial servant. *Kennet's Gloss.*

**GARCIONES**. Servants who follow the camp. *Incantiph.* 88. *Wassent* 242. Boys

**GARD**, **GARDIAN**, &c. See *Guard* and *Guardian*.

**GARDEBRACHE**, Fr. *Gardebrache*. An armour or vambrace for the arm. *Chart. K. Hen.* 5.

**GARDENS**. By 7 and 8 G. 4. c. 29. s. 12. persons stealing or destroying, or damaging with such intent, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, or the like, or in a house, or conservatory, are punishable summarily by one justice, with imprisonment for six months, with or without hard labour, or a fine not exceeding 2*l.* over and above the value of the article stolen, or injury done; and for a second offence are guilty of felony, and punishable as in cases of simple larceny.

And by § 43. persons stealing any cultivated root or plant, used for food for man or beast, or for medicine, distillery, dyeing, or for any manufacture growing in land, open or inclosed, not being a garden, orchard, or nursery ground, are punishable summarily before one justice; and for a subsequent offence may by two justices be ordered to be whipped.

By 7 and 8 G. 4. c. 30. § 21. maliciously destroying, or damaging with intent to destroy, any of the productions mentioned in the 42d section of the above act growing in any garden, &c., is for the first offence in like manner punishable summarily before one justice; and persons committing a second offence are declared guilty of felony, and liable to be transported for seven years, or to four years imprisonment, and if a male, to be whipped.

By § 22. the offence of destroying or damaging, &c. any cultivated root, &c. in open or inclosed land not being a garden, &c. is subjected to the same punishment as stealing,

under the 43d section of the above act. See *tit. Trespass*.

**GARDEROBE**, *garderoba*.] A wardrobe: a closet or small apartment for hanging up clothes. See 2 *Inst.* 255.

**GARDIA**. Is a word used by the *fuedists* for *custodia*. *L. h. Feud.* 1.

**GARLE**. A coarse wool, full of staring hairs, such as grow about the shanks of sheep. See *stat.* 32 *Ed.* 3. c. 2.

**GARLANDA**. A chaplet, coronet, or garland. *Matt. Paris.*

**GARNISTURA**. Victuals, arms, and other military stores of war, necessary for the defence of a town or castle. *Matt. Paris, Anno.* 1250.

**GARNISH**, *garnishment*.] Money paid by a prisoner on his entrance into gaol. It is for him to be taken by the 4 G. 4. c. 13. s. 10. r. 23. See *tit. Gaol*.

To **GARNISH**. To warn; to *garnish* the heir, signifies in law to warn the heir. *Stat.* 27 *Ed.* c. 3. Repealed by 6 G. 4. c. 105. § 13.

**GARNISHMENT**, Fr. *garnement*, from *garnir*, i. e. *instruire*.] In a legal sense intends a warning given to one for his appearance, for the trial and trial of the court and explaining a cause. For example—one is said for the *defence* of certain writings delivered; and the defendant alleging that they were delivered to him by the plaintiff, and another person, upon condition, prays that the other person may be warned to plead with the plaintiff, whether the condition be performed or not; in this petition he is said to pray *garnishment*, which may be interpreted either a warning of that other, or a furnishing the court with all parties to the action, whereby it may thoroughly determine the cause: and until he appears and joins, the defendant is as it were out of the court. *Crompt. Juris.* 211; *F. N. B.* 106. A writ of *scire facias* is to go forth against the other person to appear and plead with the plaintiff: and when he comes and thus pleads, it is called *interpleader*. If the *garnishee* be returned *scire facias*, and make default, judgment will be had to recover the writings, and for their delivery, against the defendant; and if the *garnishee* appears and pleads, if the plaintiff recovers, he shall have damages. *Rast.* 213; 1 *Brownl.* 147.

Garnishment is generally used for a warning; as *garnishes the court* is to warn the court, and *reasonable garnishment* is where a person hath reasonable warning. *Kitch.* 6. Further, some contracts are naked, *sans garnement*, and some furnished, &c. See *tit. Interpleader*.

**GARNISHEE**. Such third person or party

in whose hands money is *attached* within the liberties of the city of London, by process out of the sheriff's court; so called, because he hath had *garnishment* or warning, not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit. Vide *Attachment Foreign*.

**GARNISTURE.** A furnishing or providing. *Pat. 17: Ed. 3.* Vide *Garnestura*.

**GARRANTY.** See *Warranty*.

**GARSUMMUNE:** *gersuma*, or *gersoma*. A fine or amercement. *Domesday, Spelm. Gloss.*

**GARTER:** *garterium*, Fr. *jartier*, i. e. *periscelis fascia poplitaria*.] Signifies in divers statutes, and elsewhere a special *garter*, being the ensign of a noble order of knights, instituted by King Ed. III. anno Dom. 1344, called *Knights of the garter*. It is also taken for the principal *king at arms*, among our *English heralds*, attending upon the knights thereof created by Henry V.

The first dignity after nobility is that of a knight of the Order of Saint George, or of the Garter. See tits. *Knights Precedency*.

**GARTH.** A little back-side, or close in the *North of England*; being an ancient *British* word; *gardd* in that language signifying *garden*, and pronounced and writ *garth*; also a *dam* or *wear*, &c.

**GARTHMAN.** As there are *fishgarths* or *wears* for catching of fish, so there are *garthmen*; for by statute 17 R. 2. c. 9. it is ordained, that no fisher nor *garthman* shall use any nets or engines to destroy the fry of fish, &c. This word is supposed to be derived from the Scottish *gart*, which signifieth enforced or compelled; the fish being forced by the wear to pass in at a loop where they are taken.

**GASTALDUS.** A governor of the country, whose office was only temporary, and who had jurisdiction over the common people. *Blount*.

**GATE.** At the end of the names of places, signifies a way or path, from the Sax. *geat*, i. e. *porta*. The custody of the *gates* of the city of London is granted to the Lord Mayor, &c, by *chart*. King Henry IV.

See further tits. *Fence, Malicious Injuries*.

**GAUGETUM.** A *gauge* or *gauging*, done by the *gauger*; and the true English *gauge* is mentioned in *Rot. Parl. 32 Ed. 1*.

**GAUGER, gaugeator**, Fr. *gauchir*, i. e. *in gyrum torquere*.] An officer appointed by the king to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, honey, &c., and to give them a mark of allowance, as containing lawful measure, before they are sold in any place: and because his mark is a circle made with an iron instrument for that purpose, it seems to have its name from thence.

The stat. 31 Eliz. c. 8. ordained that beer, &c. imported shall be gauged by the masters and wardens of the Coopers' Company.

*Gaugers* are now the surveying officers under the board of Excise. See tit. *Excise*.

*Gaugers* may take samples not exceeding half a pint. 32 G. 2. c. 29.

**GAVEL, Sax. gafel.**] Tribute, toll, custom, or yearly revenue; of which we had in old time several kinds. See tit. *Gabel*.

**GAVELET, gavelatum.**] An ancient and special kind of *cessavit* used in Kent, where the custom of *gavel-kind* continues, whereby a tenant, if he withholds his rents and services due to the lord, shall forfeit his land; it was intended where no distress could be found on the premises, so that the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time, if the tenant came and paid his rent, he was admitted to his tenement to hold it as before; but if not, the lord might enter and enjoy the same. The lord was to seek by the award of his court, from three weeks to three weeks, to find some distress upon the land or tenement, until the fourth court; and if in that time he could find none, at the fourth court it was awarded that the tenement should be seized as a distress, and kept in the lord's hands a year and a day without manuring; and if the tenant did not in that time redeem it, by paying the rent and making amends to the lord, the lord having pronounced his process by witnesses at the next county court, was awarded by his court to enter and manure the tenement as his own: and if the tenant would afterwards have it again, he was to make agreement with the lord. *Fitz. Cess. 60: Terms de Ley*.

*Gaveletum* is as much as to say to cease, or to let to pay the rent: and *consuetudo de gavelet* was not a rent or service, but a rent or service withheld, denied or detained, causing the forfeiture of the tenement. *Dict.*

The word *gavelet* in its original signification imported *rent*; but it means also a *process for the recovery of rent* peculiar to Kent and London. The *gavelet* thus prevailing by the custom of Kent may be used whether there is a sufficient distress on the land or not; but is restricted to *gavelkind* tenure. *Robins, on Gavelk. 243.* To London this writ was given for rent service generally by stat. 10 Ed. 2; which is therefore called the statute of *gavelet*. But by the words of the statute this latter *gavelet* only lies where the lord cannot obtain payment by distress. See *Spelm. voc. Gaveletum, Wright's Ten. 197.*

This remedy of *gavelet*, as well as that of *cessavit*, is now fallen wholly into disuse; nor, whilst they continued in use, were they appli-

cable, except where the tenure was in fee. *Booth on Real Act.* 133. See 1 *Inst.* 142. n. 2: and this Dict. tit. *Cessavit, Distress, Tenure.*

GAVELET IN LONDON, *breve de gavelto in London, pro redditu ibidem, quia tenementa fuerunt indistingibilia.*] The writ used in the hustings of London; where the parties, tenant and demandant, appear by *scire facias*, to show cause why the one should not have his tene-ment again on payment of his rent, or the other recover the lands, on default thereof.

GAVELGELD. Payment of tribute or toll. *Mon. Angl. tom.* 3.

### GAVELKIND.

A tenure or custom, annexed and belonging to lands in Kent, whereby the lands of the father are equally divided at his death among all his sons; or the land of the brother among all the brethren, if he have no issue of his own. *Lit.* 210. See tit. *Tenures*, III. 12.

All the lands in England, it is said, were of the nature of gavelkind before the year 1066, and descended to all the issue equally; but after the conquest (as it is called) when knight service was introduced, the descent was restrained to the eldest son for the preservation of the tenure; *Lamb.* 167: 3 *Salk.* 129; except in Kent, for the supposed reason of which see *Blount in v. Gavelkind*, who relates the story of the Kentish men surrounding William I. with a moving wood of boughs, and thus obtaining a confirmation of their ancient rights.

In the reign of Henry VI. there were not above thirty or forty persons in all Kent that held by any other tenure than this of gavelkind; which was afterwards altered upon the petition of divers Kentish gentlemen, in much of the land of that county, so as to be descendible to the eldest son, according to the course of the common law, by the stat. 31 *H. 8. c.* 3; though the custom to devise gavelkind land, and the other qualities and customs, remained. *Co. Litt.* 140. By the stat. 34 and 35 *H. 8. c.* 26. all gavelkind lands in Wales were made descendible to the heir, according to the common-law; whereby it appears that the tenure of gavelkind was likewise in that principality.

Blackstone relies on the nature of tenure in gavelkind as a pregnant proof that *tenure in free socage* was a remnant of Saxon liberty. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and the success with which those struggles were attended. And as it is principally here that we meet with the custom of gavelkind, we may fairly conclude that this

was a part of those liberties; agreeable to Mr. Selden's opinion that gavelkind, before the Norman conquest was the general custom of the realm. The distinguishing properties of this tenure are various. Some of the principal are—that the tenant is of sufficient age to alien his estate, by feoffment, at the age of fifteen; that the estate does not escheat in case of an attainder and execution for felony; that in most places the tenant had power of devising lands by will before the statute for that purpose was made (*Fitz. N. B.* 198: *Cro. Car.* 561.); the descent of the lands, as above stated, which was indeed anciently the most usual course of descent all over England (*Glanvil.* l. 7. c. 3.); though in particular cases particular customs prevailed.

These among other properties distinguished this tenure in a more remarkable manner; and yet it is said to be only a species of a *socage* tenure, modified by the custom of the country; the lands, being holden by suit of court and fealty, which is a service in its nature certain. *Wright.* 211. See this Dict. tit. *Tenure*, III. 12. Wherefore by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to exchange the gavelkind tenure holden of the see of Canterbury into tenures by knight's service: and by the above mentioned statute of 31 *H. 8. c.* 3. for disgavelling lands in Kent, they are directed to be descendible for the future, like other lands which were never holden by the service of socage. Now the immunities which the tenants in gavelkind enjoyed were such as cannot be conceived should be conferred on mere ploughmen and peasants; from all which the learned commentator conceives it to be sufficiently clear that tenures in free socage are generally of a nobler original than is assigned by *Littleton*, or after him by the bulk of common lawyers. 2 *Comm.* 84, 85. c. 6.

A father having gavelkind lands, had three sons, one of whom died in the life-time of his father, leaving issue a daughter: and it was held that the daughter shall inherit the part of her father *jure representationis*, and yet she is not within the words of the custom of dividing the land between the heirs male, for she is the daughter of a male and heir by representation. 1 *Salk.* 243. The heir at the age of fifteen years, it is said, may give and sell his lands in gavelkind, and shall inherit. *Co. Lit.* 111. The custom of gavelkind is not altered, though a fine be levied on the lands at common law; because it is a custom that runs with the land. 6 *Ed.* 6.

Land in gavelkind was devised to the husband and wife for life, remainder to the next heir male of their bodies, &c. They had three sons, and it was adjudged that the eldest



son should not have the whole. *Dyer*, 133. A donee in tail of gavelkind lands had issue four sons; and it was held, that all should inherit; but if a lease for life is made of gavelkind remainder to the right heirs of A. B., who hath issue four sons; in this case the eldest son shall inherit the remainder, because, in case of purchase, there can be but one right heir. 1 *Rep.* 102. If gavelkind lands come to the crown, and are re-granted to hold in *capite*, &c. the land shall descend to all the heirs male as gavelkind. *Nels. Abr.* 895.

A wife shall be endowed of gavelkind land, of a moiety of the land whereof her husband died seized, during her widowhood. *Co. Lit.* 111. And it has been adjudged, that the widow cannot have election to demand her thirds or dower at common law, so as to avoid the custom, by which she shall lose her dower, if she marry a second husband. *Moor.* 260. But see 1 *Leon.* 62. See tit. *Dower*.

The husband shall be tenant by the curtesy of half the gavelkind lands of the wife, during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. *Co. Lit.* 111: 1 *Atk.* 603. If the husband had issue by his wife, and she die, he shall be tenant by the curtesy of the whole land; and though he marry, he shall not forfeit his tenancy. *Mich.* 21 *Car. B. R.* 1 *Lil. Abr.* 649.

It was formerly supposed that although a father was attainted of treason or felony, the heir of gavelkind land should inherit, for the custom, as said, was, 'the father to the bough and the son to the plough.' *Dock. & Stud. c.* 10. But it has been held, that, in matters of treason, which strike at the foundations of policy and government, even gavelkind lands are forfeitable, and always were. See tit. *Forfeiture*.

A rent in fee granted out of gavelkind lands, shall descend in gavelkind to all the heirs male, as the lands would have done; it being of the same nature with the land itself. 2 *Lev.* 138: 1 *Mod.* 97: 1 *Vern.* 489.

A rectory in Kent, formerly belonging to one of the dissolved monasteries, having been granted by Henry VIII. to a layman, to be holden in fee by knight's service in *capite*, the lands are descendible according to the custom of gavelkind, but the tithes according to the common law. 2 *N. R.* 491.

There is no difference between parceners at common law and co-heirs in gavelkind, the latter being only parceners by custom; one, therefore, of several co-heirs in gavelkind may distrain for rent due to him and the rest without an actual authority from them; and an avowry of his right, and a cognizance as their bailiff, is sufficient, without averring any au-

thority. 2 *B. & E.* 465: 5 *Moore*, 297: and see *Co. Lit.* 241, 265: *Bro. Abr. Traverse*, 18: 5 *Mod.* 72: *Carth.* 364.

All lands in Kent shall be taken to be gavelkind, except those which are disgavelled by particular statutes. 1 *Mod.* 98. If lands are alleged to be in Kent, it shall be intended that they are gavelkind, if the contrary doth not appear. 2 *Sid.* 153: 1 *Vern.* 489.

By *Hale, Ch. J.*, gavelkind law is the law of Kent, and is never pleaded, but presumed; and it has been held, that the superior courts may take notice of gavelkind generally without pleading; though not of the special custom of devising it, which ought to be pleaded specially. 1 *Mod.* 98: *Cro. Car.* 465: *Lutw.* 236, 754.

The gavelkind descent of lands in Ireland was an incident to the custom of *tanistry*, and as such fell to the ground with its principal, in consequence of a solemn judgment against the latter in a case *Anne*, 5 *Jac.* 1. See *Dav. Rep.* 28. But in the reign of Queen Anne, the policy of weakening the Roman Catholic interest in Ireland was the cause of an Irish statute to make the lands of Papists descendible according to the gavelkind custom, unless the heir conformed within a limited time. See *Rob. on Gavelkind, c.* 17. However, by an Irish statute (17 and 18 *G. 3. c.* 49.), the descent of the lands of Papists was again reduced to the course of common law. 1 *Inst.* 176. *n.* 1.

The commissioners appointed to inquire into the laws relative to real property, in their third report recommend the abolition of gavelkind, principally on the ground of the difficulty of dealing with property of this tenure, arising from the minute shares into which it frequently becomes divisible. Another reason is the additional trouble and expense attending purchases in Kent consequent on the necessity of ascertaining whether the lands are subject to the custom.

**GAVELMAN.** A tenant liable to tribute. — *Sommer of Gavelkind, p.* 33. And hence gavelkind has been thought to be land in its nature taxable. *Blount.* See *Tenures*, III.

**GAVELMED.** The duty or work of mowing grass, or cutting a meadow land, required by the lord from his customary tenants; *consuetudo falcandi quæ vocatur gavelmed.* *Somm.*

**GAVELCESTER**, *Sax. sextarius vectigalis.* A certain measure of rent-ale; and among the articles to be charged on the stewards and bailiffs of the manors belonging to the church of Canterbury, in Kent, according to which they were to be accountable, this of old was one; *de gavelcester cujuslibet braciini braciati infra libertatem maneriorum, viz. unam lagenann et dimidium cervisiæ.* This duty elsewhere occurs under the name of *tolcester*; in lieu

thereof the *Abbot of Abingdon* was wont of custom to receive the penny mentioned by *Selden* in his Dissertation annexed to *Fleta*, cap. 8. Nor does it differ from what is called *oak gavel* in the Glossary at the end of Henry I. *Law's Sax. Dict.*

**GAVEL-WERK, Sax.]** Was either *manu opera*, by the hands and person of the tenant, or *corropera*, by his carts or carriages. *Philips of Purvey.*

**GAZETTE, gazetta.]** The London Gazette, which is published by the King's printer by authority of the government, is evidence of all acts of state, and of every thing done by the king in his political capacity. 5 *T. R.* 436. So it is to prove the king's proclamation, of which a court will not take notice except the Gazette be produced. 2 *Camp.*

But it is not evidence to prove particular facts between individuals, as a certain military commission; 2 *Camp.* 513; at least, unless the other side refuse to produce the commission, which is the best evidence. *Ibid.* S. P. 5 *Esp.* 233.

It is evidence, however, as a medium to prove notices; as of a dissolution of partnership, which is usually so notified. 1 *Stark.* 186: *Peake*, 42. 154, 155. n. But such evidence is very weak, without proof that the party to be affected by the notice read the particular Gazette in which it was contained. 1 *Stark.* 186. And it seems incumbent on persons dissolving partnership to give a special notice to those with whom they have dealt. 1 *Esp.* 171: *Peake*, 42: 1 *Stark.* 418.

Notices of bankruptcies in the Gazette are made sufficient by express enactment, as are also declarations of insolvency, and many other of the proceedings under the bankrupt laws.

**GEASPECIA.** In a charter of the privileges of Newcastle-upon-Tyne, renewed anno 30 Elizabeth, we find *sturgiones*, *porpecias* (i. e. porpoises), *delphinos*, *geaspecia*, viz. *grampoies*, &c.

**GEBURSCIP, geburscipa.]** Neighbourhood or adjoining district. *Leg. Ed. Confess.* cap. 1.

**GEBURUS.** A country inhabitant of the same gebureship, or village; from the Sax. *gebure*, a carl ploughman, or farmer. *Cowel.*

**GELD, geldum, mulcta; compensatio delicti et pretium rei.]** Hence, in our ancient laws, *wergeld* or *weregild* was used for the value or price of a man slain; and *orfgeld* of a beast: likewise money or tribute; for it is said, *et sint quieti de geldis, danegeldis, horngeldis, blodwita*, &c. *Chart. Ric. 2. Priorat. de H. in Devon.* pat. 5. Ed. 4. *Angeld* is the single value of a thing; *twigeld*, double value, &c.

**GELDABLE, geldabilis.]** That is, liable to pay tax or tribute. *Camden*, dividing Suffolk into three parts, calls the first *geldable*, be-

cause subject to taxes; from which the other two parts were exempt, as being *ecclesiæ donatæ*. The word is mentioned in the stat. 27 *H. 8. c.* 26. But in an old MS. it is expounded to be that land or lordship which is '*sub districtione curiæ vicecom.*' 2 *Inst.* 701.

**GELDING.** See tit. *Cattle.*

**GEMOTE, Sax. i. e. conventus.]** An assembly. *Leg. Ed. Conf. c.* 35. See *Alderman*, *Ealdorman*, *Folemote*, *Mote*, *Wittenagemote*, *Parliament.*

**GENEATH, villanus: regis ganeath,** is the king's villian. *LL. Inæ, MS. cap.* 19.

**GENERAL COUNCIL.** See *Synod.*

**GENERAL ISSUE,** is a plea to the fact of *not guilty*, in criminal cases, in order to trial, by the country, or by peers, &c. *H. P. C.* 254. In civil suits there are various pleas, which are general issues, according to the species of the action, as in *trespass*, *not guilty*; in case on *promises*, *non assumpsit*; &c.

By the rules made by the judges in *H. T.* 4 *W.* 4. the general issues in civil actions have been greatly modified and restricted; and "*nil debet*," the general issue in debt, is taken away. See further, tit. *Pleading.*

**GENERALE.** The single commons, or ordinary provision of the religious, were termed *generale*, as their general allowance, distinguished from their *pietantiæ*, or pittances, which on extraordinary occasions were thrown in as over commons. These are described amongst other customs, *Cartular, Glaston. MS. fol.* 10.

**GENERALS OF ORDERS.** Chiefs of the several orders of *monks*, *friars*, and other religious societies.

**GENERAL WARRANTS.** See tits. *Arrest*, *Commitment.*

**GENERATIO.** When an old abbey, or religious house, had spread itself into many colonies, or depending cells, that issue or off-spring of the mother monastery was called *generatio*; quasi *proles et soboles matricis domas.* *Annal. Waverl.* 1232.

**GENTLEMAN, generosus.]** Is compounded of two languages, from the Fr. *gentil*, i. e. *honestus*, vel *honesto loco natus*, and the Sax. *mon*, a man; thus meaning a man well born. The Italians call him *gentil uomo* whom we style a *gentleman*: the French distinguish him by the name of *gentilhomme*; and the Spaniards keep up to the meaning of the word, calling him *hidalgo*, or *hijo d' alga*, who is the son of a man of account; so that gentlemen are such whom their blood or race doth make known.

Under the denomination of gentlemen are comprised all above yeomen: whereby noblemen are truly called gentlemen. *Smith de Rep. Ang. lib.* 1. cc. 20, 21. A gentleman is

generally defined to be one, who, without any self liable to the debts of the ancestor. This title, bears a *coat of arms* (*qui gerit arma*), or may be by taking possession of title deeds, re-whose ancestors have been freemen: and by ceiving rent, &c. *Scotch Dict.*

the coat that a gentleman giveth, he is known *GESTU ET FAMA.* An ancient writ to be, or not to be, descended from those of his where a person's good behaviour was im- names that lived many hundred years since. peached, now out of use. *Lamb. Eirin. lib. 4.*

There is said to be a gentleman by office, *cap. 14. See Surety for the Peace.* and in reputation, as well as those that are *GEWINEDA, Sax.* The public conven- born such. *2 Inst. 668.* And we read that tion of the people, to decide a cause: *et pax J. Kingston* was made a gentleman by King, *quam aldermanus regis in quinque bergorum Richard II. Pat. 13 Ric. 2. par. 1. Gentilis* *gewineda dabit emendatur 12 libris. LL. Ethelred, cap. 1.* *homo* for a gentleman, was adjudged a good ad- dition. *Hil. 27 Ed. 3.* But the addition of esquire, or gentleman, was rare before 1 H. 5. *GEWITNESSA.* The giving of evidence. though that of knight is very ancient. *2 Inst. Leg. Ethel. cap. 1. apud Brompton.* *GIFT, donum donatio.]* A conveyance 595. 667.

"As for gentlemen," says Sir Thomas Smith (*De Rep. Ang. lib. 1. c. 20*), "they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman." See tit. *Precedency.*

*GENTLEWOMEN, generosa.]* Is a good addition for the state and degree of a woman, as *generosus* is for that of a man; and if a gentlewoman be named *spinster* in any original writ, appeal, &c., it hath been held that she may abate and quish the same. *2 Inst. 6. 8.* But it seems that *spinster* is in general a good addition, for an unmarried woman, as *single woman* is for one who being unmarried hath had a bastard.

*GENTILITY, gentilitas.]* Is lost by attainder of treason or felony, by which persons become base and ignoble, &c.

*GENU.* A generation.—*Successit Ethelbaldo Offa quinta Genu. Malmsb. lib. 1. c. 4.*

*GENUS, Lat.]* The general stock, extraction, &c., as the word office in law is the genus or general; but the sheriff, &c. is the species of it, or particular. *2 Lil. Abr. 528.*

*Genus*, among metaphysicians and logicians, denotes a number of beings which agree in certain general properties, common to them all; so that a genus is, in fact, only an abstract idea, expressed by some general name or term; or rather a general name or term, to signify what is called an abstract idea.

*GEORGE NOBLE.* A piece of gold, current at six shillings and eight-pence, in the reign of King Henry VII. *Lowndes's Essays upon Coins, p. 41.*

*GEORGIA.* In America, its colony established by stat. 6 G. 2. c. 25. § 7.

*GERSUMA.* See *Garsumme.*

*GESTIO PRO HEREDE.* Behaviour as heir. That conduct by which the heir renders him-

self liable to the debts of the ancestor. This title, bears a *coat of arms* (*qui gerit arma*), or may be by taking possession of title deeds, re-whose ancestors have been freemen: and by ceiving rent, &c. *Scotch Dict.*

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*GEWITNESSA.* The giving of evidence. *Leg. Ethel. cap. 1. apud Brompton.*

*GIFT, donum donatio.]* A conveyance which passeth either lands or goods. A gift is of a larger extent than a grant, being applied to things moveable and immoveable; yet as to things immoveable, when strictly taken, it is applicable only to lands and tenements given in tail: but gifts and grants are said to be alike in nature, and often confounded. *Wood's Inst. 260.*

The conveyance of lands by gift is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment but in the nature of the estate passing by it; for the operative words of conveyance in this case are *do, or dedi—I give, or have given*; and gifts in tail are equally imperfect without livery of seisin, as feoffment in fee simple. *Lat. § 59.* And this is the only distinction that *Littleton* seems to take when he says, "it is to be understood that there is feoffer and feoffee; donor and donee; lessor and lessee;" *Lat. § 57; viz.* feoffer is applied to a feoffment in fee-simple, donor to a gift in tail, and lessor to a lease for life or years or at will. In common acceptance gifts are frequently confounded with grants. See tit. *Grant, 2 Comm. 316. c. 20.*

A man by deed did give and grant, bargain and sell, alien, enfeoff, and confirm to his daughter certain lands; but no consideration of money was mentioned, nor was the deed indorled; there was likewise no consideration of natural affection expressed (other than what was implied in naming the grantee his daughter), and there was no livery indorsed, or any found to have been made; nor was the daughter in possession at the time of the deed made: and in B. R. it was adjudged by the court that the deed was good, and carried the estate to the daughter by way of covenant to stand seized, &c. *1 Mod. 157.*

The words *give* and *grant*, in deeds of gift, &c. of things which lie in grant, will amount unto a grant, a feoffment, a gift, release, confirmation, or surrender, at the election of the party, and may be pleaded as a gift or grant,



release, &c. at his election. *Co. Lit.* 301. And words shall be marshalled so in gifts and grants, that where they cannot take effect according to the latter, the law will make such construction as that the gift by possibility may take effect: *benigne sunt interpretationes chartarum propter simplicitatem laicorum.* *Co. Lit.* 183. If a person gives or grants land, and does not say in what parish or county it lies: yet if there be any other thing to describe it, as lately belonging to such a person, &c., or other circumstantial matter, it may be averred where the land lieth, and so the gift be good. *Bro. Grant*, 53: 9 *Rep.* 47. All corporeal and immoveable things that lie in livery, such as manors, messuages, cottages, lands, woods, and the like, may be given and granted in fee, for life, or years at first; and be assignable ever after, from man to man in infinitum. 1 *Rol. Abr.* 44. And where a man gives and grants wood to another on his lands, or 20s. for it to be received out of the same lands, &c., here the wood passes by the gift presently, with power to choose to have the money. 1 *Rol. Abr.* 47. A deed of gift of lands or goods may be made upon condition; and on a gift or sale of goods, the delivery of 6d., or a spoon, &c., is a good seisin of the whole. *Wood's Inst.* 234.

Gifts or grants for the transferring of personal property are thus to be distinguished from each other; that gifts are always gratuitous; grants are upon some consideration or equivalent; and they may be divided with regard to their subject-matter into gifts or grants of chattels real, and gifts or grants of chattels personal. Under the former head may be included all leases for years of land, assignments and surrenders of these leases; and all the other methods of conveying an estate less than freehold. These, however, very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection; or of 5s. to 10s. nominally paid to the grantor: and in case of leases, always reserving a rent, though it be but a pepper corn: any of which considerations will in the eye of the law convert the gift, if executed, into a grant; if not executed, into a contract. 2 *Comm.* 440. c. 30.

Grants or gifts of chattels personal are the act of transferring the right and the possession of them, whereby one man renounces, and another immediately acquires, all title and interest therein, which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually con-

strued to be fraudulent, if creditors or others become sufferers thereby; and particularly, by stat. 3 *H. 7. c.* 4. all deeds of gift of goods made in trust to the use of the donor shall be void, because otherwise persons might be tempted to commit treason or felony without danger of forfeiture: and the creditors of the donor might also be defrauded. And by stat. 13 *Eliz. c.* 5. every grant or gift of chattels as well as lands with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial, but as against the grantor or giver himself shall stand good and effectual; and all persons, partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and the other to the party grieved: and also on conviction suffer half a year's imprisonment. See 3 *Rep.* 82; and this *Dict. tit. Fraud.*

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A. gives to B. 100l. or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompence; *Jenk.* 109; unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration. 2 *Comm.* 441. c. 30. See this *Dict. tit. Assumpsit, Consideration, Contract.*

A gift may be by deed, in word, or in law: all goods and chattels personal may be given without deed, except in some special cases; and a free gift is good without a consideration. *Perk.* 57.

Whenever any gift shall be made, in satisfaction of a debt, it is proper to make it in a public manner before neighbours, that the goods and chattels be appraised to the full value, and the gift expressly made in satisfaction of the debt; and that on the gift, the donee take possession of them, &c. *Hob.* 230. See *tit. Fraud.*

If a man intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it, &c.*, and with his own hand delivers it to the party, this will be a good gift, notwithstanding the ring bear any other jewel, being delivered by the party himself, to the person to whom given. And if a person give a horse to another, being present, and bid him

take the horse, though he call the man by a wrong name, it will be a good gift; but it would be otherwise if the horse were delivered for the use of any other person, being absent; there a mistake of the name would alter the case. *Bac. Max.* 87. A gift must be certain; therefore to give or grant another his horses or cows that may be spared, will be void: though if one give to A. B. his horse, or his cow, he may take which he will. *Bro. Done,* 90.

If a person make a suit of clothes for another, and put it upon him to use and wear, this will be a gift or grant in law of the apparel made. *Co. Lit.* 351. This must mean if there was not any employment, and if the tailor, therefore, meant to give the clothes.

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee. 2 *B. & A.* 551. A mere verbal gift, therefore, of five colts from a father to his son, which continued in the donee's possession above twelve months up to the time of his death, does not pass the property. 2 *B. & A.* 551: and see 2 *Marsh.* 532.

And letters to executors, expressing that 1000*l.* was proper to be given to the writer's daughter, were held not to amount to a gift of so much in their hands, the gift not being completed. 1 *Mod.* 76.

But a deposit of Bank notes with executors for the depositor's sister and children, is a gift of the money among them. 2 *Bro. C. C.* 500.

A gift of chattels to take place after the donor's death passes only those which remain in specie at the time of the gift. 3 *Swanst.* 400. *n.*

A general gift of income arising from personal property is equivalent to a general gift of the property. 1 *S. & St.* 481.

As to gifts in law, when a man is married to a woman, all her goods and chattels by gift in law becomes the husband's; but then he is liable for her debts: so if a man is made executor, the law gives him all the goods and chattels of the testator, subject to his debts. 1 *Inst.* 351. See *tit. Baron and Feme, Executor.*

And see further *tit. Conveyance, Deed, Donatio Mortis Causa, Estate, Fraud, Grant, Limitation, &c.*

**GIFTA AQUÆ.** The stream of water to a mill. *Mon. Angl. tom.* 3.

**GIGMILLS.** A kind of fulling mills for fulling and burling of woollen cloth, prohibited stat. 5 and 6 *Ed.* 6 c. 22. See *Woollen Manufacturers.*

**GILD.** A fraternity or company, &c. See *Guild, Geld.*

**GILDA MERCATORIA.** A mercantile meeting or assembly. If the king grants to a set of men to have *gildam mercatoriam*, this

is alone sufficient to incorporate and establish them for ever. 10 *Rep.* 30: *Roll. Ab.* 513. See *tit. Corporation, Guild.*

**GILDING METALS.** By certain ancient statutes, now obsolete, the gilding any metal but silver, and church ornaments, or silvering any thing except the apparel of peers, &c., and metal for knights' spurs, is liable to forfeiture of ten times the value, and a year's imprisonment. None shall gild rings or other things made of copper or latten, on pain to forfeit 5*l.* to the king, and damages to the party deceived. For gilding silver wares, no person may take above 4*s.* 8*d.* for a pound of troy weight, under penalties. *Stats.* 5 *H.* 4. c. 13: 2 *H.* 5. c. 4: 8 *H.* 5. c. 3. See *tit. Gold.*

**GIPSIES.** See *tit. Egyptians.*

**GIRLS.** See *tit. Abduction, &c.*

**GISARMS, or GUIARMES.** An halbert or hand-axe, from the Lat. *his arma*, because it wounds on both sides. *Skene—Spelm.* It is mentioned in the statute 13 *Ed.* 1. c. 6.

**GIST OF ACTION.** From the Fr. *gist*; is the cause for which the action lieth; the ground and foundation thereof; without which it is not maintainable. 5 *Mod.* 305. See *tit. Action.*

**GLADIOLUM.** A little sword or dagger; also a kind of sedge. *Matt. Paris.* 1206.

**GLADIUS.** *Jus Gladii* is mentioned in Latin authors and the Norman laws; it signifies a supreme jurisdiction. *Cambd.* And it is said that from hence, at the creation of an earl, he is *gladio succinctus*; to signify that he had a jurisdiction over the county of which he was made earl. See *Pleas of the Sword.*

**GLAIRE, Fr.]** A sword, lance, or horseman's staff. *Gleyre* was one of the weapons allowed the contending parties in a trial by combat. *Orig. Jurisd.* 79.

**GLASS.** Various internal duties of excise have from time to time been by many statutes laid on glass and glass manufactures, and all works and manufactures of glass are subjected to strict regulation. Equivalent duties are imposed on all glass imported. See *Burn's Justice, tit. Excise.*

As to stealing glass belonging to any building, see *tit. Fixtures.*

**GLASS-MEN,** are reckoned amongst wandering rogues and vagrants by the old statutes, 39 *Eliz.* c. 17: 1 *Jac.* 1. c. 7.

**GLAVEA.** A hand dart. *Blount.*

**GLEANING, LEASING, or LESING,** from Fr. *glainer, quasi graner*; *colligere grana.*—*Teuton. ahrlesen, ex ahr, spica.* et lesen, *colligere.*—*Minshew in v. Glean.*] It has been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest

without being guilty of trespass; which humane provision seems borrowed from the *Mosaical* law. 3 *Comm.* 212, 213: *Trials per pais*, c. 15. p. 438. 534.

But it is now settled by a judgment of the Court of Common Pleas, that a right to glean in the harvest field cannot be claimed by any person at common law. Neither have the poor of a parish, legally settled, such right. *Gould, J.* dissented from this opinion, quoting the passage in the *Mosaical* law (*Levit. c. 19. vv. 9, 10. c. 23. v. 22: and see Deut. c. 24. v. 19.*) and 4 *Burr.* 1927. together with the recognition of the custom or privilege in a private act of parliament for an inclosure in Basinstoke parish. The other judges, however, were of opinion that it would be dangerous and impolitic to admit gleaning to be a right, and in fact would be prejudicial to the poor themselves, now provided for under various positive statutes. They also remarked that the custom of gleaning or leasing was various in various places, and was in many places restricted to particular corn, and could not therefore be set up as an universal common law right; that it would be opening a tempting door to fraud and idleness, and had never been specifically recognised by any judicial determination. 1 *H. Black. Rep.* 51—63. By the Irish acts 25 *H. 8. c. 1.* and 28 *H. 8. c. 24.* gleaning and leasing is so restricted as in fact to be prohibited in that part of the kingdom.

**GLEBE, gleba.]** Church land; most commonly taken for the land belonging to a parish church, besides the tithes.

Every church of common right is entitled to house and glebe. And the assigning of these at the first was of such absolute necessity, that without them no church could be regularly consecrated. *Gibbs.* 661.

If any parson, vicar, &c. hath caused any of his glebe-land to be manured and sown at his own costs, with any corn or grain, the incumbents may devise all the profits and corn growing upon the said glebe by will, under 28 *H. 8. c. 11.* And if a parson sows his glebe and dies, the executors shall have the corn sown by the testator. But if the glebe be in the hands of a tenant, and the parson dies after severance of the corn, and before his rent due, it is said, neither the parson's executors, nor the successor, can claim the rent, but the tenant may retain it, and also the crop, unless there be a special covenant for the payment to the parson's executors proportionably, &c. *Wood's Inst.* 163; *sed qu.* if this case would not come within the equity of stat. 11 *G. 2. c. 19. § 15.* which gives right of action to the representative of *tenant for life*, for any portion of rent in arrears at the time of his death?

By the said stat. 28 *H. 8. c. 11.* every suc-

cessor, on a month's warning, after induction, shall have the mansion-house and the glebe belonging thereto, not sown at the time of the predecessor's death. He that is instituted may enter into the glebe-land before induction, and has right to have it against any stranger; *per Coke, Ch. J., Roll. R.* 192. See *tit. Induction, Institution.*

Prohibition was moved for to a parson for digging new coal mines in his glebe, and also for felling trees; for it is waste, and prohibited by the statute *de non prosternend, arbores, &c.* The court held it not lay for the mines; for then no mines in the glebe could ever be opened. *Lev.* 107.

But it was said by *Lord Hardwicke*, in *Amb.* 176. that a parson cannot open mines, but may work those already open.

There is a writ grounded on the *stat. articuli cleri, c. 6.* where a parson is distrained in his glebe-lands by sheriffs or other officers, against whom attachment shall issue. *New Nat. Br.* 386, 387.

See as to exchanging *glebe-lands*, 55. *G. 3. c. 147: 56 G. 3. c. 52:* and *tit. Church, Parson, Tithes, Vicar, &c.*

**GLEBARIÆ.** Turfs dug out of the ground. *In Sylvis, Campis, Semitis, Moris, Glebariis, &c.*

**GLISCYWA.** An old Saxon word for a fraternity. *Leg. Athelstan, c. 12.*

**GLOMERELLS.** Commissaries appointed to determine differences between scholars in a school or university, and the townsmen of the place: in the edict of the bishop of Ely, anno 1276, there is mention of the *Master of the Glomerells.*

**GLOVE SILVER.** Money customarily given to servants to buy them gloves, as an encouragement for their labours.—The term glove money has also been applied to extraordinary rewards given to officers of courts, &c.; and to money given by the sheriff of a county in which no offenders are left for execution, to the clerk of assize and the judge's officers.

**GLOVES.** It is an ancient custom on a maiden assize, that is, when there is no offender to be tried, for the sheriff to present the judge with a pair of white gloves.

**GLYN.** A valley, according to the book of *Domesday.*

**GO.** This word is sometimes used in a judicial signification, as to *go* without day is to be dismissed the court; so in old phrase to *go* to God. *Broke. Kitch.* 190.

**GOATS.** No man may common goats within the forest without especial warrant. *Nota, capriolus non est bestia venationis forestæ. Mamwood's Forest Laws, c. 25. numb. 3.* See *tit. Common.*

**GOD-BOTE, Sax.]** An ecclesiastical or



church fine, paid for crimes and offences committed against God.

**GOD-GILD.** That which is offered to God or his service. *Sax.*

**GOD and RELIGION.** *Offences against Apostacy* is an offence against God and religion. It appears from *Bracton*, l. 3. c. 9. that in his time apostates were burnt to death; but this punishment afterwards became obsolete, and the offence for a long time was cognizable only in the Ecclesiastical Courts, which corrected the offender *pro salute animæ*.

By stat. 9 and 10 W. 3. c. 32. if any person educated in, or having made any profession of, the Christian religion, shall by writing, printing, teaching, or *advised* speaking, deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room, however, for repentance, if within four months after the first conviction the delinquent will, in open court, publicly renounce his error, he is discharged for that once from all disability.

All publications blaspheming God, or turning the doctrines of the Christian religion to contempt and ridicule, are undoubtedly the subject of indictment, punishable by the temporal courts with fine, imprisonment, and also infamous corporal punishment, in the discretion of the court. 1 *Hawk. P. C. c. 3*; 1 *Russell*, 209. 217.

*Heresy* is another offence, for which the offender is subject only to ecclesiastical censure, by stat. 29 *Car. 2. c. 9*; see that title.

See further, 4 *Comm.* 42. 65: and this Dictionary. *Blasphemy, Religion, Simony, Sunday, Swearing.*

**GOD'S PENNY.** Earnest money given to a servant when hired. *Craven Glossary.*

**GOLDA.** A mine, according to *Blount Mon. Angl. tom. 2. p. 610.*

**GOLD-MINES.** See *Mines.*

**GOLD and SILVER.** Gold and silver manufactures are to be assayed by the warden of the Goldsmith's Company in London, and marked; and gold is to be of a certain touch. *Stat. 28. Ed. 1. c. 20.* By 57 *Ed. 3. c. 7.* goldsmiths were to have their own marks on plate after the surveyors have made their assay: and false metal was to be seized and forfeited to the king. Work of silver made by goldsmiths, &c. is to be as fine as *sterling*, except the solder necessary; and marking other work incurs a forfeiture of double value. *Stat. 2 H. 6. c. 14.*

Gold plate made by goldsmiths shall contain

22 carats of fine gold, and silver plate 11 ounces and two pennyweights of silver, in every pound troy, or they forfeit 10*l.* And no goldsmith shall sell any such plate until marked with the first letters of the maker's christian and surname, the marks of the city of London being the leopard's head, lion passant, &c., and those made use of by the assayers at York, Exeter, &c. All persons making plate are to enter their marks, names, and places of abode in the Assay-office: they are likewise to send with the plate required to be marked a particular account thereof, in order to be entered, &c., or forfeit 5*l.* The assayers determine what solder is necessary about plate, and judge of the workmanship, and for good cause may refuse to assay it; and if any parcel be discovered of a coarser alloy than the standard, it may be broke and defaced; also the fees for assaying and marking are particularly limited, &c. 12 *G. 2. c. 26*: and see 31 *G. 2. c. 32*: 13 *G. 3. c. 59*: 24 *G. 3. st. 2. c. 53*: 35 *G. 3. c. 69.*

Goldsmiths shall not take above 1*s.* the ounce of gold beside the fashion, more than the buyer may be allowed for it at the king's exchange: and if the work of any goldsmith be marked and allowed by the master and wardens of the mystery, and afterwards found faulty, the wardens and corporation shall forfeit the value of the thing so sold or exchanged. *Stat. 18 Eliz. c. 15.*

Molten silver is not to be transported by goldsmiths before it is marked at Goldsmith's Hall, and a certificate made thereof on oath; and officers of the customs may seize silver shipped otherwise. 6 and 7 *W. 3. c. 17.* See 59 *G. 3. c. 49. § 12.*

The cities of York, Exeter, Bristol, Chester, Norwich, and town of Newcastle, are also appointed places for assaying and marking wrought plate of goldsmiths, &c. 12 *W. 3. c. 4*: 1 *Anne, c. 9.*

By 59 *G. 3. c. 49.* so much of all the ancient statutes as prohibited the melting or exportation of gold or silver or bullion was repealed.

Certain duties have been from time to time imposed on gold and silver plate wrought in Great Britain.

Persons that sell orrize lace, mixed with other metals or materials than gold, silver, silk, and vellum, shall forfeit 2*s. 6d.* for every ounce: and there shall be allowed at least six ounces of gold and silver prepared and reduced into plate to cover four ounces of silk, except large twist, frize, &c. And laying the same on greater proportions of the silk, or in any other manner than directed, incurs the like forfeiture of 2*s. 6d.* the ounce. Copper, and lace inferior to silver, is to be spun upon thread, yarn,

or incle, and not on silk; but this does not extend to tinsel apparel used in theatres. No gold or silver lace, thread, fringe, or wire, &c. may be imported on pain of being forfeited and burnt, and 100*l.* penalty. 28 G. 3. c. 7. See further tit. *Wire-Drawers*.

**GOLDWIT, or GOLDWICH.** Perhaps a golden mulet; in the records of the Tower there is mention of *consuetudo vocata, goldwith vel goldwich*.

**GOLIARDUS.** A jester or buffoon. *Mat. Paris*. 1229.

**GOOD ABEARING**, *bonus gestus*.] Signifies an exact carriage or behaviour of a subject towards the king and the people, whereunto some persons upon their misbehaviour are bound: and he that is bound to this is said to be more strictly bound than to the peace; because where the peace is not broken, the surety *de bono gestu* may be forfeited by the number of a man's company, or by their weapons. *Lamb. Eirin. lib. 2. c. 2.* See *stat. 34 Ed. 3. c. 1.*

**GOOD BEHAVIOUR.** Surety for the good behaviour is surety for the peace, and differs very little from *good abearing*. A justice of peace may demand it *ex officio*, according to his discretion, when he sees cause; or at the request of any other under the king's protection: his warrant also is to be issued when he is commanded to do it by writ of *supplicavit* out of Chancery, or B. R. See further tits. *Justices of Peace* and *Surety of the Peace*, at large.

**GOOD CONSIDERATION.** See *Consideration*.

**GOOD HOPE, CAPE OF.** By 6 G. 4. c. 114. § 73. the king in council is empowered to regulate the trade between the Cape of Good Hope and the British plantations.

**GOODWILL.** The custom of any trade or business.

A court of equity will not enforce a contract for the sale of a goodwill merely, but will leave the parties to law. 1 *I. & W.* 576. However, a specific performance of an agreement to sell the goodwill of a trade, and the exclusive use of a secret therein, has been decreed. 1 *S. & S.* 74.

But it appears to have been doubted whether, when a goodwill forms the principal part of a contract, performance will be decreed. 1 *Russ.* 376.

A contract for the transfer of the goodwill of the business of an attorney is good at law. 4 *East.* 190: 4 *Esp.* 179. But such an agreement will not be enforced in equity. 1 *Mer.* 459.

The goodwill of professional partnerships survives; and on the death of one of the partners, his representatives have no claim on the

other, though the one dying paid a large premium. 3 *Mad.* 74. A commercial partnership might be different. *Id. ib.* 79: but see 15 *Ves.* 227.

Contracts entered into between two persons to restrain one of them from setting up in a particular trade or employment, within a certain limited district, and for a valuable consideration, are valid. 1 *Bro. P. C.* 234. And where an award was made to B., a retiring partner, as the consideration for the goodwill, &c. on an understanding (which was not expressed in the award) that he should not set up the same trade in the vicinity, an injunction was granted to enforce the award on parol evidence of the understanding. 2 *Mod.* 198.

If partners become bankrupts, the goodwill of their trade passes to their assignees, who may sell it for the benefit of the creditors. The sale, however, will not prevent the partners from setting up the same trade again, and in the same place. 17 *Ves.* 335: *S. C.* 1 *Rose*, 1: 3.

**GOODS and CHATTELS**, *bona et catalla*. See *Chattels*.

**GOOLE**, *Fr. goulet*.] A breach in a sea-bank or wall; or a passage worn by the flux and reflux of the sea. *Stat. 16 and 17 Car. 2. c. 11.*

**GORCE**, or **GORS**, from *Fr. gort*.] A wear. By *stat. 25 Ed. 3. st. 4. c. 4.* it is ordained, that all gorges, mills, wears, &c. levied and set up, whereby the king's ships and boats are disturbed and cannot pass in any river, shall be utterly pulled down without being renewed. *Sir Edward Coke* derives this word from *gurges*, a deep pit of water, and calls it a *gor* or *gulf*: but this seems to be a mistake, for in *Domesday* it is called *gourt* and *gort*, the French word for wear. *Co. Lit.* 5. It is used for a pool or pit of water for fish in ancient grants. See *Termes de Ley*.

**GORE.** A narrow slip of ground. *Paroch. Antiq.* 393.

**GORZE.** Maliciously setting fire to gorze wherever growing is felony, by 7 and 8 G. 4. c. 30. § 17.

**GOTE**, *Sax. geotan, i. e. fundere*.] A ditch, sluice, or gutter, mentioned in *stat. 23 H. 8. c. 5.*

## GOVERNMENT.

By this word, in common speech, is understood the constitution of our country as exercised, according to the principles of *limited monarchy*, under the legislature of *King, Lords, and Commons*.

When civil society is once formed, government at the same time results of course, as necessary to preserve and keep that society in order. Unless some superior be constituted,

whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature without any judge upon earth to define their rights and redress their wrongs. But as all the members which compose this society were naturally equal, it may be asked in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically styled *The Supreme Being*; the three grand requisites of wisdom, of goodness, and of power: wisdom to discern the real interest of the community: goodness to endeavour always to pursue that real interest; and strength or power to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government.

How the several forms of government we now see in the world at first actually began is matter of great uncertainty, and has occasioned infinite disputes. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty reside. And this authority is placed in those hands wherein (according to the opinion of the founders of such respective states, either expressly given or collected, from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government. The first when the sovereign power is lodged in an aggregate assembly, consisting of all the free members of a community, which is called a *democracy*; the second when it is lodged in a council, composed of select members, and then it is styled an *aristocracy*; the last when it is intrusted in the hands of a single person, and then it takes the name of a *monarchy*. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power is meant the power of making laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time at the option of the legislature to alter that form and

administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases, by constituting one or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a *democracy*, where the right of making laws resides in the people at large, public virtue or goodness of intention is more likely to be found than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution: but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In *aristocracies* there is more wisdom to be found than in the other frames of government, being composed, or intended to be composed, of the most experienced citizens. But there is less honesty than in a republic, and less strength than in a monarchy. A *monarchy* is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers, all the sinews of government are knit together, and united in the hand of the prince; but then [in absolute monarchies] there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. *Democracies* are usually the best calculated to direct the end of a law; *aristocracies* to invent the means by which that end shall be obtained; and *monarchies* to carry those means into execution. The ancients had in general no idea of any other permanent form of government but these three: for though *Cicero* declares himself of opinion, "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa*," yet *Tacitus* treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But, happily for us of this island, THE BRITISH CONSTITUTION has long remained, and it is to be hoped will long continue, a standing exception to the truth of this observation; for, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch, that are to be found in the most absolute monarchy: and as the legislature of this kingdom is intrusted to three distinct powers, entirely independent of each other; first, the *King*; secondly, the Lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the House of Com-



mons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the *British parliament*, and has the supreme disposal of every thing, there can be no inconvenience attempted by either of the three branches, but which will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British Constitution; and lodged as beneficially as is possible for society; for in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy, and so want two of the three principal ingredients of good policy, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the King and the House of Lords, our laws might be providentially made, and well executed, but they might not have always the good of the people in view; if lodged in the King and Commons, we should want that circumspection and mediatory caution which the wisdom of the peers is to afford; if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceeding, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of *any one* of the three should be lost, or that it should become subservient to the views of either of the other two, their would soon be an end of our constitution. 1 *Comm.* 48. 52. *Introd.*

Contempts and misprisions against the king's person and government may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has also been held an offence of this species to drink the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which

they die; these being acts which impliedly encourage rebellion. And for this species of contempt, a man may not only be fined and imprisoned, but previous to its abolition might have suffered the pillory, or other infamous corporal punishment. 1 *Huic. P. C. Comm.* 123. c. 9.

In cases of conspiracy or meditated treason against the king and government, it is not unusual to vest a power in the king of apprehending and detaining suspected persons without bail or mainprise: which as to them operates as a suspension of the Habeas Corpus Act. For this purpose the stats. 1 *W. & M. c. 2:* 6 *Anne, c. 15:* 1 *G. 1. cc. 8. 39.* and divers others have been from time to time passed. The last instances were 57 *G. 3. cc. 3. 55.* See tit. *Habeas Corpus.*

See further *Habeas Corpus, Jury, King, Liberties, Parliament, Tenure, Treason*, and other apposite titles.

GRACE. Acts of Parliament for a general and free pardon are called *acts of grace.*

Grace is sometimes used for a faculty, licence, or dispensation; but this seemeth to be only in case where the matter proceedeth, as it were, *ex gratia*, of grace and favour, and not where the licence or dispensation is granted of course or of necessity. *Ayl. Par.* 353.

GRACE, *days of.* See tit. *Bill of Exchange.*

GRADUATES, *graduati.*] Scholars who have taken *degrees* in an university. Those not having taken any degree are called under-graduates.

GRAFFER, *Fr. greffier, i. e. scriba.*] A notary or scrivener, used in the ancient stat. 5 *H. 8. c. 1.*

GRAFFIO, GRAVIO. A landgrave, or earl—*Nec princeps, nec graffio, hanc lenitatem mutar audeat.* *Mon. Angl. tom. 1. p. 100.*

GRAFFIUM. A writing book, register, or cartulary of deeds and evidences. *Annal. Eccl. Menevensis apud Angl. Sac. par. 1 p. 653.*

GRAIL, *gradale, or graduale.*] A gradual or book, containing some of the offices of the Romish church.—*Gradale, sic dictum, a gradalibus in tali libro contentis.* *Lyndewood. Provincial. Ang. lib. 3.* It is sometimes taken for a *mass book*, or part of it, instituted by *Pope Celestine, anno 430.*

GRAIN. The twenty-fourth part of a penny-weight. *Merch. Dict.* Also grain signifies any corn sown on ground; and there is what is so called in the top of the ear, less than corn. *Lit. Allyn's Rep.* 89.

GRAIN, STACKS OF. Maliciously setting fire to, is a capital felony, by 7 and 8 *G. 4. c. 30.* § 17. and by the same section, maliciously setting fire to crops of grain, whether standing or cut down, is felony, punishable with seven years' transportation, &c.

**GRAINAGE.** An ancient duty in London of the twentieth part of salt imported by aliens. *Dy.* 352.

**GRANARY.** Maliciously setting fire to a granary is a capital felony, by 7 and 8 G. 4. c. 30. § 2. By § 8. riotously pulling down, &c., or beginning to demolish, &c., any granary is also a capital felony.

**GRAND ASSISE.** A writ that lay in a real action to determine the right of property in lands. See *tit. Jury, Magna Assisa.*

**GRAND CAPE.** See *Cape Magnum.*

**GRAND DAYS.** Those days in the terms which are solemnly kept in the Inns of Court and Chancery, i. e. Candlemas day in Hilary term, Ascension day in Easter term, St. John the Baptist's day in Trinity term, and All Saint's day in Michaelmas term; which days are *dies non juridici*, or no days in court.

**GRAND DISTRESS,** was a writ so called, not for the quantity of it, for it was very short, but for its quality; for the extent thereof was very great, being to all the goods and chattels of the party distrained within the county: it lay in two cases, either when the tenant or defendant was attached, and appeared not, but made default; or where the tenant had once appeared, and after makes default; then this writ was had by the common law in lieu of a *petit cape, stats. West. 1. cap. 44: 52 H. 3. c. 9.*

**GRAND JURY.** A body of twenty-four good and lawful men which the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, some out of every hundred, "to inquire, represent, do, and execute all those things which, on the part of the king, shall be then and there commanded them." 2 *Hale, P. C.* 154.

As many as appear upon this panel are sworn, to the number of twelve at least, and not more than twenty-three, so that twelve may be a majority.

According to *Lord Hale* they should be freeholders, but to what amount is uncertain. 2 *Hale*, 155. It has, however, been lately held by the judges, that grand jurors are not positively required to be freeholders. *R. & R.* 177. But by the 7 and 8 W. 3. c. 32. § 8. grand jurors returned for the county of York are to be freeholders or copyholders, each having 80*l.* land per annum. And they usually are gentlemen of the most consequence in the county. The grand jurors at the sessions, however, must now, by the 6 G. 4. c. 50. § 1. possess the same qualification as is required in all cases of petit jurors by that statute. See *tit. Jury.*

A grand jurymen must be a lawful liege subject, and consequently neither under attainder of any treason or felony, nor an alien, nor

attainted, whether for a criminal or a civil matter. And hence it seems that any one under prosecution may, by the common law, before he is indicted, challenge any of the persons returned on the grand jury for any of the above defects. 2 *Hawk. cap.* 25 § 16. And if any one be outlawed the indictment is void, though twenty others be upon the inquest. 2 *Hale*, 202.

No peer of the realm ought to serve on the grand jury; nor an Irish peer, unless he is a member of the House of Commons, in which case he is to all intents and purposes a commoner. *R. & R.* 117.

The grand jury, as an inquest for the body of the county, are sworn diligently to inquire, and true presentment make, of all such matters and things as shall be given them in charge; to keep secret the king's counsel, their fellows', and their own; to present no one for envy, hatred, or malice; nor to leave any one unpresented from fear, favour, or affection, or hope of reward, but to present all things truly, as they come to their knowledge, according to the best of their understanding.

As soon as they are sworn, they are instructed in the articles of their inquiry by a charge from the judge who presides upon the bench. They then withdraw to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor.

The names of all the witnesses who are to be examined before the grand jury should be indorsed on the bill of indictment, and the witnesses previously sworn in court. Where the session had lapsed in consequence of its having on two successive days been opened and adjourned when no justices were present, it was held a party could not be legally convicted on an indictment found by the grand jury on the testimony of witnesses sworn by the officer of the court after such lapse. 6 G. & P. 90.

The grand jury may insist upon the same strictness of proof as is required on the trial, though it is not usual to do so, nor to weigh the evidence with that degree of scrutiny with which it is afterwards sifted by the judge and jury. They are to hear evidence only on behalf of the prosecution; for the finding of an indictment is merely in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and their duty in this respect is solely to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. They are therefore not to try the prisoner, but merely to determine whether evidence against him is of such a nature, as to render necessary a more formal investigation into the fact of his innocence or

his guilt. But they ought nevertheless to be thoroughly persuaded of the truth of the indictment, as far as their evidence goes, and not to rest satisfied merely with remote probabilities, a doctrine that *Blackstone* observes might be applied to very oppressive purposes. 4 *Com.* 303.

Being sworn to inquire only for the body of the county, *pro corpore comitatus*, they cannot regularly inquire of any fact done out of that county for which they are sworn, unless particularly enabled so to do by act of parliament.

Where the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, "*ignoramus*," or, we know nothing of it; intimating that though the facts might possibly be true, that truth did not appear to them; but now they assert in English more absolutely, "not a true bill," or, which is the better way, "not found," and then the party is discharged without further answer; but a fresh bill may be afterwards preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then indorse upon it, "a true bill," anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted; but to find a bill, there must at least be twelve of the jury to agree; for so tender is the law of England of the lives of its subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours, that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. 2 *Hale*, 161: 4 *Com.* 306.

If a bill be against A. for murder, and the grand jury, on the evidence before them, be satisfied it was *se defendendo*, &c., and so return it specially, the court may remand them to consider better thereof, or hear the evidence at the bar, and accordingly direct the grand jury. 2 *Hale's Hist. P. C.* 157, 158.

And it seems that if the matter submitted to the consideration of a grand jury be weighty and difficult, or if it appear that the prosecution is too indulgently or too vindictively conducted, the evidence may be heard in court, so that the jury may be the better assisted in the performance of their duty. 1 *Chitty, C. L.* 313. citing *Dalt. c.* 185. § 9. *Dick. Sess.* 116.

Where a grand jury refuses to present things within their charge, &c., a new grand inquest may be impanelled to inquire of the concealment of the former, on whose defaults presented, they shall be amerced. 2 *Hale's P.*

C. 155. A grand juror disclosing, to any one indicted, the evidence that appeared against him, is guilty of a high misprison, and liable to be fined and imprisoned. 4 *Comm.* 126.

Several acts have been passed, since the union between Great Britain and Ireland, to regulate the powers of grand juries in Ireland, with respect to presentments for levying money on account of roads and public works: the one now in force is the 3 and 4 *W. 4. c.* 78.

See at large tit. *Indictment, Jury*.

GRAND SERJEANTY. An ancient tenure, by military service. See tit. *Chivalry, Serjeanty, Tenure*.

GRANGE, *grangia*.] A house or farm where corn is laid up in barns, granaries, &c., and provided with stables for horses, stalls for oxen, and other things necessary for husbandry. This definition is agreeable to *Spelman*. According to *Wharton*, grange is strictly and properly the farm of a monastery, where the religious reposed their corn. *Grangia*, Lat. from *granum*. But in Lincolnshire, and other northern counties, they call every lone house or farm which stands solitary a grange. *Steevens's Shakspeare*.

Dr. Johnson in his dictionary derives the word from *grange*, French, and defines it, a farm, generally; a farm with a house, at a distance from neighbours.

GRANGEARIUS, is the person who has the care of such a place, for corn and husbandry; and there was anciently a *granger*, or grange-keeper, belonging to religious houses, who was to look after their granges or farms in their own hands. *Fleta, lib.* 2. c. 8: *Cartular. St. Edmund MS.* 323.

## GRANT.

DONATIO; CONCESSIO in the common law, a conveyance in writing of incorporeal things, not lying in livery, and which cannot pass by word only; as of reversions, advowsons in gross, tithes, rents, services, common in gross, &c. It has also been used generally, for every gift and grant of any thing whatsoever. *Co. Lit.* 172: 3 *Rep.* 63.

All grants concern incorporeal hereditaments, or interest in reversion or remainder, and must be made by deed, except rents granted by parceners for owelty of partition. 1 *Inst.* 50. b. 169. b. Grants are made by such persons as cannot give but by deed: he that granteth is termed the grantor, he to whom the grant is made is the grantee. *West. Symb.* 234.

Grant is the regular method, by the common law, of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had. *Co. Lit.* 9. For which



reason all corporeal hereditaments, as lands and houses, are said to *lie in livery*, and the others, as advowsons, commons, rents, reversions, &c. to *lie in grant*. *Ib.* 172. And the reason is given by *Bracton*, "*Traditio*, [livery] nihil aliud est quam rei corporalis, de persona in personam, de manu in manum translatio, aut in possessionem inductio: sed res incorporeales quæ sunt ipsum jus rei vel corpori inherens, traditionem non patiuntur." *Bract.* l. 2. c. 18. Incorporeal hereditaments therefore pass merely by delivery of the deed. And in seignories or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of land in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter, for the operative words therein commonly used are *dedi et concessi*; *have given and granted*. 2 *Comm.* 316. c. 20. See further this Dict. tit. *Conveyance, Deed, Gift*.

In the case of incorporeal hereditaments, grants are frequently presumed; the law supposing that where a thing has been enjoyed for a number of years, such enjoyment must have commenced in a sufficient grant. And every prescription is founded on the presumption of a grant which has been lost. The time of prescription with respect to certain incorporeal hereditaments has been shortened by the 2 and 3 W. 4. c. 71. See further tit. *Easements, Lights, Prescription, Ways, &c.*

Of grants some charge the grantor with something he was not charged with before; others discharge the grantee of something wherewith he was before charged, or chargeable. If a man grant to me a rent-charge, and after I grant to him, that he shall not be sued for this rent; this is good to bar me of bringing an action, though I may still distrain for the rent. And if one grants to his lessee for life or years, that he shall not be impeached for waste, it will be a good discharge, and may be pleaded. 7 H. 6. 43: *Bro. Grant*, 175: *Owen*, 37. *Keilw.* 88. See 1 *Rep.* 147: 10 *Rep.* 48. and this Dict. tit. *Condition*.

I. *What Things and Interests may be granted; by what Description; and how Grants shall be construed.*

II. *Who may make Grants, and who may take by Grant.*

I. 1. *What Things and Interests may be granted.*—A man cannot grant that which he hath not, or more than he hath; though he may covenant to purchase an estate, and levy a fine to uses, which will be good. A person may grant a reversion, as well as a possession; but

the law will not allow grants of titles only, or imperfect interests, or of such interests as are merely future. *Bac. Max.* 58. A bare possibility of an interest, which is uncertain; a right of entry, or thing in action, cause of suit, &c., may not be granted over to a stranger. *Perk. Sect.* 65: 2 *Inst.* 214: 4 *Rep.* 66.

In grants there must be a foundation of interest, or they will not be binding. If a person grants a rent-charge out of lands, when he hath nothing in the land, the grant will be void. *Perk.* 15. Though it is said, if a man grant an annual rent out of land, wherein he hath no kind of interest, yet it may be good to charge the person of the grantor. *Owen Rep.* 3. A man may grant an annuity for him, and his heirs to commence after his death, and it shall charge the heir. *Bac. Max.* 58. And after the grant of an annuity, &c. is determined, debt lies for the arrears; and the person of the tenant will be charged. 7 *Rep.* 39. If a common person grants a rent, or other thing that lies in grant, without limitation of any estate, by the delivery of the deed, a freehold passes: but if the king make such a grant of a rent, &c. it is void for uncertainty. *Danv. Rep.* 45. a.

Trees in boxes will not pass by the grant of the land, &c., as they are separate from the freehold. *Mod. Cases*, 170. A man grants all his wood that shall grow in time to come; it is a void grant, not being in *esse*. 3 *Leon.* 37. A grant *de vestura terræ* passeth not to the freehold, therefore the grantee hath no authority to dig in it by virtue of such a grant. *Owen*, 37. By the grant of lands in the possession of another, it is good if such other be in possession, let the possession be right or wrong. 1 *Roll. Rep.* 23. If a grant is general, and the lands granted restrained to a certain vill, the grantee shall have no lands out of the vill. 2 *Rep.* 33. It has been held, that where a grant is made of lands and tenements in D. copy-hold lands will not pass; for they cannot pass otherwise than by surrender. *Owen*, 37.

Grants may be void by uncertainty, impossibility, being against law, on a wrong title, to defraud creditors, &c. *Co. Lit.* 183. Such things as lie in grant may not be granted or held without deed: and if any thing not grantable is granted with other things, the grant will be void for all. 2 *Shep. Abr.* 269. 271. 273. Trusts and confidences are personal things, and may not be granted over to others in most cases, as offices of trust, and the like; but all kinds of chattels, real and personal, are grantable. *Perk.* § 99: *Plowd.* 141. 379.

If one grant any thing that lies in livery or grant, and that is in *esse* at the time of the grant, in fee, or for life, and the estate is to

begin at a day to come; this for the most part will be void; but a lease or grant for years may be good *in futuro*; and may be to one for term of years, or years determinable on lives, and after to another, to begin at the end of that estate. 5 Rep. 1: Dyer, 58. Where a man hath a reversion after an estate for life of land, and he grants a rent out of it, the grant is good, and will fasten upon the land after the estate of the tenant for life is ended: and if a person grant rents, &c., and a stranger take them at that time; in this case the grant will be good, for one may not be out of possession of these things but at his pleasure. Perk. 92. 98. If a man grants that to one, that he hath granted before to another, for the like term, &c., the second grant will be void. Dyer, 23: Perk. § 102.

An appointment of a steward of a manor court for life of the grantee is a good grant, and binds the future owners of the manor 3 B. & C. 616: 5 D. & R. 526: 1 C. & P. 522: and see Co. Lit. § 378. 233, 6. But a grant of part of the chancel of a church, by a lay impropriator, to A., his heirs, and assigns, is not valid in law. 1 B. & A. 498.

2. *By what Description.*—Where lands are certainly described in a grant, with a recital as granted to A. B. &c., though they were not thus granted, it has been adjudged that the grant was good. 10 Rep. 110. If a first description of lands in a grant is false, notwithstanding the second be true, nothing will pass by it; though, if the first be true, and the second false, the grant may be good. 3 Rep. 10.

Where there is a grant of a particular thing once sufficiently ascertained by some circumstances belonging to it, the addition of an allegation, mistaken or false, respecting it, will frustrate the grant: but when a grant is in general terms, then the addition of a particular circumstance will operate by way of restriction and modification of such grant. 5 East, 51.

Where the principal thing is granted, the *incident* shall pass, but the *principal* will not pass by the grant of the *incident*. Co. Lit. 152. A lord of a manor cannot grant the same, and reserve the court baron, it being inseparably incident. Co. Lit. 313. A grant of a manor, without the words *cum pertinentiis*, will pass all things belonging to the manor; the grant of a farm will also pass all lands belonging to it; but a grant of a messuage passes only the house, out-houses, and gardens. Owen's Rep. 51. But the grant of a manor to A., with particular words of reference to a previous grant to B., as, "with all liberties, &c." which B. had, in as full and ample manner as B. held and enjoyed, &c. is not sufficient to pass rights which had been granted to and enjoyed by B.

without express words. 5 Price, 269. When lands are granted by deed, the houses which stand thereon will pass; houses and mills pass by the grant of all lands, because that is the most durable thing on which they are built. 4 Rep. 86: 2 Aust. 123. By grant of all lands, the woods will pass: and if a man grant all his trees in a certain place, this passeth the soil; though an exception of wood extends to the trees only, not the soil. 1 Rol. Rep. 33: Dyer, 19: 5 Rep. 11.

It was formerly held, that by a grant of all a man's goods and chattels, bonds would pass; now it is held the contrary, that the words *goods and chattels* do not extend to bonds, deeds, or specialties, being things in action, unless in special cases. 8 Rep. 33: Co. Lit. 152. Thus by a grant of goods and chattels of felons mere choses in action will not pass. 5 Price, 217. q: and see 9 Ves. 177: 1 Ves. sen. 271: 1 Bro. Ch. C. 127: 12 Co. 1. n.

By a grant of all tithes arising out of or in respect to farms, lands, &c., the tithes arising in respect of rights of common appurtenant to such farms or lands will pass. 7 T. R. 641.

3. *How Grants shall be construed.*—Grants are taken most strongly against the grantor in favour of the grantee: the grantee himself is to take by the grant immediately, and not a stranger, or any *in futuro*; and if a grant be made to a man and his heirs, he may assign at his pleasure, though the word *assigns* be not expressed. Lit. 1: Saund. 322. The use of any thing being granted, all is granted necessary to enjoy such use: and in the grant of a thing, what is requisite for the obtaining thereof is included. Co. Lit. 56. So that if timber trees are granted, the grantee may come upon the grantor's ground to cut and carry them away. 2 Inst. 309: Plowd. 15.

The word *grant*, where it is placed among other words of demise, &c. shall not enure to pass a property in the thing demised: but the grantee shall have it by way of demise. Dyer, 56.

The words *limit and appoint* in a deed may operate as words of grant so as to pass a reversion. 5 T. R. 124.

Grants are usually made by these words, *viz. have given, granted, and confirmed, &c.* And words in grants shall be construed according to a reasonable sense, and not be strained to what is unlikely. Hob. 304. Also it hath been adjudged, that grants shall be expounded according to the substance of the deed, not the strict grammatical sense; and agreeable to the intention of the parties. Co. Lit. 146. 313.

A grant of a right appertaining to the freehold, as to make a drain across certain premises, cannot be pleaded as made by *parol*, as

it must be created by deed. 5 B. & C. 229. good against them likewise. *Co Lit.* 2 See *Co. Lit.* 42. a: *Termes de la Ley*, 9 Co. *Perk.* § 26. 31.

9. *Shep. Touch.* 231: 4 *East*, 167.

A grant of wreck was made by Henry II. to the proprietors of certain lands on the coast, and confirmed by Henry VIII. The proprietors of those lands having forty years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left dry at low water, and having ever since asserted without opposition an exclusive right to the soil of the bay, though the bank was forced by tempest; it was held that such usage was evidence, where anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and establish the right so asserted. *Chad v. Tiltred*, 2 *Brod. & B.* 403: and see 2 *Brod. & Bing.* 667: 5 *Moo.* 527: 1 *N. & M.* 533.

II. 1. *Who may make Grants.*—Any natural person, or corporate body (not prohibited by law, as infants, feme coverts, monks, &c.), may make a grant of lands, and be a grantor; and an infant, or woman covert, may be a grantee. Though the infant at his full age may disagree to the grant, and the husband disagree to the grant to his wife. *Perk.* 3, 4. 43.

But herein the law distinguishes between such grants as are void, and only voidable; the first of which are all such gifts, grants, or deeds, made by an infant, which do not take effect by delivery of his hand; as if an infant give a horse, and no delivery of the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the grant was merely void. But if an infant enters into an obligation, makes a feoffment, levies a fine, or suffers a recovery, these are not void, only voidable. *Perk.* § 12, 13. 19. See tit. *Infant*.

A grant by a feme covert is void, for no act of hers can transfer that interest which the intermarriage has vested in the husband. See 2 *New Abr.* 648: *Perk.* § 6. See tit. *Baron and Feme*.

Grants made by persons *non sanæ memoriæ*, are good against themselves; but they are voidable by their heirs, &c. A man born dumb, or dumb and deaf, if he have understanding, by making signs, may grant his land to another; not one who is born deaf, dumb, and blind also. *Co. Lit.* 2. See tit. *Idiot*.

A person attainted of treason, or felony, may take a deed of gift, or grant, and it shall be good against all persons except the king, and the lord of whom the lands are held, and for relief in prison they may be

The grants of persons under duress are void; that is if they were made under an apprehension of some bodily hurt, or if the grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such grant. 2 *Inst.* 183. But menacing to burn houses, or spoil or carry away the party's goods, are not sufficient to avoid the grant: for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him. 4 *Inst.* 485: *Perk.* § 18. See tit. *Duress*.

If there be father and son of the same name, and the father grants an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition, yet the grant is good, for he cannot deny his deed. *Perk.* § 37.

2. *Who may take by Grant.*—There are but few (if any) persons excluded from being grantees, therefore a man attainted of felony, murder, or treason, may be a grantee: so the king's villein, and alien, one outlawed in a personal action, or a bastard, may be grantees. *Perk.* § 48. A bastard who is known to be the son of such a one may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation. *Co. Lit.* 3: 2 *Rol. Abr.* 43, 44.

A feme covert may be a grantee, therefore if a rent-charge be granted to a feme covert, and the deed is delivered to her without the privity of her husband, and the husband dies before any disagreement made by him, and before any day of payment, the grant is good, and shall not be avoided, by saying, that the husband did not agree, &c., but the disagreement of the husband ought to be shown. *Perk.* § 43. See tit. *Baron and Feme*.

Although aggregate corporations are invisible, and exist only in supposition of law, yet they are capable of taking by grant, for the benefit of the members of the corporation. *Co. Lit.* 9: 1 *Saund.* 344.

A grant to a man with a blank for his christian name is void, except to an officer known by his office, when it must be averred: and it is the same where the grantee's christian name is mistaken. *Cro. Eliz.* 328.

GRANTS OF THE KING.—The king's grants are matters of public record; for the king's excellency is so high in the law, that no freehold may be given to, nor derived from, him but by matter of record. *Doct. & Stud. b. 1. d. 8.* To this end a variety of offices are erected, communicating in a regular subordination one



with another, through which all the king's grants must pass, and be transcribed and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters or letters patent; that is, open letters, *literæ patentés*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons and for particular purposes which therefore, not being designed for public inspection, are closed up and sealed on the outside, and are thereupon called writs-close, *literæ clausæ*; and are recorded in the close-rolls, in the same manner as the others are in the patent rolls 2 *Comm.* 346. c. 21.

Grants or letters-patent must first pass by bill; which is prepared by the Attorney and Solicitor General, in consequence of a warrant from the crown: and is there signed, that is, subscribed at top, with the king's own sign-manual, and sealed with his privy signet, which is always in the custody of the principal secretary of state: and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, *per ipsum regem, by the king himself*. Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the Chancery, so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed *per breve de privato sigillo; by writ of privy seal*. But there are some grants which only pass through certain offices, as the Admiralty or Treasury, in consequence of a sign-manual, without the confirmation of either the signet, the great, or the privy seal. 2 *Comm.* c. 21. See 9 *Rep.* 18: 2 *Inst.* 555.

The manner of granting by the king does not more differ from that by a subject, than the construction of his grants when made. A grant made by the king at the suit of the grantee, shall be taken most beneficially for the king, and against the party; whereas the grant of a subject is construed most strongly against the grantor. Wherefore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but *ex speciali gratiâ, certâ scientiâ et mero motu regis; of the king's special favour, certain knowledge, and mere motion*; and then they have

a more liberal construction. *Fidch. L.* 100: 10 *Rep.* 112. But in *Rez v. Capper*, 5 *Price*, 217. it was doubted whether the words *ex certâ scientiâ et mero motu* reduced the royal grant to the same rules of construction as the grant of a subject.

A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away, those profits are also inclusively granted; and if a feoffment of land was made by a lord to his villein, this operated as a manumission, for he was otherwise unable to hold it. *Co. Lit.* 56: *Lit.* § 206. But the king's grant shall not enure to any other intent than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for such grants shall not also enure to make him a denizen, that so he may be capable of taking by grant. *Bro. Abr. Patent*, 62: *Finch. L.* 110.

When it appears from the face of the grant that the king is mistaken, or deceived, either in matter of fact or of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law, in any of those cases the grant is absolutely void. *Frem.* 172. For instance, if the king grants lands to one and his heirs-male, this is merely void; for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee simple, as in common grants it would be, because it may reasonably be supposed that the king meant to give no more than an estate-tail; the grantee is therefore, if any thing, nothing more than tenant at will. *Finch.* 101, 103: *Bro. Abr. Estate*, 34: *Patents*, 104: *Dy.* 270: *Dav.* 42: 5 *Rep.* 94: *More*, 293.

Before the statute *de prerogativâ regis*, dowers, advowsons, and other things, have passed by the general grant of the king; but by that statute they are to be granted in express words. 1 *Rep.* 50. See tit. *Advowson*.

The king's grant is good for himself and successors, though his successors are not named *Yelv.* 13.

The king's grant may be void by reason of uncertainty; as if debts and duties are granted, without saying in particular what duties, &c. 12 *Rep.* 46. But where there is a particular certainty preceding, they shall not be destroyed by any uncertainty or mistake which follows: and there is a distinction where a mis-

take of title is prejudicial to the king, and when it is in some description of the thing which is supplemental only, and not material or issuable. 1 *Mud.* 195. The king grants the manor of D. which he has by the attainder of a certain person, &c., and in fact the king hath it not; so this grant is void. 10 *Rep.* 109.

The king may not grant away an estate tail in the crown, &c. And the law takes care to preserve the inheritance of the king for the benefit of the successor. 2 *And.* 151: *Style*, 263. See *Jenk. Cent.* 307. A grant may not be made by the king which tends to monopoly, against the interest and liberty of the subject. Nor can the king make a grant *non obstante* any statute made, or to be made; if he doth, any subsequent statute prohibiting what is granted, will be a revocation of the grant. 11 *Rep.* 87. *Dyer*, 52. Where the king is restrained by the common law to make a grant, if he make a grant *non obstante* the common law, it will not make the grant good; but when he may lawfully make a grant, and the law requires that he should be fully apprised of what he grants, and not be deceived, a *non obstante* supplies it, and makes the grant good. If the words are not sufficient to pass the thing granted, a *non obstante* will not help. 4 *Rep.* 35: *Nels. Abr.* 904. If a grant is made by the king, and a former grant is in being of the same thing, if it be not recited, the grant will be void: and reciting a void grant, when there is another good, may make the king's grant void. *Dyer*, 77: *Cro. Car.* 143. And there may be a *non obstante* to a former grant. 5 *Rep.* 94: *Moor.* 293.

If the king grants a message of the value of 5*l.* a year to A. B. and it be the yearly value of 10*l.* the value being in the same sentence with the grant, will make it void: though if it be mentioned in another sentence it may be good. *Jenk. Cent.* 26.

To prevent deceits of the king with regard to the value of estates granted, it is particularly provided by stat. 1 *H. 4. c. 6.* that no grant of his shall be good, unless, in the grantee's petition for them, express mention to be made of the real value of lands. Other statutes have also been passed relative to this subject. The king's grantee shall not forfeit for non-payment of rent, where the rent has been answered before process issued. *Stat.* 21 *Jac.* 1. *c. 25.* Grants of felons' goods how to be inrolled. *Stat.* 4. and 5 *W. & M. c. 22* § 1. The crown restrained from granting lands, except for thirty-one years, &c. *Stat.* 1 *Anne*, st. 1. *c. 7:* 34 *G. 3. c. 75:* and 48 *G. 3. c. 73.* See also 39 & 40 *G. 3. c. 88:* 47 *G. 3. st. 2. c. 24:* 52 *G. 3. c. 8:* and 59 *G. 3. c. 22.* as to the disposition of the private property of

the king, real and personal; and also as to grants of land escheated; and which the king may please to restore for the execution of any trusts relating to them, or to reward the discoverers. See also *tit. Forfeiture, Trustees.*

The grant of the king to a corporation, that they shall not be impleaded for lands, nor for any cause arising there, elsewhere than before themselves, doth not bind the king where he is a party; and the king by his grant cannot excommunicate himself from prosecuting pleas of the crown; for it concerns the public government. *Kilb.* 85: *Dyer*, 376: *Jenk. Cent.* 190.

The king cannot grant a thing *intrusted to him in respect to his sovereignty*: as, the lapse of a church, before or after it becomes void. 2 *Rol.* 187. *l. 32. 35.* Nor purveyance, buttrage, passage, &c. 2 *Rol.* 187. *l. 35.* Nor the power to make a dispensation of a statute. 7 *Co.* 36. *b.* So he cannot grant the lands, or goods, of a recusant convict, before the commission returned. 2 *Rol.* 184. *l. 20.* Nor the lands or goods of one attainted of treason, before his attainder. *Dyer*, 108. *a.*

So the king cannot grant the prosecution or execution of any penal statute to another; for it is intrusted to him as the head of the public weal. *R. 7: Co.* 37. *a.* Nor the benefit of the penal statute before it be recovered. 7 *Co.* 36. *b. 37. a.* Nor any fine or forfeiture of a particular person, before he be convicted. Declared by stat. 1 *W. & M. st. 2. c. 2.* that such grant or promise is illegal and void. See *tit. Forfeiture*; and further as to the subject of this article, *tit. King, Scire Facias to repeal patents.*

No patent or grant of any office or employment, either civil or military, shall cease, determine, or be void, by reason of the death of any king or queen, but shall continue in force for six months after such death, unless in the mean time superceded, determined, or made void, by the successor: 1 *W. 4. st. 2. c. 6:* by which all such offences as had been granted by the preceding king were continued for six months from the passing of the act. See further *tit. King.*

GRANTZ, is used for *grandeess*, in *Par. Roll.* 6 *Ed.* 3. *m.* 5, 6.—*Et les ditz countz, barons, et autre grantz, &c.*

GRASS-HEARTH. The *grazing* or turning up the earth with a plough; whence the customary service for the inferior tenants of the manor of Amersden, in Oxfordshire, to bring their ploughs and do one day's work for their lord, was called *grass hurth* or *grass hurt*: and we still say the skin is *grased* or slightly hurt, and a bullet *grases* on any place, when it gently turns up the surface of what it strikes upon. *Paroch. Antiq.* 496, 497.

**GRATUITOUS DEEDS**, &c. such as are made without good and legal consideration. See *Consideration*.

**GRAVA**. A little wood or grove. *Mon. Angl. tom.* 2. p. 198: *Co. Lit.* 4.

**GRAVARE ET GRAVATIO**. An accusation or impeachment. *Leg. Etheld.* cap. 19.

**GRAVE**. The names of places ending with *grave*, come from the Sax. *graf*, a wood, thicket, den, or cave.

**GRAVERS** of seals and stones shall give to every one their weight of silver and gold, on pain of imprisonment. *Stat. 7 Ed.* 3 c. 7. now obsolete.

**GRAZIER**, *pecuarius*.] A breeder or keeper of cattle. See *Cattle*.

**GREAT MEN**. This expression is sometimes, in ancient statutes, understood of the temporal lords in the higher house of parliament, and sometimes of the members of the House of Commons. See tit. *Parliament*.

**GREAT SEAL OF ENGLAND**. See tits. *Chancellor*, *Treasure*.

By article 24. of the union between England and Scotland (see 5 *Anne*, c. 8.) it was provided, that there should be one great seal for the united kingdom of Great Britain, which should be used for sealing writs to summon the parliaments, and for sealing all treaties with foreign states, and all public acts of state which concern the united kingdom, and in all other matters relating to England, as the great seal of England was then used; and that a seal in Scotland should be kept and made use of in all things relating to private rights, or grants which had usually passed the great seal of Scotland, and which only concern offices, grants, commissions, and private rights within Scotland. On the Union between Great Britain and Ireland, no express provision was made by any article of that union as to the establishing one great seal for the united kingdom; but various acts (as to the summoning parliament, &c.) are required to be done under the great seal of the united kingdom, and others under the great seal of Ireland; and by § 3. of the Acts of Union (39 and 40 *G.* 3. c. 67. *British*, and 40 *G.* 3. c. 38. *Irish*.) it is enacted, that the great seal of Ireland may, if his Majesty shall so think fit, after the union, be used in like manner as before the union (except where it is otherwise provided by the articles of union) within that part of the united kingdom called *Ireland*.

Forging the great seal is treason, punishable with transportation for life. See tit. *Forgery*.

**GREE**, Fr. *gre*. i. e. good liking or allowance.—*Satisfaction*; as to make *gree* to the parties, is to agree with and satisfy them for an offence done. And where it is said in our

statutes, the judgment shall be put in suspense till *gree* is made to the king of his debt, it is taken for *satisfaction*. *Stats.* 1 *Ric.* 2. c. 15: 25 *Ed.* 3. c. 19.

**GREEN CLOTH**. Of the king's household, so termed from the green cloth on the table, is a court of justice composed of the lord steward, treasurer of the household, comptroller, and other officers, to which is committed the government and oversight of the king's court, and the keeping of the peace within the verge, &c.

**GREENHEW**, or **GREENHUE**. The same as *vert* in forests, &c. *Manwood*, par. 2. cap. 6. num. 5. See tit. *Forest*.

**GREEN HOUSE**. See tit. *Gardens*.

**GREENLAND COMPANY**. A joint stock of 40,000*l.* was, by statute, to be raised by subscribers, who were incorporated: and the company to use the trade of catching whales, &c. into and from Greenland, and the Greenland seas; they might make by-laws for government, and of persons employed in their ships, &c. 4 and 5 *W.* 3. c. 17. But by 1 *Anne*, c. 16. any persons who shall adventure to Greenland for whale fishing shall have all privileges granted to the Greenland Company. Several subsequent statutes have been passed relative to the Greenland fisheries. See this Dict. tits. *Fish*, *Fisheries*, and *Fishing*; *Naviga- tion Acts*.

**GREEN-SILVER**. There is an ancient custom within the manor of Wittel, in the county of Essex, that every tenant whose fore- doors opens to Granbury, shall pay a halfpenny yearly to the lord, by the name of *green-silver*. The term *silver* here must mean *rent*.

**GREEN-WAX**, is where estreats are delivered to the sheriff's out of the Exchequer, under the seal of that court, made in green-wax, to be levied in the several counties; this word is mentioned in stat. 7 *H.* 4. c. 3.

**GREENWICH HOSPITAL**. A duty was laid on all foreign-built ships, half of it payable at the Trinity-house, to be applied for the use of decayed seamen, by the 1 *Jac.* 2. cap. 18: but that statute was repealed by the 3 *G.* 4. c. 41. § 4.

Every seaman shall allow out of his wages 6*d.* a month for the better support of the said hospital; for which duty receivers are appointed, who may depute officers of the customs, &c. to collect the same, and examine on oath masters of ships, &c. 8 and 9 *W.* 3. c. 23, &c.: 10 *Anne*, c. 17: 2 *G.* 2. c. 7. Provisions for securing the payment of the 6*d.* per month from privateers. 18 *G.* 2. c. 31. These funds are under the management of the governors of Greenwich-Hospital. See 5 *G.* 3. c. 16; and were further improved by the



transfer thither of the chest from Chatham, 43 G. 3. c. 119; and by proportions of prize money, 46 G. 3. cc. 100, 101.

By 52 G. 3. cc. i. 56. the chest at Greenwich is dissolved, and the funds carried to, and united with the hospital funds; and see c. 133. of the same session, § 6. as to apportioning pensions according to length of service.

The 57 G. 3. c. 127. was passed to settle the share of prize money, droits of admiralty, and bounty money payable to Greenwich-Hospital, and to secure to the said hospital all unclaimed shares of vessels found derelict, and of seizures for breach of the laws relating to the revenue, colonies, navigation, or slave-trade abolition.

By 3 G. 3. c. 16. § 6. personating or falsely assuming the name or character of any person entitled as an out-pensioner to any out-pension, in order to receive the money due on such pension, was declared to be a felony, punishable with death. And by various subsequent statutes (43 G. 3. c. 119. § 17: 54 G. 3. c. 110. § 6: 58 G. 3. c. 64. § 4. 6: 59 G. 3. c. 56. § 12. 17.) forging any documents for the purpose of obtaining the pensions paid at Greenwich-Hospital, as well as falsely personating the pensioners, were also made capital felonies.

By the 54 G. 3. c. 110. § 6. it is declared to be a capital felony to falsely personate any person, to whom a certain certificate to the treasurer of Greenwich-Hospital may be granted, in order to receive the money mentioned therein, or to falsely personate the name or character of any person in order to receive any money due on account of any out-pension granted by the hospital, or to forge any document in order to receive such money, or to take a false oath for that purpose, or to alter or publish as true any false or forged letter of attorney or other document in order to receive such money.

The 4 G. 4. c. 46. repeals so much of the above act of 3 G. 3. c. 16. as excluded the benefit of clergy from persons convicted of the felony thereby created, and substituted the punishment of transportation for life or not less than seven years, or of imprisonment with or without hard labour, for any term not exceeding seven years. But this act takes no notice whatever of the capital punishment inflicted by the 54 G. 3. c. 110.

All forgeries which are declared capital felonies by the above act are now only punishable with transportation for life. See tit. *Forgery*, and further tit. *Navy*.

By the said act 54 G. 3. c. 110. provisions were made for preventing the embezzlement of the clothes and property of the hospital.

**GREENWICH-HOSPITAL.** The statutes

here mentioned requiring a contribution out of the wages of merchant seamen towards the support of the Royal Naval Hospital at Greenwich, have been repealed by the 4 and 5 W. 4. c. 34., and in lieu thereof an annual sum of 20,000*l.* has been granted out of the consolidated fund.

**GREVE**, Sax. *gerefa*,] or rather *reve*. A word of power and authority, signifying as much as *comes* or *vicecomes*; and hence comes our *shreve portreve*, &c., which by the Saxons were written *sciregerefa*, *portgerefa*. Lambert, in his exposition of Saxon words, *verbo prefectus*, makes it the same with *reve*. See *Hovedon Part. poster. Annal. fol.* 346.

**GRILS.** A kind of small fish. *Stat.* 22. *Ed.* 4. c. 2.

**GRITH, Sax.] Peace. Termes de Ley.**

**GRITHBRECHE**, Sax. *grythbryce*, i. e. *pacis fractio*.] Breach of the peace.—*In causis regis grithbreche* 100 *sol.* emendabit. *Leg. H.* 1. c. 36.

**GRITHSTOLE**, Sax. *scides pacis*.] A place of sanctuary. See *Fridstol*.

**GROATS.** The allowance to prisoners kept in execution for debt is vulgarly so called; it was formerly 4*d.* per day, or 2*s.* 4*d.* per week. It is now 3*s.* 6*d.*

**GROCERS**, were formerly those who ingrossed merchandise. *Stat.* 37 *Ed.* 3. c. 5. It is now a particular and well known trade; and the custom duties for grocery wares and drugs are particularly ascertained by statute. See tit. *Customs, Navigation Acts*.

**GRONNA.** A deep pit, or bituminous place, where turfs are dug to burn. *Hoved.* 438: *Mon. Angl. tom.* 1 p. 243.

**GROOM.** The name of a servant in some inferior place; generally applied to servants in stables: but it hath a special signification, extending to groom of the chamber, groom of the stole, &c., which last is a great officer of the king's household, whose precinct is properly the king's bed-chamber, where the lord chamberlain hath nothing to do; *stole* signifies a robe of honour. *Lex Constitutionis*, p. 182. See *Garcio*.

**GROOM-PORTER.** An officer or superintendent over the royal gaming tables; in Latin, he is stiled *Aula Regiæ Janitor Primarius*.

**GROSS, grossus.**] In gross, absolute, intire, not depending on another; as anciently a villain in gross was such a servile person as was not appendant or annexed to the lord or manor, nor to go along with the tenure as appurtenant to it, but was like the other personal goods and chattels of his lord, at his lord's pleasure and disposal. So also advowson in gross differs from advowson appendant, being distinct from the manor. *Co. Lit.* 120. See 2 *Comm.* 22.

**GROSSE BOIS**, Fr. *gros bois*, i. e. great wood.] Signifies such wood as by the common law or custom is reputed timber. 2 *Inst.* 642.

**GROSS** (Common in, or *common at large*), is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property. See tit *Common*.

**GROSS WEIGHT**. The whole weight of goods or merchandise, dust and dross mixed with them, and of the chest, bag, &c. out of which tare and tret are allowed. *Merchant's Dict.*

**GROT**, Fr.] A den, cave, or hollow place in the ground; also a shady woody place, with springs of water. *L. Fr. Dict.*

**GROUNDAGE**. A custom or tribute paid for the standing of a ship in a port.

**GROUND ANNUAL**. A ground rent, payable out of the ground, before the tenement in a burgh is built.—*Scotch Dict.* It is contradistinguished in the Scotch law from *Feu Annual*. See that title.

**GROUSE**. The red and black heath game: for preserving of which, no heath, furze, or fern, should be burnt on any heaths, moors, or other wastes, between the 2d of February and 24th of June. 4 and 5 *W. & M. c.* 23 (repealed by the new Game Act, 1 and 2 *W. 4. c.* 32). Grouse have been decided not to be birds of warren. 7 *B. & C.* 36. See tit. *Game*.

**GROWME**. An engine to stretch woollen cloth after it is woven. See the ancient *stat.* 43. *Ed.* 3. c. 10.

**GROWTH HALFPENNY**. A rate so called; and paid in some places for the tithe of every fat beast, ox, or other unfruitful cattle. *Clayton's Rep.* 92.

**GRUARIL**, from the Fr. *gruyer*.] The principal officers of the forest in general.

**GUARANTEE**. A promise, or undertaking, to be answerable for the debt or default of a third person; and to make such an obligation binding, there must be some good consideration moving from the party with whom it is made; as, for example, the sale and delivery of goods to, or work to be done on credit for, the person on whose behalf the guarantee is given, or in consideration of a creditor giving time, or forbearing to sue his debtor for a precedent debt and the like.

By the Statute of Frauds, 29 *Car.* 2. c. 3. the promise must be in writing.

But a promise to indemnify need not be in writing, as it does not fall either within the words or the policy of the statute. 8 *B. C.* 728. See further, tit. *Agreement*, II.

**GUARD**, Fr. *grade*, Lat. *custodia*.] A cus-

tody or care of defence. And sometimes it is used for those that attend upon the safety of the prince, called the life-guard, &c.; sometimes such as have the education and guardianship of infants; sometimes for a writ touching wardship, as *droit de garde*, *ejectione de gard*, and *ravishment de gard*. *F. N. B.* 139. See tit. *Guardian*.

## GUARDIAN.

Fr. *gardien*, Lat. *custos*, *guardianus*.] One who hath the charge or custody of any person or thing; but commonly he who hath the custody and education of such persons as are not of sufficient discretion to guide themselves and their own affairs, as children and idiots (usually the former), being as largely extended in the common law as *tutor* and *curator* among the civilians. *Blount*.

I. *The several kinds of Guardians; who may be Guardians; and how appointed.*

II. *Of the Guardian's Interest in the Body and Lands of the Wurd; and what he may lawfully do, so as to bind the Infant.*

III. *Of the Infant's Remedy against the Guardian, and of obliging him to account.*

IV. *Of the general Authority of the Court of Chancery.*

I. A guardian is either *legitimus*, *testamentarius*, *datus*, or *customarius*: he that is a legitimate or lawful guardian is so *jure communi*, or *jure naturali*; the first, as guardian in chivalry, in fact, or in right; the other *de jure naturali*, as father and mother. A testamentary guardian was allowed even by the common law; the body of the minor was to remain with him who was appointed till the age of fourteen; and as for his goods it might be longer, or as long as the testator appointed; *guardianus datus* was one appointed by the father in his life-time, or by the lord chancellor after the death of the father; and where there is a guardianship by the common law, the lord chancellor can order and intermeddle; but where, by statute, he cannot remove either the child or the guardian. Guardianship by custom is of orphans by the custom of London, and other cities and boroughs; and in copyhold manors, by the custom it may belong to the lord of the manor to be guardian himself, or to appoint one. 3 *Salk. Rep.* 176, 177.

The guardianships by the common law were guardians in chivalry; guardians by nature, such as the father or mother; guardians in socage, who are the next of blood, to whom the inheritance cannot descend, if the father does not order it otherwise; and guardian because of nature, when the father by will ap-

points one to be guardian of his child. *Co. Lit.* 18: 2 *Inst.* 305: 3 *Rep.* 37.

Though guardianship in chivalry is now abolished by stat. 12 *Car.* 2. c. 24. it may be useful as well as curious to consider the following summary concerning it. See 1 *Inst.* 88. b. n. 11.

This guardianship could only be where the estate vested in the infant by descent. All males under 21 at the ancestor's death were liable to it; but not females, unless they were under 14. It extended not only to the person of the infant, but also to all of his lands and tenements as were within the guardian's seignory; and if the king was guardian in respect of a tenure *in capite*, then to the whole of the infant's estate of whatsoever holden, whatever the tenure, and whether lying in tenure or not. If the infant heir held lands by knight's service of several lords, each had the wardship of the land within his seignory; and as to the body, the wardship of it belonged to that lord of whom the tenure was most ancient, he being styled the lord by priority, and the other lords by posteriority: but if any lands of the infant were holden of the king by knight's service *in capite*, he was intitled to the wardship both of the infant's body and all his lands so held of the crown, or of others by knight's service.

This guardianship continued over males till 21, over females till 16 or marriage, when it determined; if the tenure were of a subject, the heir might enter on the lord immediately; but if the king had the wardship, then the heir was not entitled to take possession of the land without suing for livery to the crown, which was a process both nice and expensive. See 1 *Inst.* 77. a. It had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the father, where the infant was his heir apparent, even the mother being excluded. It entitled the lord to make sale of the marriage of the infant, subject only to the restriction of not disparaging, and if the infant refused the marriage tendered by the lord, or married after such a tender and against the lord's consent; in the former case the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case, the heir female paid the same sum as for a refusal, but the heir male was charged the double value, which was called a forfeiture of marriage. The guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. Lastly, guardianship in chivalry being deemed more

an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives.

The above general explication of the nature of wardship in chivalry may well excite a strong idea of the evils necessarily incident to it; and it is natural to wonder how this species of guardianship should be patiently endured for several centuries after the conquest, and even remain unreformed by any effectual checks to soften its rigour till it was wholly taken away at the Restoration; the true period when Britons gained more real liberty than any other that can be named in history, by no means even excepting the Revolution: and of this proposition the Habeas Corpus Act and the statute for abolishing tenures are most pregnant proofs; statutes both made in the reign of Charles II., and as far preferable to the vaunted Bill of Rights, as practical liberty is to theoretical doctrines.

Perhaps the facility of evading the guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the descent were practised. One was entailing the heir of the ancestor's life-time: another the enfessing strangers on condition to pay a sum far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See stat. *Malbridge*, 52 *H.* 3. c. 6: 2 *Inst.* 109. When these modes were declared to be fraudulent, and therefore checked by the said statute, a third, more fit to attain the same end, succeeded; for *uses* and *trusts* being invented, and guardianship in chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent, instead of becoming the legal tenant, he of course escaped being in wardship. This evasion continued in practice till 4 Henry VII. when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestui que use* liable to wardship in chivalry. See stat. 4. *H.* 7. c. 17: 1 *Inst.* 84. b: 2 *Inst.* 110. For some time after this there seems to have been no other means of preventing wardship in chivalry than the ancestor's making a lease for life, with remainder to his heir apparent in fee; but this protection of wardship in chivalry was



soon followed by a great diminution of its profits, for in the succeeding reign the statutes of wills gave the power of devising, so as to deprive the lord of the wardship of two-thirds of the land holden by knight's service; in which contracted state this odious species of guardianship was suffered to languish till it was entirely abolished, with the other oppressive appendages of military tenures, by the famous statute 12 Car. 2. c. 24. See 2 *Inst.* 110, 111: *Smith's Rep. Angl. (English Edit.)* b. 3. c. 5: *Staundf. P. C.*: 4 *Inst.* 188: *Crompt. Jurisd.* 112, a.—125: *Mad. Exch.* 221: *Ley on Words*, and *Liv. 1 Inst. lib. 2. c. 4*: and the abridgments, *tits. Garde and Gardien*.

The several guardians now in use may be thus enumerated: 1 By nature; 2. For nurture; 3. In socage; 4. By statute; 5. By custom in London and other cities and boroughs, &c., (which however, from particular exceptions, do not fall under the general law); 6. By election of the infant; 7. By appointment of the chancellor; 8. *Ad litem*; 9. By appointment of the Ecclesiastical Court.

1. The father and (in some cases) the mother of the child are guardians by nature. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. 1 *Inst.* 88. Though a father is guardian by nature, yet a man may be guardian to an infant against his father, for prevention of waste: which is a forfeiture of guardianship. *Hard.* 96. And an executor may not pay to a father a legacy left to an infant without the sanction of a court of equity. 1 *P. Wms.* 285. See *tits. Executor, Legacy*. And with regard to daughters, it seemd, by construction of 4 and 5 *P. & M. c. 8.* that the father might by deed or will assign a guardian to any woman child under the age of sixteen; and if none be so assigned, the mother shall in this case be guardian. 3 *Rep.* 39.

The above statute was repealed by the 9 *G. 4. c. 31.* which is nearly a reenactment of § 2, 3. of the former act, and which by § 30. declares the taking of any unmarried girl, under the age of 16 years, out of the possession and against the will of the father or mother, or of any other person having the lawful care or charge of her, to be a misdemeanor, punishable with fine or imprisonment, or both.

Many books, especially some of modern date, are very indiscriminate when they mention guardianship by nature. Sometimes the father is styled guardian by nature of his heir apparent, for the time, in general terms; such as at first appear to intimate that no other ancestor except the father, not even the mother, is entitled to the guardianship in that right; and accordingly Comyns makes this inference from the language of the books, though perhaps too

hastily. See *Com. Dig. tit. Guardian (C)*: 3 *Co. 38. a.*: 6 *Co. 22. b.*, there cited. In other cases it appears that the father being dead, the mother may have a writ of trespass *quare consanguineum et haeredem cept*; which imports that she may also be guardian by nature of her heir apparent. The silence in one book as to the other ancestors, and the express exclusion of the grandfather in another book, without the necessary explanation, tend to an opinion that all ancestors, except the father and mother, are really excluded. See 1 *Inst.* 84. b.: 6 *Co. 22. b.* However, in another place, it appears that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be postponed to others, where the father is not, both they and the mother have a title distinguishable from his, in point of inferiority. 3 *Co. 38. a.* Further, some modern books do not confine guardianship by nature to heirs apparent, but denominate the father and mother the natural guardians of all their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians, 1 *Ves.* 158; 2 *Atk.* 15. 70: 9 *Mod.* 117. And see 2 *Str.* 1162: 1 *East, P. C.* 457. Also the guardianship of female children under 16, as impliedly given to the father and mother by the 4 and 5 *P. & M. c. 8.*, has been said to be *jure naturæ*. 3 *Co. 38. b.*

On the whole, it seems that not only the father, but also the mother, and every other ancestor, may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the first title to guardianship by nature, the mother the second. As to other ancestors, if the same infant happens to be heir apparent to two, perhaps priority of possession of the person of the infant might probably be allowed to decide the question. While the tenure by knight's service continued there was another difference, which more strongly marked the superiority of the father's claim; for he was entitled to the custody of the infant's person even against the lord in chivalry; a preference not allowed to the mother or other relations; and this diversity appears to reconcile the determinations in the old books, which apply only to cases in which the right to the infant's person was in contest with the lord in chivalry. 3 *Co. 38. b. Radcliff's Ca.* According to the strict language of our law, only an heir apparent can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted whether such guardianship can be of a daughter whose heirship, though denominated apparent, yet being liable to be superseded by the birth of a son,

is, in effect, rather of the presumptive kind. 3 Co. 38. b.: 1 Inst. 84. a. Therefore, when the term of guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to its legal sense, but must be understood to have reference to some rule independent of the common law; as the dictates of nature, and the principles of general reason. Yet we must not, however, conclude that parents have not a right to the custody of their other children, for the law gives them this custody till the age of fourteen by the guardianship for nurture, next mentioned, which, though it differs from that by nature, not only in name, but also in duration, and some other particulars, is founded on a like conformity to the order of nature. 1 Inst. 88. b. n. 12.

This guardianship by nature continues till the infant attains the age of twenty-one: it extends no further than the custody of the infant's person. Carth. 386: 1 Inst. 84. It yields, as to the custody of the person, to guardianship in socage, where the title to both guardianships concur in the same individuals. 1 Inst. 88. b. (see post, 3.) But guardianship in socage ending at fourteen, it seems that after that age the father, or other ancestor having a like title to both guardianships, becomes guardian by nature till the infant's age of twenty-one. See Carth. 384. Lastly, the father may disappoint the mother, and other ancestors, of the guardianship by nature, by appointing a testamentary guardian under the 12 Car. 2. See post, 4.

2. Guardians for nurture are of course the father or mother, till the infant attains the age of fourteen years. Moor, 738: 3 Rep. 38. In default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. 2 Jones, 90: 2 Lev. 163. See post, 9. This guardianship by nurture only occurs where the infant is without any other guardian; and it has been said, that none can have it except the father or mother. 8 Ed. 4. 7. b: Bro. Gard. 70: 3 Co. 38. It extends no further than the custody and government of the infant's person; and determines at fourteen in the case of both males and females. Ibid. Comyns refers to *Fleta*, as if, according to that ancient book, grandfathers and great grandfathers might be guardians by nurture. But the statute cited by him doth not point at this species of guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship as our own law regulates it. 1 Inst. 88. b. in n. 13. *ad fin.*

3. Guardians in socage are also called guardians by the common law. Wardship is incident to tenure in socage, but of a nature very different from that which was formerly incident to knight service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because in this tenure no military or other personal service being required, there was no occasion for the lord to take the profits in order to provide a proper substitute for his infant tenant. See this Dict. tit. *Tenure*.

This kind of guardianship takes place only when the minor is entitled to some estate in lands; and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian. Litt. § 123. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him, that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. 1 Comm. c. 17. And though this provision has been considered as arising from harsh and barbarous principles, experience shows that it is founded in sound policy and humanity. See 2 P. Wms. 262: 1 Inst. 88.

Guardianship in socage, like that in chivalry, springs wholly out of tenure. It is for this reason that the title to it cannot arise, unless the infant is seised of lands, or other hereditaments, lying in tenure, holden by socage. 1 Inst. 87. b. Like guardianship in chivalry, it is deemed to take place on a descent only, though the contrary has been argued. 2 Mod. 176. The title to this guardianship is without any distinction between the whole and the half blood. If there are two or more disinterested relations in equal degree, he who first gains possession of the heir shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands both by descent *ex parte paternâ* and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side first seizing the infant is entitled to the custody of his person; and the custody of the lands coming *ex parte maternâ* goes to the maternal heir, and so *vice versâ*. Should, however, the infant derive lands by descent in such a way as lets in both the paternal and maternal blood successively to the inheritance, but

with a preference of the former, it seems unsettled who shall have the guardianship. If the person entitled to be guardian in socage is himself under custody of a guardian, the latter is entitled to the custody of both, to the former in his own right, and to the latter *pur cause de ward*, that is, in right of his wardship of the former; a species of guardianship distinct from all others above enumerated. And it seems that only guardian in chivalry and in socage could be guardian *pur cause de ward*. See 2 *Rol. Ab.* 35. 40: *Vaugh.* 184.

An infant, idiot, lunatic, *non compos*, one blind and dumb, deaf and dumb, or leper removed, cannot be guardian in socage. *Co. Lit.* 88. b.

Guardianship in socage being wholly for the infant's benefit, and not in any respect for the guardian's profit, is not a subject either of alienation, forfeiture, or succession, as wardship in chivalry was; and consequently, if the guardian in socage becomes incapable or dies, the wardship devolves on the person next in degree of kindred to the infant, not being inheritable to him. Some ancient cases seem to show that under certain circumstances guardianship in socage might be assignable. See *F. N. B.* 143. P.: *Fitz. Ab. Garde*, 161. But according to the doctrine and practice of later times, the acknowledged qualities of guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, they are not consistent with its being assignable; and there is Lord Chief Justice Vaughan's authority for saying that even in his time common experience proved the contrary. See *Plowd.* 293: *Vaugh.* 181: *Gilb. Rep. Eq.* 177: and 2 *Swans.* 533. n. *post*, IV.

This guardianship extends not only to the person and socage estates of the infant, but also to his hereditaments not lying in tenure; and even to his copyhold estates, unless there is a special custom for the lord's appointing a guardian of them. 1 *Inst.* 87. b.: 1 *Rol. Ab.* 40: *Egleton's Ca. Hutt.* 17: 2 *Lutw.* 1181. But whether the guardian in socage is entitled to take into his custody the infant's personal estate, is not ascertained by any express authority. It seems, however, that personalty is included, except where, by the custom of a particular place, it happens to be liable to a different custody: and this opinion is founded on the idea that the custody of an infant's person draws after it the custody of every species of property for which the law hath not otherwise provided; which receives some countenance from the instances of copyholds, and hereditaments not lying in tenure; for including which it will be difficult to account by any other reason than that above given for includ-

ing personalty. It is also strongly confirmed by the manner in which the stat. 12 *Car.* 2. c. 24. regulates the power of the guardian, which it enables a father to appoint. After authorising such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments, it provides that he may bring such action or actions in relation thereunto, as by law a guardian in common socage might do; words almost necessarily importing that the personal estate is equally an object of the custody of guardian in socage with the infant's real property; though a contrary opinion is hinted by *Vaughan*, C. J. See *Vaugh.* 186.

Guardianship in socage is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian according to stat. 12 *C.* 2. c. 24. (See *post*, 4.) And regularly it ends, when the infant, whether male or female, attains fourteen; though some say that this must be understood only where another guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time. *And.* 313. At that age, however, it seems the heir may oust the guardian in socage, and call him to account for the rents and profits. *Litt.* § 123: *Co. Lit.* 89. It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenure had so much the advantage of the military ones. See *tit. Tenure*. But as the wardship ceased at fourteen, this disadvantage attended it; that young heirs being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures by the stat. 12 *Car.* 2. c. 24. that statute gave the power of appointing the testamentary guardian next mentioned. If no such appointment be made, the Court of Chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin. 2 *Comm.* 88. c. 6. See *post*, 7, and *tit. Recto de Custodia*.

4. The statute 12 *Car.* 2. c. 24. considering the unbecility of judgment in children of the age of fourteen, and the abolition of guardianship in chivalry (which lasted till twenty-one; see *ante*), enacts, that any father, under age, or of full age, may, by deed or will attested by two witnesses, dispose of the custody of his child, either born or unborn, to any person except a popish recusant, either in possession or reversion, till such child attains the age of twenty-one. These are called guardians by statute, or testamentary guardians. The substance of this parliamentary regu-



lation is, that the father shall have the power, though under twenty-one. That he shall have it as to *all* his children under twenty-one, and unmarried at his decease, or born after. That he may appoint any person except popish recusants. That the appointment may be either in possession or remainder. That he may appoint the guardianship to last till twenty-one; or any *less* time. That the appointment shall be effectual against all claiming as guardians in socage or otherwise. That the guardian so appointed shall have ravishment of ward or trespass, and recover damages for the ward's benefit. That the guardian shall have the custody of the infant's estate, both real and personal, and have the same actions in relation to them as a guardian in socage. Finally, that the statute shall not prejudice the custom of London, or any other city or corporate town. For cases on the construction of this statute, see *Vin. Ab. and Com. Dig. tit. Guardian*. The nature of this new kind of guardianship, which the statute professedly models after that in socage, except as to duration, is particularly discussed in the case of *Bedell v. Constable*, *Vaugh.* 177. and in *Lord Shaftesbury's case*, 2 *P. Wms.* 102; *Gubb.* 172.

A Jew may, under this statute, devise the guardianship of his children. 2 *Swanst.* 533. n.

The statute empowers *fathers* only to make the appointment. Perhaps this was an unintentional omission; but the consequence is, that where a mother is the surviving parent, the children, upon her death, will be left to find guardians according to the provisions of the common law. In this case, where none other can be found, the jurisdiction of the Lord Chancellor arises on the part of the crown to protect the infant subject, and to delegate the care to some proper person.

Though the appointment by testament under this statute annexes to the office the custody and management of the infant's real and personal estate, and empowers the guardian to bring all such actions relating thereto as guardian in socage might, this appointment does not so far supersede the general duty and power of the Chancellor, as delegate of the crown to protect infants, but that he may interfere in cases of gross misconduct or legal incapacity of the guardian (such as lunacy or bankruptcy), to control him. See *Coleridge's note* to 1 *Comm.* 462.

The court, however, cannot remove a testamentary guardian, but will appoint a proper person to superintend the infant's education. 6 *Mad.* 275.

A reputed or putative father cannot appoint guardians under this statute to a natural child; but where he has named guardians by his will to an illegitimate child, the Court of Chancery

will appoint the same persons guardians without any reference to a master for his approbation. 2 *Bro. C. R.* 583; and see this *Dict. tit. Marriage*.

Though there is no decided case that guardians can be appointed for a child, by a stranger, during the life of the parent, yet the law will take care that the child shall be educated according to his expectations, in cases where the child is benefited by the will, &c., of such stranger. See 2 *Bro. C. R.* 500.

A grandfather cannot appoint guardians to his grandson under this statute; but he may give his estate to him on condition that certain persons be his guardians; and if the father of the legatee do not submit to the will, the Chancery will make the father's opposition work a forfeiture of his son's estate. *Anbl.* 306.

Guardianship is a thing cognisable by the temporal courts, where a devise is made of it, which courts are to judge whether the devise be pursuant to the statute. 1 *Vent.* 207.

5. We may here just mention that there is another species of customary guardianship besides that in London and certain cities and boroughs; where, by the special custom of a manor, the lord names, or is himself, the guardian of an infant copyholder. See *Com. Dig. tit. Copyhold* (K. 5.) The nature of this guardianship depends wholly on the custom of the particular manor; and though it is not expressly saved by the stat. 12 *Car.* 2. yet it has been held that the father's appointment of the custody of his child under that statute will not extend to copyhold estates. 2 *Lutw.* 1181: 3 *Lev.* 395: *Comb.* 253. See 2 *Watk. on Copyholds*, 104.

6. The right of electing a guardian by an infant arises only when, from a defect in the law (or, rather, in the execution of it), the infant finds himself wholly unprovided with a guardian. This may happen either before fourteen, when the infant has no such property as attracts a guardianship by tenure, and the father is dead without having executed his power of appointment, and there is no mother; or after fourteen, when the custody of the guardian in socage terminates, and there is no appointment by the father under the 12 *Car.* 2. *Lord Coke* only takes notice of such election where the infant is under fourteen; and as to this omits to state how, or before whom, it should be made: see 1 *Inst.* 87. b: nor does this defect seem supplied by any prior or contemporary writer. As to a guardian after fourteen, it appears from the ending of guardianship in socage, at that age, as if the common law deemed a guardian afterwards unnecessary. However, since the 12 *Car.* 2. c. 24. it has been usual in defect of an appointment under the statute, to allow the infant to elect

one for himself; and this practice appears to have prevailed even in some degree before the Restoration. Such election is said to be frequently made before a judge on the circuit. 1 *Ves.* 375. But this form does not seem essential. The late *Lord Baltimore*, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for special purposes relative to his proprietary government of Maryland, named a guardian by deed; a mode adopted by the advice of counsel. It seems, in fact, as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before, and therefore election by parol, though unsolemn, might be legally sufficient. The deficiency in precedents on this occasion is easily accounted for; this kind of guardianship being of very late origin, unnoticed as it seems by any writer before *Coke*, except *Swinburn* (*Testam. edit.* 1590. 97. b.); and there being yet no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself. *Coke*, though professing to enumerate the different sorts of guardianship, omits this in one place; whence perhaps it may be conjectured that in his time it was in strictness scarcely recognised as legal. 1 *Inst.* 88. b. in n.

7. As to guardian by appointment of the Lord Chancellor. It is not easy to state how this jurisdiction was acquired: it is certainly of no very ancient date, though now indisputable. See *Co. Lit.* 88. b. n. 70. by *Mr. Hargrave*; and *Fonblanque on Equity*, 2 vol. 226. 232. 5th edit.

The first instance of such a guardian appointed on petition without bill, was in the year 1696, in the case of one *Harupden*. But since that time the Court of Chancery has exercised this power, without its being once called into question; therefore, in the case of *Lady Teynham v. Leonard*, in *Dom. Proc.* anno 1724, the counsel for the respondent stated it as a thing fixed, that the Lord Chancellor was entrusted with that part of the crown's prerogative which concerned the guardianship of infants. *Bro. P. C.*

The court never appoints a guardian to a woman after marriage. 1 *Ves.* 157. But guardianship is not determined by the marriage of the ward. *Id. Ib.* 160.

Neither can the husband of a woman under age disavow a guardian made by the court for his wife. 1 *Vent.* 185.

The court is not precluded from appointing a guardian by the circumstance of the infant having by deed appointed one for himself. 4 *Mad.* 462.

A party not resident within the jurisdiction will not be appointed guardian. 1 *Jac.* 193.

8. All courts of justice have a power to assign a guardian to an infant to sue, or defend actions, if the infant comes into court and desires it; or a judge at his chambers, at the desire of the infant, may assign a person named by him to be his guardian; but this last is no record until entered and filed by the clerk of the rules. *F. N. B.* 27. *L.*: 1 *Inst.* 88. b. n. (16.) 135 b. n. (1.): 1 *Lil.* 656: 2 *Leon.* 238. And this is called a guardian *ad litem*. See tit. *Equity*.

9. Guardian by appointment of the Ecclesiastical Court seems now perfectly insignificant, and merely on a par with other guardians *ad litem*. The right of appointment is, however, claimed by that court, as to personal estate; and, if there is no other guardian by tenure or otherwise, for the person also; but the following detail will show with how little effect.

*Swinburne* takes notice of such a guardian, but confines his observations on the appointment, and his extent of power, to the custom within the province of York. *Testam.* 1st ed. 99. b. In a case in the Court of K. B. *Lord Hale* admitted the right of the Ecclesiastical Court to appoint a curator of the personal estate; and after that judge's death the court inclined to the same opinion. 2 *Lev.* 162: *T. Jo.* 90. In another case, soon after, the same court allowed the right as to the infant's portion, but denied it over the person. 3 *Keb.* 384. In the next case, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law, used and approved in England, if any person by his will devises any goods to his children, the ordinary before whom the will is proved hath used to commit the custody of the sons and their portions till 14, and of the daughters and their portions till 12, except where they are in the custody of any other by reason of tenure, or by the father's appointment; and if any person detained such infants, or their portions, the ordinary hath also used to compel the delivery of them by ecclesiastical censures. 2 *Lev.* 217. But on a demurrer this plea was over-ruled, and the prohibition ordered to stand, the latter being founded on the libel in the suit in the Ecclesiastical Court, which had stated the right in a more extensive way, viz., that by the ecclesiastical law every person having the tuition of any infant under age, by the will of the father, or *per judicem competentem* ought to have the custody of the infant and suit in the Ecclesiastical Court for the detainer. After this case, nothing appears in the books on the subject for a long time but a cursory notice by *Lee, J.* of the Ecclesiastical Court's appointment without objection, saying the course of that court is, that if the infant is under seven years of age, they choose a *curator*, but if he

is seven he chooses. *Fitzgib.* 164. By a loose note of a later case it appears that *Lord Hardwicke* said, that only guardians *ad litem* can be appointed by the Ecclesiastical Court. 14 *Vin. Abr.* 176. *pl. 7. in n.* In another case, however, reported more at length, the same judge reprobated it as a presumption in the Ecclesiastical Court to appoint a guardian of the person and estate, and declared their appointment except when a suit was depending to an interference with his power as chancellor; and even recommended to the attorney general to consider whether a *quo warranto* would not lie in such a case against the Ecclesiastical Court. 3 *Atk.* 631. In a subsequent case in B. R. (*Miss Cuttley's*) the power of appointment in the Ecclesiastical Courts was considered as confined to guardians *ad litem*, and therefore perfectly insignificant. 3 *Burr.* 1436. See 1 *Inst.* 88. *b. in n.*

With respect to the appointment of guardian, a distinction exists in the spiritual court between an infant and a minor. The former is so denominated, if under seven years of age; the latter from seven to twenty-one. *Toller*, 100. The ordinary *ex officio* assigns a guardian to an infant: the minor himself may nominate his guardian, who is then admitted in that character by the judge; but if he makes an improper choice, the court will control it. *Ibid.* According to the practice of the Prerogative Court, the guardianship in either case is granted to the next kin of the child, unless sufficient objection to him is shown. *Ibid.*

The above recapitulation, as to guardians, is exclusive of any thing relative to the royal family. See the arguments in the case on the king's right, in respect to the education and marriage of his grand-children, which was referred to the judges in the reign of George I. *Fort.* 401. See also the *stat.* 12 *G. 3. c. 11*; and this *Dict. tit. King*.

II. Guardian in socage shall make no waste, nor sale of the inheritance, but keep it safely for the heir: and where their hath been some doubt of the sufficiency of a guardian in socage, the Chancery hath obliged him to give security. 2 *Mod.* 177. Also a guardian may be ordered to enter into security by recognizance, not to suffer a female infant to marry whilst in his custody; and to permit other relations to visit her, &c. 2 *Lee.* 128. And the Court of Chancery will make such guardian give security not to marry the infant without the court is first acquainted with it. 2 *Chan. Rep.* 237.

Before the *stat.* 12 *Car. 2. c. 24.* tenant in socage might have disposed of his land, in trust for the benefit of the heir; but it is said he could not devise or dispose of the guardianship or custody of the heir from the next of

kin to whom the land could not descend, because the law gave the guardianship to such next of kin. *Kerbo.* 186. But now tenant in socage may nominate whom he pleases to have the custody of the heir, and the land shall follow the guardianship, as an incident given by law to attend the custody; and such special guardian cannot assign the custody by any act, the trust being personal; nor shall it go to the executor or administrator of the guardian, but determines by his death. *Vaug.* 180: *Dyer*, 189.

As the law hath invested guardians not with a bare authority only, but also with an interest till the guardianship ceases; so it hath provided several remedies for guardians against those who violate that interest; at common law there were remedies, both droitual and and possessory, to recover the guardianship. 2 *Inst.* 90; 9 *Co.* 72.

A guardianship of a minor is an interest in the body and lands, &c. of one within age. Guardian to infants, appointed by the court to sue, may acknowledge satisfaction upon the record, for a debt recovered at law for the infant. *Trin.* 23 *Car. 2. B. R.* A guardian in socage may keep courts in the infants manors in his own name, grant copies, &c. He is *dominus pro tempore*, and hath an interest in the lands. *Cro. Jac.* 91. Such guardian may let the land for years, and avow in his own name and right; and his lessee for years may maintain ejectment; but he cannot present to an advowson, for which he may not lawfully account; and the infant must present of whatsoever age. *Cro. Jac.* 98, 99. Though it is said, if the infant be within the age of discretion, his guardian may present. 8 *Ed.* 2. 10. See 1 *Inst.* 89. *a:* and *tit. Advowson*.

In another place *Lord Coke* extends the doctrine so far as to say that the infant shall present whatsoever his age may be. 3 *Inst.* 156. But some suppose the guardian to have the right of presenting in the name of the infant in general; others admit the right of the infant: but add that if he be of such tender years as not to have any discretion, then the guardian should present for him. *Vin. Abr. tit. Guardian. Q. pl. 2.* But the law seems now settled in the full extent of *Lord Coke's* opinion, by a determination of *Lord Chancellor King*. An advowson was conveyed to trustees on trust to present such person as the grantor, his heirs and assigns, should by deed appoint: and, on the principle that an infant of any age may present, the chancellor confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the guardian guided the child's hand in making his mark and putting his seal. 2 *Eq. Ab. Infant, B. pl. 3: Vin. Abr. Collation,*



*A. pl.* 10: and see 3 *Atk.* 710. It still remains, however, undecided whether the want of discretion might not induce a court of equity to control the exercise of this right by an infant, in case a presentation should be obtained with the concurrence of his guardian. 1 *Inst.* 89. *a. in n.* 1.

A guardian for nurture of the minor, appointed by will, hath power to make leases at will only. *Cro. Eliz.* 678. 734. A testamentary guardian cannot make a lease of the infant's lands; but such lease is absolutely void. 2 *Wils.* 129. 135. Guardians are to take the profits of the minor's lands, &c. to the use of the minor, and account for the same; they ought to sell all moveables in a reasonable time, and turn them into land or money, except the minor is near of age, and may want such goods himself; and they shall pay interest for money in their hands, which might have been put out, for it shall be presumed they made use of it themselves. 3 *Salk.* 177.

As to the various powers given to guardians by statute to lease, &c., see tit. *Infant*.

III. The power and reciprocal duty of a guardian and ward are the same *pro tempore*; as those of a parent and child; but the guardian when the ward comes of age is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent all disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction and accounting annually before the officers of that court. And that court, in case any guardian abuses his trust, will check and punish him, and sometimes proceed to the removal of him and appoint another in his stead. 1 *Sid.* 424: 1 *P. Wms.* 703. See 1 *Comm.* 463. *c.* 17: and *ante*, I. 7.

Where a transaction seems to have originated in the influence arising from the relation of guardian and ward, the court will set it aside, although all the accounts have been settled, and such a relation is at an end. 13 *Ves.* 138.

At common law, both a prohibition of waste, and an action of waste, lay against a guardian in chivalry and a guardian in socage, for voluntary, but not for permissive, waste, or waste done by a stranger. 2 *Inst.* 305.

By the common law, guardians in socage are accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit. *Co. Lit.* 87. And so is one who is guardian by nature after the infant's age of 21. See *ante*, I. 1: and 1

*Inst.* 886. *n.* 9. But the guardian on his account shall have allowance of all reasonable expenses; and if he is robbed of the rents and profits of the land, without his default or negligence, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity. *Co. Lit.* 89. *a.*

But against a testamentary or other guardian whose authority doth not determine till the infant is 21, or being a female attains that age or marries, the infant cannot have action of account before; for the rule of the common law is that account shall not lie while the guardianship continues. But in equity the infant may by *prochein ami* sue his guardian for an account during the minority. 2 *Vern.* 342: 2 *P. Wms.* 119: 1 *Ves.* 91: 3 *Atk.* 625.

A guardian cannot be charged in account as a receiver, because then he would lose his costs and expenses; these it is said being in general allowed only to guardians and bailiffs, and not to receivers. See 1 *Inst.* 89. *a. n.* 2. 172. *a.*

If a guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it. 2 *Chan. Rep.* 97. If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him, yet he shall account for the profits throughout, and not during the infancy only. 1 *Eq. Abr.* 280. A receiver to the guardian of an infant, who has had his account allowed him by the guardian, shall not be obliged to account over again to the infant when he comes of age. *Preced. Chan.* 535.

A guardian shall answer for what is lost by his fraud, negligence, or omission; but not for any casual events, as where the thing had been well but for such an accident. *Lit.* 123. By statute *Mag. Cart.* 9 *H.* 3. *c.* 3. guardians were to retain the lands till the heir comes of age, and then restore the same as fully stocked, &c. as received. By stat. 6 *Anne*, *c.* 18. persons who are guardians or trustees for infants holding over, without the consent of the person next entitled, shall be adjudged trespassers, and be accountable for profits, &c. By stat. 4 *Anne*, *c.* 16. § 27. action of account may be brought against the executors or administrators of a guardian, &c.

IV. It is clearly agreed, that the king, as *pater patriæ*, is universal guardian of all infants, idiots, and lunatics, who cannot take care of themselves; and as this care cannot be exercised otherwise than by appointing them procurators or committees, it seems also agreed

that the king may, as he has done, *delegate the authority to his chancellor*; therefore, at this day, the *Court of Chancery* is the only proper court which hath jurisdiction in appointing and removing guardians, and in preventing them and others from abusing their persons or estate. 2 *Inst.* 14: 4 *Co.* 126: *Staundf. Proc.* 37. See tit. *Idiots and Lunatics, Infant, and ante, I. 7.*

And as the *Court of Chancery* is now invested with this authority, hence in every day's practice we find that court determining, as to the right of guardianship, who is the next of kin, and who the most proper guardian; as also orders are made by that court on petition, or motion, for the provision of infants during any dispute herein: as likewise guardians removed or compelled to give security; they and others punished for abuses committed on infants, and effectual care taken to prevent any abuses intended them in their persons or estates; all such wrongs and injuries being reckoned a contempt of that court, it having, by an established jurisdiction, the protection of all persons under natural disabilities. 2 *Mod.* 177.

Guardianship is a private office of personal trust, and therefore not assignable (except in chivalry); therefore, where a mother had by an agreement (but not purporting to be an assignment) devolved the care of her two children on the grandfather (who was a Jew), and married again, and subsequently abjured Judaism, the court held that her guardianship continued, and ordered the children to be restored to her. 2 *Swanst.* 533. n: and see 3 *Mer.* 67.

The jurisdiction of the *Court of Chancery* to control the authority of *parents*, as well as guardians (from whatever source it may have originated, as to which, see the *Quarterly Review*, 1829, No 77.), is now firmly established by the decisions. Where the father was a man of immoral and irreligious habits, and lived in adultery with a married woman, *Lord Eldon*, after full argument, deprived him of the custody and education of his children, and the decision was affirmed by the *House of Lords* on appeal. *Wellesley v. Duke of Beaufort*, 2 *Russell, R.* 1: and see *Dow's Ca. N. S.* 152: *Bac. Ab.* vol. 4. *Guardian, Addenda* (ed. by *Gwillim and Dodd*).

#### FORM OF ELECTION OF A GUARDIAN BY A MINOR.

Know all men by these presents, That I, A. B. son and heir of, &c. deceased, being now about the age of eighteen years, have elected and chosen, and by these presents do elect and choose, C. D. of, &c. to be guardian of my person and estate, until I shall attain the age of twenty-one

years, and I do hereby promise to be ruled and governed by him in all things touching my welfare; and I do authorise and empower the said C. D. to enter upon and take possession of all and every my messuages, lands, tenements, hereditaments, and premises whatsoever, situate, lying, and being in, &c. in the county of, &c. or elsewhere, whereunto I have or may have any right or title, and to let and set the same, and receive and take the rents, issues, and profits thereof, for my use and benefit, during the term aforesaid; giving and hereby granting unto the said C. D. my full power in the said premises; and whatsoever he shall lawfully do or cause to be done in the premises, by virtue hereof, I do hereby promise to ratify and confirm. In witness, &c.

As to *Orphans* under the custom of *London*, see that title.

**GUARDIAN DE L'ESTEMARY.** The guardian or warden of the *Stannaries*, or mines in the county of *Cornwall*, &c. See tit. *Stannaries*.

**GUARDIANS DE L'EGLISE.** Churchwardens. See that title.

**GUARDIANS OF THE PEACE.** Those that have the keeping of the peace; *wardens* or *conservators* thereof. *Lamb. Eiren, lib.* 1. c. 3. See tit. *Justices of the Peace*.

**GUBRDIAN (or WARDEN) OF THE CINQUE PORTS.** A magistrate that hath the jurisdiction of the ports or havens, which are commonly called the *cinque ports*, who has there all the authority and jurisdiction the admiral of *England* has in places not exempt: and *Camden* believes this warden of the *cinque ports* was first erected among us in imitation of the *Roman* policy, to strengthen the sea coasts against enemies, &c. *Camd. Br.* 238. See tit. *Cinque Ports*.

**GUARDIAN OF THE SPIRITUALITIES.** The person to whom the *spiritual jurisdiction* of any diocese is committed, during the *vacancy* of the see, is called by this name. See *stat.* 25 *H. 8. c.* 21. and also *stat.* 3 *Ed.* 1. c. 21. in which the word guardian seems applicable to this officer. The archbishop is guardian of the spiritualities on the vacancy of any see within his province; but when the archiepiscopal see is vacant, the dean and chapter of the archbishop's diocese are guardians of the spiritualities, viz. the spiritual jurisdiction of his province and diocese is committed to them. 2 *Roll. Ab.* 22. 223. The guardian of the spiritualities, it is said, may be either guardian in law, *jure magistratus*, as the archbishop is of any diocese in his province, or guardian delegation, being he who the archbishop or vicar general doth for the time appoint. The guardian of the spirituali-

ties hath all manner of ecclesiastical jurisdiction of the courts, power of granting licenses and dispensations, probate of wills, &c. during the vacancy, and of admitting and instituting clerks presented; but such guardians cannot, as such, consecrate or ordain, or present to any benefices. See *stat. 13 Eliz. c. 12: Wood's Inst. 25. 27.*

**GUARDIAN OF THE TEMPORALITIES.** *Custos temporalium.*] The person to whose custody a vacant see or abbey was committed by the king; who as steward of the goods and profits was to give an account to the escheator, and he into the Exchequer. His trust continued till the vacancy was supplied, and the successor obtained the king's writ *de restitutione temporalium*, which was usually after consecration. See *tit. Temporalities.*

**GUERNSEY.** See *Jersey.*

**GUEST,** *Sax. gest, Fr. gist*, a stage of rest in a journey. A lodger or stranger in an inn, &c. See *tit. Inns and Innkeepers.*

**GUIDACE,** *guidagium.*] An old legal word, signifying that which is given for safe conduct through a strange land, or unknown country. *Est guidagium quod datur alicui, ut tuto conducatur per terram alterius. Consuetud. Burgund, p. 119: 2 Inst. 526.*

**GUILD,** from *Sax. guildan*, to pay.] A fraternity or company, because every one was *gildare*, i. e. to pay something toward the charge and support of the company. The original of these guilds and fraternities is said to be from the old Saxon law, by which neighbours entered into an association and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured, for which purpose they raised a sum of money among themselves, and put into a common stock, whereout a pecuniary compensation was made according to the quality of the offence committed. From hence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them; though at this day they are a company combined together, with orders and laws made by themselves, by the prince's licence. *Camd.*

*Gilda mercatoria*, or the *merchants' guild*, is a liberty or privilege granted to merchants, whereby they are entitled to hold certain pleas of land, &c. within their own precinct. 37 *Ed. 3: 15 Ric. 2.* King Edward III. in the 14th year of his reign, granted licence to men of Coventry to erect a merchant's guild, and also a fraternity of brethren and sisters, with a master or warden, and that they might make chantries, bestow alms, do other works of piety, and constitute ordinances touching the same &c.

*Guild* or *gild*, is also used for a tribute, or tax, an amercement, &c. 27 *Ed. 3: 11 H. 6:*

15 *Car. 2* See *Geld*; and more fully *tit. Corporation, London.*

**GUILD-HALL.** The chief hall of the city of London, for the meeting of the lord mayor and commonalty of the city, making laws and ordinances, holding of courts, &c. *Gildarum nomine continentur non solum minores fraternitates, sed ipsæ etiam civitatum communitates. Spelm.* It also signifies the chief hall of other cities and corporate towns; the Sessions-hall in King-street, Westminster, is called the Guild-hall.

**GUILDHALDA TEUTONICORUM.** The fraternity of Easterling merchants in London, called the Still-yard. See (repealed) *stat. 22 H. 8. c. 8.*

**GUILD-RENTS.** Rents payable to the crown, by any guild or fraternity; or such rents as formerly belonged to religious guilds, and came to the crown at the general dissolution of monasteries, being ordered to be sold by the *stat. 22 Car. 2 c. 6.*

**GUILDER.** A foreign coin. The German guilder is 3s. 8d., and the golden one in some parts of Germany 4s. 9d. In Portugal it passes for 5s., but the Polish and Holland guilder is but 2s.

**GULE** or **AUGUST,** *Gula Augusti, Goule d'Aout.*] The day of *St. Peter ad Vincula*, which is celebrated on the 1st of August, and called the Gule of August, from the *Lat. gula*, a throat; for this reason, as pretended, that one Quirinus, a tribune, having a daughter that had a disease in her throat, went to Pope Alexander (the sixth from St. Peter), and desired of him to see the chains that St. Peter was chained with under Nero, which request being granted, she the said daughter kissing the chains, was cured of her disease; whereupon the Pope instituted this feast in honour of St. Peter; and, as before this day was termed only the calends of August, it was on this occasion called indifferently either *St. Peter's day ad Vincula*, from what wrought the miracle; or the *Gule of August*, from that part of the virgin whereon it was wrought. *Durand's Rationale Divinorum, lib. 7. c. 19.* It is mentioned *F. N. B. 62: Plowd. 315: Stat. West. 2. c. 30.* See *Yule.*

**GULTWIT** (or rather *Guiltwit*). An amends for trespass. *Terms de la Ley.*

**GUNS.** See *tit. Arms, Game.* As to spring-guns, see *tit. Engines.*

**GUNPOWDER.** Erecting powder mills, or keeping gunpowder magazines near a town, is a nuisance at common law, punishable by indictment or information. 2 *Stra. 1167.*

The *stat. 12 G. 3. c. 61.* reduces into one, and repeals all former acts, relative to the making, keeping, and carrying, of gunpowder. By this act it is provided, that no person



shall make gunpowder but in the regular manufactories, established at the time of making the statute, or licensed by the sessions pursuant to the provisions in § 13. &c., on forfeiture of the gunpowder and 2s. per pound. § 1. Pestle-mills not to be used, on the like penalty. § 2. Only 40 pounds of powder to be made at one time under one pair of stones, except battle-powder, a fine fowling-powder so called, made at Battle and elsewhere in Sussex. § 3. 5. Not more than 40 hundred weight to be dried at one time in one stove. § 6. Only the quantity absolutely necessary for immediate use to be kept in or near the place of making, except in brick or stone magazines, fifty yards at least from the mill. § 7. All gunpowder makers to have a Brick or stone magazine near the Thames below Blackwall to keep the gunpowder when made, under penalty of 25*l.* per month, and 5*l.* a day for not removing it, when made, with all possible diligence. § 8. Charcoal not to be kept within 20 yards of the mill. § 10. No dealer to keep more than 200 pounds of powder, nor any person not a dealer more than 50 pounds, in the cities of London and Westminster, or within three miles thereof; or within any other city, borough, or market town, or one mile thereof; or within two miles of the king's palaces or magazines, or half a mile of any parish church; on pain of forfeiture and 2s. per pound, except in licensed mills; or to the amount of 300 pounds for the use of collieries within two hundred yards of them. § 12. § 13, 14, 15, 16, contain provisions respecting the licensing mills, building magazines, &c. Not more than 25 barrels to be carried in any land carriage, nor more than 200 barrels by water (unless going beyond sea or coastwise): each barrel to contain not more than 100 pounds. Various means are directed for the safe conveyance, in both cases, and to prevent all danger and delay. § 18—22. [and see 54 *G. 3. c. 152.*] Justices of the peace may search mills, houses, carriages, &c. § 23.

Outward bound ships to take in, and homeward bound to discharge, their gunpowder at or below Blackwall; and be searched by the officers of Trinity-house. § 24, 25. Penalties to be recovered before two justices; and prosecutions to be within fourteen days. § 26, 27. General exceptions are made as to his Majesty's mills, storehouses, and magazines; and as to powder sent with the army or militia; and exported or carried coastwise below Blackwall. § 29, 30.

Additional regulations are made by the 54 *G. 3. c. 152.* and the 54 *G. 3. c. 159.*

**GURGITES.** Wears. *Black Book, Hereford, f. 20.* See *Gorce.*

**GUTI AND GOTTI.** Engl. *Goths*, called sometimes *Jutæ*, and by the Romans *Getae*, were one of those three nations or people who left Germany, and came to inhabit this island. *Leg. Edw. Confess. c. 35.*

**GUTTERA.** A gutter or spout to convey the water from the leads and roofs of houses: gutter-tiles are mentioned in stat. 17 *Ed. 4. c. 4.* See tit. *Bricks.*

**GWABR MERCHED.** A British word which signifies a payment or fine, made to the lords of some manors, upon the marriage of their tenants' daughters; or otherwise on their committing incontinency. See *Mercheta Mulierum.*

**GWALSTOW, Sax.]** A place of execution: *omnia gwalstowa, i. e. occidendorum loca, totaliter regis sunt in socia sua.* *Leg. H. 1. c. 11.*

**GYLPUT.** The name of a court held every three weeks in the liberty or hundred of Path-bew, in the county of Warwick. *Inquisit. 13 Ed. 3.*

**GYLTWITE.** A compensation or amends for trespass, &c. *Mulcta pro transgressione .LL. Edgar Regis, Anno 964.*

**GYPSIES.** See tit. *Egyptians.*

**GYROVAGI.** Wandering monks, who pretending great piety, left their own cloisters, and visited others. *Matt. Paris, p. 490.*

# H.

## HABEAS CORPUS.

**T**HE subject's WRIT OF RIGHT, in cases where he is aggrieved by illegal imprisonment, founded on the common law, and secured by various statutes; of which the most powerful, the stat. 31 *Car. 2. c. 2.* is emphatically stiled THE HABEAS CORPUS ACT; and is at least next in importance, if not indeed as relates to modern times, superior in its beneficial effect, to *Magna Charta.* See 2 *Inst.* 55. 615: 4 *Inst.* 182: *Cro. Jac.* 543: 2 *Rol. Ab.* 69: *Comm. Journ.* April 1st. 1628.

Next to personal security, the law of England regards, asserts, and preserves, the personal liberty of individuals against all imprisonment or restraint, unless by due course of law. This is a right strictly natural, and the laws of England have never abridged it without sufficient cause; nor can it ever be abridged in this kingdom at the mere discretion of the magistrate, without the explicit permission of the laws. The language of the great charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. *Mag. C. c.* 29. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. See 5 *Ed. 3. c. 9*: 25 *Ed. 3. st. 5. c. 4*: 28 *Ed. 3. c. 3.* By the *Petition of Right*, 3 *Car. 1.* it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 *Car. 1. c. 10.* if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of habeas corpus, to bring his body before the Court of King's Bench or Common Pleas; who shall within three court days determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by the Habeas Corpus Act, 31 *C. 2. c. 2.* the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, ex-

cept in those cases in which the law requires and justifies a detainer. And lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 *W. & M. st. 2. c. 2.* that extensive bail ought not to be required. 1 *Comm.* 135. c. 1.

Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily, whenever he or his officers thought proper, there would soon be an end of all other rights and immunities. And yet sometimes, when the state is in real danger, even this measure may be necessary. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, consisting of King, Lords, and Commons, that, wherever it seems proper, can authorise one branch of it, the crown, by suspending the benefit of the Habeas Corpus Act for a short and limited time, and in certain specified particulars, to imprison suspected persons without giving any reason for so doing. An experiment which ought only to be tried, and which we believe has never been tried, but in cases of extreme emergency; and in these the nation parts with a portion of its liberty for a while in order to preserve the whole for ever. See 1 *Comm. c. 1.* 136. and this Dict. tit. *Government.*

The effect of a suspension of the Habeas Corpus Act, is not in itself to enable any one "to imprison suspected persons without giving any reason for so doing," but to prevent persons who are committed upon certain charges from being bailed, tried, or discharged during the time of the suspension; except under the provisions of the suspending act, leaving, however, to the magistrate, or person committing, all the responsibility attending an illegal imprisonment. It is very common, therefore, to pass acts of indemnity subsequently for the protection of those who either could not defend themselves in actions for false imprisonment, without making improper disclosures of the information on which they acted, or who

may have done acts not strictly defensible at law, though justified by the necessity of the moment. See 57 G. 3. c. 3. and 55, for instances of suspending acts; and 58 G. 3. c. 6. for one of indemnifying act. 1 *Comm.* 136. note by Coleridge.

In the case of the justices of the Supreme Court of Judicature at Bombay, determined on an appeal to the privy council (see *Knapp's Reports*), the council made a report to the king, and which was affirmed by him, "that that court had no power or authority to issue a writ of habeas corpus, except when directed either to a person resident within the local limits within which such court has a general jurisdiction, or to a person out of such local limits, who is personally subject to the civil and criminal jurisdiction of the Supreme Court."

Having said thus much in general, we may pursue our inquiries under the following heads:—

- I. *The Nature, various Kinds, and Effects, of this Writ.*
- II. *When, by whom, and in what Cases, it is grantable for the Furtherance of Justice.*
- III. *What shall be a proper Return of such Writ.*
- IV. *Of Bailing, Discharging, or Remanding a Prisoner, or Cause brought up on a Habeas Corpus; and see tit. Procedendo.*

For other matters connected with this subject see this Dict. tits. *Arrest, Bail, Commitment, Gaoler, &c.*, and as to the *Habeas Corpora Juratorum*, see tit. *Jury*, 1.

1. THE WRIT OF HABEAS CORPUS is the most celebrated writ in the English law. Various kinds of it are made use of by the courts at Westminster for removing prisoners for the more easy administration of justice.

One of these is the *habeas corpus ad respondendum*, when a man hath a cause of action against one, who is confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above. 2 *Mod.* 198. For inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue in another court. But it seems, that regularly a person confined in B. R. cannot be removed to C. B. by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have consueance as well of local as transitory actions. *Dyer*, 197. a: 249. pl. 84. 296. 307: 1 *Mod.* 235: *Style Pract. Regist.* 330.

The *habeas corpus ad satisfaciendum* is used when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. 2 *Lill. Prac. Reg.* 4.

On this writ the attorney for the plaintiff must endorse the number roll of the judgment on the back of the writ. *Style Regist.* 331.

Habeas corpus upon a *cepi*, where the party is taken in execution in the court below. So upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *habeas corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the king's writ. *Dict.*

Of the same nature are writs of *habeas corpus ad prosequendum, testificandum, deliberandum, &c.*, which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed. See *Sty. Reg.* 331. 119. 126. 230: *Comb.* 17. 48: 4 *East's Rep.* 587.

The two following statutes have rendered the *habeas corpus ad testificandum* much more effectual; and the first applies as well to a *habeas corpus ad deliberandum*.

By 43 G. 3. c. 140. any judge of the courts at Westminster may award a writ of habeas corpus for bringing up prisoners for trial or examination before courts martial, commissioners of bankrupt, or for auditing public accounts, or other commissioners acting under the authority of any commission or warrant from his Majesty.

By 44 G. 3. c. 102. any judge of the superior courts in England or Ireland may award writs of habeas corpus for bringing prisoners before courts of record to be examined as witnesses.

By § 2. the like authority was given to the justices of the courts of great sessions in Wales, and of the county palatine of Chester; but by the 1 W. 4. c. 70. these courts were abolished, and their jurisdiction transferred to the courts at Westminster.

Lastly, as relates to writs of habeas corpus for these confined purposes, may be mentioned the common writ *ad faciendum et recipiendum*, which issues only in civil cases out of any of the courts in Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer; whence this writ is frequently denominated an *habeas corpus cum causa*, to do and



receive whatsoever the king's court shall consider in that behalf. In this case the body is to be removed by habeas corpus, but the proceedings by *certiorari*. 3 *Bac. Abr.* This is a writ grantable of common right without any motion in court, and instantly supersedes all proceedings in the court below. 2 *Mod.* 306. No writ of habeas corpus, or other writ to remove a cause out of an inferior court, shall be allowed, except delivered to the judge of the court, before the jury to try the cause have appeared, and before any of them are sworn. *Stat. 3 Eliz. c. 5.* And to avoid vexatious delays by removal of frivolous causes, it is enacted by 21 *Jac. 1. c. 23.* that where the judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by habeas corpus or other writ, after issue or demurrer deliberately joined. That no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed, and that no cause shall be removed, at all, if the debt or damages laid in the declaration do not amount to the sum of 5*l.* But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards; (when by the course of the court the habeas corpus removed both actions together;) it is therefore enacted by *stat. 12 G. 1. c. 29.* that the inferior court may proceed in such actions as are under the value of 5*l.*, notwithstanding other actions may be brought against the same defendant to a greater amount. And by 19 *G. 3. c. 70.* no cause under the value of 10*l.* (raised to 15*l.* by 51 *G. 3. c. 124.*) shall be removed by habeas corpus, or otherwise, into any superior court, unless the defendant so removing the same shall give special bail for payment of the debt and costs. See 3 *Comm. c. 8.*

The 21 *Jac. c. 23.* applies equally if the judge of the inferior court has an assessor, a barrister of three years' standing; but it does not apply to any removal after judgment or where the issue or demurrer have been joined within six weeks after the defendant's arrest or appearance, or in any cause concerning freehold inheritance, or title to lands, lease, or rent, or where any foreign plea is pleaded which the inferior court is unable to determine; or in any case where the barrister, whether judge or assessor, is not actually present at the trial. 1 *Burr.* 54.

But the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and

detention, *ad faciendum, subjiendum, et recipiendum*; to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf. 8 *St. Tr.* 142.

The personal liberty of the subject, as has been already observed, is a natural inherent right which cannot be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and in what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon an habeas corpus, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner. Yet early in the reign of Charles I. the Court of K. B. determined that they could not upon an habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. 7 *St. Tr.* 136. This drew on a parliamentary inquiry, and produced the Petition of Right, 3 *Car. 1.* already mentioned, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. Some evasions, however, of this statute, in favour of the crown, gave rise to the 16 *Car. 1. c. 10.* already stated; and even after this some shifts and devices, not very creditable to the judges of that time, were made use of to the same unpopular end. See 3 *Comm.* 134, 135. § 8.

Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party, and many other vexatious shifts were practised to detain state prisoners in custody. But whoever will attentively consider the English history, may observe that the flagrant abuse of any power, by the crown or its ministers, has always been productive of a struggle which either discovers the exercise of that power to be contrary to law, or (if legal)

restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous Habeas Corpus Act, 31 Car. 2. c. 2., which is frequently considered as another Magna Charta of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law), to the true standard of law and liberty. The provisions of this act are extended to Ireland by the Irish act, 21 and 22 G. 3. c. 11.

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony, expressed in the warrant; or as accessory, or on suspicion of being accessory before the fact, to any *petit treason* or felony, plainly expressed in the warrant; or unless he is convicted, or charged in execution by legal process), the lord chancellor, or any of the twelve judges in vacation, upon viewing the copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself, or any of the judges; and upon the return made, shall, within two days, discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned, and the prisoner brought up, within a limited time, according to the distance, not exceeding in any case twenty days, upon tender of the charges not exceeding 1s. per mile, and security by his own bond to pay the charges of his return, if remanded, and not to escape. 4. That any officer or keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by habeas corpus, shall be recommitted for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony, expressed in the warrant, shall, if he requires it, the first week of the next term, or the first day of the next session of *Oyer and Terminer*,

be indicted in that term or session, or else admitted to bail (unless the king's witnesses cannot be produced at that time); and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person after the assizes shall be opened for the county in which he is detained, shall be removed by habeas corpus, till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any prisoner may move for and obtain his habeas corpus as well out of the Chancery, or Exchequer, as out of the King's Bench or Common Pleas; and the lord chancellor or judges denying the same, on sight of the warrant, or oath that the same is refused, shall forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of habeas corpus shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or persons having committed some capital offence in the place to which they are sent to be tried) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved a sum not less than 500*l.*, to be recovered with treble costs, shall be disabled to bear any office of trust or profit, shall incur the penalties of *præmunire*, and shall be incapable of the king's pardon.

This is the substance of that great and important statute, which extends only to the case of commitments for such criminal charge as can produce no inconvenience to the public justice by a temporary enlargement of the prisoner; and left all other cases of unjust imprisonment to the habeas corpus at common law. But even upon writs at the common law, it was expected by the court, agreeable to ancient precedents, and spirit of the act of parliament, that this writ should be immediately obeyed, without waiting for any *alias* or *pluries*. 4 Burr, 856.

A modern historical writer (Hallam) represents that "it is a very common mistake, not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. 2. enlarged, in a great degree, our liberties, and forms a sort of epoch in their history." That though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle or conferred any right on the subject. "From the earliest records of English law (he adds, no freeman can be detained in

prison except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which the party was enjoined to bring up the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the case. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in *Magna Charta*, if indeed, it were not much more ancient, that the statute of *Car. 2.* was enacted, but to cut off the abuses by means of which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege."

The Scotch act "against wrongous imprisonment," passed in the reign of William and Mary, was more effectual, in some respects, than the foregoing Habeas Corpus act in England. The prisoner was to be released on bail within 24 hours, on application to a judge, unless committed on a capital charge; and, in that case, might be brought to trial within 60 days. A judge refusing to give full effect to the act was declared incapable of public trusts.

By 56 G. 3. c. 100. "for more effectually securing the liberty of the subject," reciting that the extending the remedy of the writ of habeas corpus, and enforcing obedience thereto, will be advantageous to the public, and that the provisions of the existing acts extend only to cases of detainer on criminal charges; it is enacted that when any person shall be confined or restrained of his liberty (except for crime or debt) any baron of the Exchequer, as well as any judge of either bench (in England or Ireland), shall, on complaint on behalf of the party confined or restrained, if reasonable cause appear to them, award in vacation time a writ of *habeas corpus ad subjiciendum*, returnable immediately before the judge awarding the same, or any other judge of the same court. The party to whom the writ is directed refusing to make a return or pay obedience thereto is declared guilty of a contempt of the court, and may be apprehended on the judge's warrant, and held to bail or committed, to answer such contempt. Such writs issued in vacation may be made returnable in the ensuing term, and writs issued by the Court of K. B., C. P., or Exchequer, in term time, may be made returnable in the vacation, before one judge or baron. The judge before whom the writ is returnable may examine the truth of the fact in the return, and do therein as to justice shall appertain; or, if he has any doubt,

may bail the party detained, to appear before the court, who shall finally determine on the discharging, bailing, or remanding such party: and the like proceedings may be had by the court on such writs awarded by the court. These writs shall run in counties palatine, the cinque ports, and all privileged places, and into ports, harbours, creeks and bays, though not within the body of any county; and, lastly, the provisions of this act are extended to writs of habeas corpus awarded in pursuance of the former existing acts. 31 *Car. 2. c. 2.* § 21: 22 G. 3. (I.) c. 11.

By all these admirable regulations, judicial as well as parliamentary, the remedy seems now complete for removing the injury of unjust and illegal confinement; a remedy the more necessary, because the oppression does not always arise from ill-nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. 3 *Comm.* 135. 138. c. 8.

II. The *habeas corpus ad subjiciendum* is a high prerogative writ, and therefore, by the common law, issuing out of the Court of King's Bench, not only in term time, but also during the vacation, by a *fiat* from the chief justice, or any other of the judges, and running into all parts of the king's dominions; for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, whenever that restraint may be inflicted. *Cro. Jac.* 543. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and then it may be returned into court. 1 *Burr.* 460. 542. 606: 2 *Burr.* 856.

If the party were privileged in the Courts of Common Pleas and Exchequer, as being, or supposed to be, an officer or suitor of the court, this *habeas corpus ad subjiciendum* might also by common law have been awarded from thence. 2 *Inst.* 55: 4 *Inst.* 290: 2 *Hal. P. C.* 144: 2 *Vent.* 22. And if the cause of imprisonment was palpably illegal, they might have discharged him. *Vaugh.* 155. But if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the Court of K. B., which occasioned the Common Pleas for some time to discountenance such applications. *Carter*, 221: 2 *Jon.* 13. But since the stat. 16 *Car. 2. c. 10.* above recited, expressly mentioned the Courts of K. B. and C. P. as co-ordinate in this jurisdiction, it hath been holden



that every subject of the kingdom is equally entitled to the benefit of the common-law writ in either of those courts at his option. 2 *Mod.* 198.

If the habeas corpus issues out of Chancery, and on the return thereof the lord chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful, he may bail him; but then it must be to appear in the Court of King's Bench, for the chancellor hath no power in criminal causes; or the chancellor may commit the party to the Fleet, and in the term time may, *propriis manibus*, deliver the record into the King's Bench, together with the body; and thereupon the Court of King's Bench may proceed to bail, discharge or commit the prisoner. 2 *Hal. Hist. P. C.* 247: 2 *Hawk. P. C.* 114, 115.

It hath also been said that the like habeas corpus may issue out of the Court of Chancery in vacation; but upon the famous application to Lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his lordship refused it. See 4 *Inst.* 182: 2 *Hal. P. C.* 147: 3 *Comm.* 132. c. 8.

In *Crowley's case*, 2 *Swans.* 1. an application was made to the Court of Chancery, in vacation time, for a habeas corpus at common law, and this passage was relied on as an answer to the application. The subject was most accurately investigated by Lord Eldon, and after a full consideration of all the authorities, he overruled the decision in *Jenk's case*, and granted the writ. It appears from his investigation, that Lord Nottingham refused the writ, not merely because no precedent could be found for the granting it, but upon a great deal of legal reasoning which he has left behind in his MSS. The general result of the argument would lead one to infer, 1st. That at common law the Court of Chancery had the power of issuing the writ both in term time and vacation, though in practice the King's Bench was more commonly applied to in term time, because the Chancery, having no criminal jurisdiction, had a difficulty in proceeding where the return was good, but it appeared that the prisoner stood charged with a bailable offence: 2ndly, That the Court of King's Bench certainly had the power in term time, but not so certainly the individual judges of that court in vacation (see 3 *B. & A.* 420. *pos*): 3dly, That it was more doubtful whether the Court of Common Pleas, or the individual judges, had the power in term or vacation, except in the case of privileged persons; and that the inference drawn from the expression in the statute, 16 *Car. 1. c. 10.* is rather

attributable to a desire to favour the liberty of the subject than to be supported in sound reasoning. The whole case is interesting and valuable. 3 *Comm.* 133. note by Coleridge.

In the King's Bench and Common Pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (as *certiorari*, *prohibition*, *mandamus*, &c.) which do not issue as of mere course, without showing some probable cause why the extraordinary power of the crown is called into the party's assistance. 2 *Mod.* 306: 1 *Lev.* 1. For, as was argued by Lord Chief Justice Vaughan, "it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it: for the court ought to be satisfied that the party hath a probable cause to be delivered." 2 *John.* 13. And this seems the more reasonable, because when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. *Cro. Jac.* 543. So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out an habeas corpus, though sure to be remanded as soon as brought up to the court. And therefore Coke, when chief justice, did not scruple to deny a habeas corpus to one confined by the Court of Admiralty for piracy; there appearing on his own showing sufficient grounds to confine him. 3 *Bulst.* 27: and see 2 *Rot. Rep.* 138. On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore had a right to be delivered; the writ of habeas corpus is then a writ of right which may not be denied, but ought to be granted to every man that is committed, or retained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other." *Com. Journ. Ap.* 1. 1628. See 2 *Inst.* 615.

In a recent case it was held that a habeas corpus at common law, though a writ of right, is not grantable of course, but only it would seem, on motion in term time, stating a probable cause for the application, and verified by affidavit. And the court doubted whether, under the 31 *Car. 2. c. 2.* which only applies where the application is made to a judge in vacation, the writ is of course. Lord Tenterden, C. J., said that the above statute "makes no alteration in the practice of the courts in granting writs of habeas corpus; they are still moved for in term time, upon the same foundation as they were before; and when a single

judge, in vacation time, grants them under that act, in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him." *Hobhouse's case*, 3 B. & A. 420.

A peer has no privilege against being compelled to obey a habeas corpus, and if he refuses he may be attached. 1 Burr. 631.

No habeas corpus lies for an enemy, prisoner of war, however ill used or deceived. 2 Blackst. Rep. 1324. Nor for a prisoner of war, the subject of a neutral power, taken in the enemy's service, into which he was forced, when taken prisoner by them in an English ship. 2 Burr. 765.

The application under the 43 G. 3. c. 140. ought to be made to a judge out of court. 2 Maul. & Selw. Rep. 582.

The Court of Common Pleas refused to grant habeas corpus to bring up a prisoner in custody upon a criminal matter, in order to his being charged with a declaration in a civil action. 2 New Rep. 245. See also 9 East, 154: 4 D. & R. 271. But the writ was granted to remove a prisoner for contempt, into another county, to take his trial for perjury. 1 Tyr. 385: 1 C. & I. 459.

Though it would seem if sailors on board a ship are to be produced as witnesses, and have been served with a subpoena, and are willing to attend, a *habeas corpus ad testificandum* may be applied for under the 43 G. 3. c. 140. directed to the commanding officer, on affidavit of that fact, and they are material witnesses; yet they cannot be brought up against their own consent. *Cowp.* 672.

The court thought there could be no habeas corpus to bring up a prisoner at war as a witness. Lord Mansfield said the presence of witnesses who are prisoners of war was generally obtained by an order from the secretary of state: and an application was made for a habeas corpus to bring up such a prisoner, but without success. Afterwards a rule was granted to show cause why the defendant should not consent either to the fact of the capture, or that the prisoner should be examined upon interrogatories. *Dougl.* 420. (403.) *Furley v. Newnham*.

Under that act the Court of King's Bench will grant a habeas corpus to the warden of the Fleet, to take the body of a debtor confined in that prison before a magistrate, to be examined from time to time, on a charge of felony or misdemeanor. 5 B. & A. 730.

The court will not grant a habeas corpus to bring up a defendant under sentence of imprisonment for a misdemeanour to enable him to show cause in person, against a rule for a criminal information. 3 B. & A. 679. *a.* and see 9 Price, 147.

But in case of a question of identity of the person of a defendant to an information who is in prison, the Court of Exchequer will grant a habeas corpus to bring him up to be present at the trial, he paying the costs. 1 Price, 403.

All persons, whether natives or foreigners, have a right to a habeas corpus. The court, on affidavit suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money against her will, granted a rule on her keeper to show cause why a writ of habeas corpus should not issue to bring her before the court, and directed an examination before the coroner and attorney of the court in the presence of the parties applying and applied against. 13 East, 195.

Besides the efficacy of the writ of habeas corpus in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the court by habeas corpus, the court will not only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to choose where they will go; and if there be any reason to apprehend they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parents, or the person who appears to be its legal guardian. See 2 Burr. 1434 where all the prior cases are considered by Lord Mansfield. See also 1 Bl. 336: *Str.* 982: 2 Lord Raym. 1354: 4 Burr. 1991.

The mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it. 1 New Rep. 148. See also 5 T. R. 278: 5 East, 224. *n.*

It is otherwise with respect to a legitimate child, even where the father is an alien enemy domiciled in this kingdom. 5 East, 221.

A writ of habeas corpus was issued in vacation and returned in court, to bring up a young lady who had been decoyed away from her father, but desired to continue with him. 1 Burr. 606. And where there are articles of separation, a wife may have the writ if her husband confine her. 13 East, 173. *n.*

If an apprentice of above the age of eighteen, having been impressed, afterwards voluntarily enter into the king's service, his master is not entitled to sue out an habeas corpus to

bring him up to be discharged. 6 *T. R.* 497. So when the apprentice is protected from being impressed, but is willing to enter into the king's service. 5 *East*, 38. So where the apprentice has entered into the king's service, and is willing to return to his master. 7 *T. R.* 715. And, without reference to the desire of the apprentice to stay or to return, the court will not grant the habeas corpus on the application of the master; for the object of that writ is the personal liberty of the party.

If a person be in custody, and also indicted for some offence in the inferior court, there must, likewise, the habeas corpus to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the habeas corpus alone removes not the record itself; but only the prisoner with the cause of his commitment; therefore, although upon the habeas corpus, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment; and bail, or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the habeas corpus give any judgment, without the record itself be removed by *certiorari*: but the same stands in the same force it did, though the return should be adjudged insufficient and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist. P. C.* 210, 211: 1 *Salk.* 352: *Comb.* 2.

So on a conviction by a justice of peace, the court will not discharge the prisoner on exceptions to the warrant of commitments, unless the conviction is also returned by *certiorari*. 2 *Str.* 794.

While the habeas corpus is pending, it suspends the power of the court below; so that if the inferior court proceed before the return of the writ, the proceedings will be *coram non iudice*, and the judge of such inferior court is liable to an attachment. *Cro. Cur.* 79. 296: 1 *Salk.* 351.

If a party be imprisoned against law, though he is entitled to a habeas corpus, yet he may have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causa*, 2: 9 *H. 6.* 14. *a.* 2 *Inst.* 35: 10 *H. 7.* 17: 5 *Co.* 61: 11 *Co.* 58, 9).

III. As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law, or against it; so the officer or parties in whose custody the prisoner is, must, according to the command of the writ, certify, on the return thereof, the day, cause of caption, and detainer. *Vaugh.* 137.

In extrajudicial commitments, the warrant of commitment ought to be returned *in hac verba* on a habeas corpus; but when a man is committed by a court of record, it is in the nature of an execution for a contempt, and in such case the warrant is never returned. 5 *Mod.* 156. And where the commitment is by a court of competent jurisdiction to a proper officer there present there is no warrant, and the gaoler must return the truth of the whole matter. 1 *Salk.* 349. The cause of imprisonment must be particularly set forth in the return of the habeas corpus, or it will not be good, for by this the court may judge of it; and with a *paratum habeo*, that they may either discharge, bail, or remand the prisoner. 2 *Nels. Abr.* 915 *Cro. Jac.* 513. If a commitment is without cause, or no cause is shown, a prisoner may be delivered by habeas corpus. 1 *Salk.* 348.

It has been adjudged, that on a commitment by the House of Commons, of persons for contempt and breach of privilege, no court can deliver on a habeas corpus: but *Holt*, Ch. J. was of a contrary opinion. 2 *Salk.* 404. 503: 3 *Wils.* 188: 3 *B. & A.* 410. See as to commitments in like cases by the House of Lords, 8 *Term Rep. K. B.* 314; and in which case one committed in execution by the House of Lords for a breach of privilege, was refused to be discharged by the Court of K. B. upon a habeas brought. See also this Dict. tit. *Bail*, II. *Commitment*.

A writ of error may be allowed by the king in such a case, &c., and it is not to be denied *ex debito iustitie*; though it has been a doubt, whether any writ of error lay upon a judgment given on a habeas corpus. 2 *Salk.* 404. 503. A man may not be delivered from the commitment of a court of *Oyer and Terminer*, by habeas corpus, without writ of error: and where there appears to be good cause, and a defect only in the form of the commitment, he ought not to be discharged. 1 *Salk.* 348.

Where a man is committed for any crime, at either common law or by act of parliament, for which he is punishable by indictment, a return that he was committed, *till discharged by due course of law*, is good. But if the commitment be in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority; and therefore, if it do not appear on the return to have been according to that authority, the return will be bad. 2 *Blackst. Rep.* 806, 807.

The return must answer the taking as well as the detaining. 2 *W. Bl.* 1264.

It seems a sufficient return to a writ of habeas corpus that the party is in custody under the sentence of a court of competent jurisdiction to inquire of the offence, and to pass



such a sentence without setting forth the particular circumstances necessary to warrant the sentence. 1 *East*, 306.

Return. "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody so that I could not have her, &c." was held a bad return, and an attachment granted against the party who made it. 5 *T. R.* 89.

A return to a habeas corpus for the discharge of an apprentice above the age of twenty-one, stating the custom of London that every citizen and freeman of the city may take as an apprentice any person *above the age of fourteen*, and under twenty-one, to serve for seven years or more, must show that the apprentice was within those ages when he bound himself apprentice; for the court will not intend that from matter *dehors* the return. 2 *M. & S.* 226.

There is a difference in the return of a habeas corpus where it is before and after conviction; for where it is after conviction, the return need not be so particular; and though not so good as it might be, yet, if sufficient appears upon the return to justify the detention of a prisoner, the court will remand him. *Fortesc.* 272: 1 *Ld. R.* 47: 1 *Salk.* 348.

It seems to be agreed, that no one can in any case controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. *Cro. Eliz.* 821: 5 *Co.* 71. b: 2 *Hawk. P. C. c.* 15. § 78. But now by virtue of stat. 56 *G. 3. c.* 100. § 4. a prisoner brought up under a habeas corpus issued at common law may controvert the truth of the return. 4 *B. & C.* 136.

It seems, that, before the return filed, any defect in form, or the want of an averment of a matter of fact, may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment. After the return is filed, it becomes a record of the court, and cannot be amended. 1 *Mod.* 102, 103.

In like manner the writ may be amended before it is returned and filed, but not afterwards. 2 *Lil. Abr.* 2.

For a false return there is regularly no other remedy against the officer than an action on the case at the suit of the party grieved, and an information or indictment at the suit of the king. 6 *Mod.* 90: 1 *Salk.* 349. But no action lies until the return be filed. 1 *Salk.* 352.

IV. UPON THE RETURN of the habeas corpus, the prisoner is regularly to be discharged,

bailed, or remanded; but if it be doubtful which the court ought to do, it is said that the prisoner may be bailed to appear *de die in diem*, till the matter is determined. 5 *Mod.* 22: *Style*, 16.

By the Petition of Right, 16 *Car.* 1 c. 10. already mentioned, the court must, within three days after the return of the habeas corpus, either discharge, bail, or remand the prisoner. But it seems that a commitment by the Court of King's Bench, to the Marshalsea, is a remanding, being an imprisonment within the statute. 5 *Mod.* 22.

Also it hath been ruled, that the Court of King's Bench may, after the return of the habeas corpus is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely. 1 *Vent.* 330.

And though in doubtful cases the court is to bail, or discharge the party on the term of the habeas corpus, yet if a person be convicted, and the conviction on the return of the habeas corpus appears only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error. 1 *Salk.* 348: 5 *Mod.* 19, 20.

In all cases where a prisoner is brought up by habeas corpus to be discharged or admitted to bail, the party (who is to contend that the commitment was proper) has a right to reasonable notice; and where notice was not received until four o'clock on Saturday for Monday, it was held too late. *Bromley's case*, 2 *Jac. & W.* 453.

It was held, that a prisoner, committed for treason by a rule of Court of the K. B., could not under the 7th section of the 31 *Car.* 2. c. 2. petition to be bailed; for his was not a commitment by warrant within the meaning of the act. 1 *Str.* 142: 10 *Mod.* 429: *Pratt, C. J. diss.* But if the chief justice of the K. B. commit a person to the custody of the marshal by his warrant, he ought to be brought up by habeas corpus, and not by rule of court. 1 *Salk.* 349.

Where a prisoner, charged with treason done in Scotland, applied for a habeas corpus to be bailed, the court said they could not grant it; for the object of the application under the 7th section was to enable the prisoner to be tried; and the K. B. cannot try a treason committed in Scotland. 1 *Str.* 308. So the court refused to bail a party committed for treason committed in Surrey, as his prayer to be brought to trial should have been entered at the assizes for that county. The court will therefore in such a case send the prisoner by habeas corpus to the assize, where he must

make a new prayer; for the K. B. cannot originally hold pleas of felony arising out of Middlesex. 1 *Ld. R.* 61.

To entitle a prisoner committed for treason or felony, to be bailed under the 7th section of the act, he must enter his prayer the first week of the term, or first day after the sessions of *Oyer and Terminer* next after his commitment. But if the Habeas Corpus Act is suspended for a time, he need not enter his prayer until the first week of the term, or first day of the sessions, after the expiration of the suspension act. 1 *Salk.* 104. Although the 7th section makes an exception to the right of a prisoner to be bailed, "where it appears upon oath that the witnesses for the king cannot be produced;" yet if one of the witnesses only be sick, and therefore cannot be produced, this is a case within the exception. *Comb.* 6.

If a person be committed by the Admiralty in execution, he is not removable by habeas corpus into B. R. to answer an action brought against him there; but it might be otherwise if an action had been before depending. 1 *Salk.* 351. Where there is an action in B. R. precedent to the king's suit, on which the party is out on bail, habeas corpus may be brought by the bail, &c., and the prisoner turned over; though this was greatly opposed in favour of the king's execution. *Id.* 353.

The court discharged an impressed seaman after the expiration of the two years of his protection, the application for his discharge having been made within that time. 8 *East's Rep.* 27.

Where persons detained without any warrant on board one of his Majesty's ships of war on a charge of smuggling, and on suspicion of murder, was brought up by writ of habeas corpus, and it appeared by the return, and to a *certiorari* issued at the same time, that the prisoners might be guilty of the offences imputed to them, the court refused to discharge them out of custody, and committed them to the custody of the marshal, to be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law. 1 *B. & C.* 258.

If the steward of an inferior court proceeds after an habeas corpus delivered and allowed, the proceedings are void, and the Court of B. R. will award a *supersedeas*, and grant an attachment against the steward for the contempt. *Oro. Cur.* 79. 296. A habeas corpus suspends the power of the court below, so that if they proceed, it is void, and *coram non judice*. And on a habeas corpus, if the record be filed, no *procedendo* can go to the court below; but where a record below is not filed, or not returned, it may be granted. 1 *Salk.* 352.

A *habeas corpus cum causa* removes the body of the party for whom granted, and all the causes depending against him (but see *stat.* 12 *G. 1. c. 29. ante*, I.); and if upon the return thereof the officer doth not return all the causes, &c., it is an escape in him. 2 *Lil. Abr.* 2. A judge will not grant a habeas corpus in the vacation for a prisoner to follow his suits; but the court may grant a special habeas corpus for a prisoner to be at his trial in the vacation time. *Id.* 3. And the court may grant a habeas corpus to bring a prisoner, not in prison on execution, out of prison, to be a witness at a trial; though it is at the peril of the party suing out the writ, that the prisoner do not escape. *Style*, 119. And where there is no collusion, even a prisoner in execution may be brought up as a witness. 3 *Burr.* 1440. But no person ought to take out a habeas corpus for any one in prison, without his consent; except it be to turn him over to B. R. or charge him with an action in court. 2 *Lil.* A man brought into B. R. by habeas corpus shall not be moved thence till he has answered there; he shall be detained until then, and after he may be removed. 1 *Salk.* 350.

A person is in custody upon a criminal, and also on a civil, matter: if he would move himself by habeas corpus, there ought to be but one habeas corpus on the crown side or plea side, and both causes are to be returned. *Mod. Cas.* 133. If there be judgment against a defendant in the Court of B. R. and another in C. B. on which he is in execution in the Fleet, he may have a habeas corpus to remove himself into B. R. where he shall be in custody of the marshal for both debts. *Dyer*, 132.

Where an action is founded on the custom of London for a thing actionable there, and not elsewhere; if it be removed by habeas corpus, a *procedendo* shall be granted: but the declaration itself ought to be returned upon the habeas corpus, and then the court will see what was the cause, &c. For the special matter and all the proceedings are to be in the return in this case; as well as in an action on a bye-law, to take notice thereof. *Carth.* 75, 76. Before a habeas corpus is returned and filed, it may be amended; but not afterwards. 2 *Lil. Abr.* 2.

A *feme covert* was arrested in London, as a sole-trader, and discharged by a judge of B. R. on habeas corpus, bail being put in to appear in B. R. The next term, on motion, the court granted a *procedendo*, affidavit of plaintiff's cause of action, &c. being made; for plaintiff could only proceed in London. See 3 *Burr.* 1776; wherein the reason of the *procedendo* being granted, is fully discussed and determined. See tit. *Procedendo*.

HABEAS CORPORA JURATORUM. A

writ which lies to compel the attendance of a jury, or any of them, upon the *tenire facias* for the trial of a cause brought to issue. See tit. *Jury*.

**HABENDUM.** See tit. *Deed*, II. 4.

**HABENTIA.** Riches. In some ancient charters, *habentes homines* is taken for rich men; and we read, *Nec Rex suum postum requirat, vel habentes homines quos nos dicimus* feasting men. *Mon. Angl. tom. I. p. 100.*

**HABERDASHER.** A dealer in miscellaneous goods and merchandizes: apparently derived from *avoldupois* corruptly written *habber-de-pois*, the weight with which goods of all sorts were weighed which were not weighed by troy weight: these being very numerous, *habber-de-poisery*, or *haberdashery* was gradually applied to any mixture of various articles of merchandize. See (repealed) stat. 9 Ed. 3. st. 1. c. 1: 25 Ed. 3. st. 3. (*vulgo* st. 4.) c. 2.

**HABERE FACIAS POSSESSIONEM.** A judicial writ that lies where one hath recovered a term for years in action of *ejectione firmæ*, to put him into possession. *F. N. B.* 167. And one may have a new writ, if a former be not well executed. *Mich. 21 Car. 1. B. R.* A sheriff delivered possession in the morning by virtue of an *habere facias possessionem*, and some time in the same day, after he was gone, the defendant turned the plaintiff out of possession; it was held that if he had been turned out immediately, or whilst the sheriff or his officers were there, an attachment might be granted against the defendant; for this had been a disturbance in contempt of the execution; but it being several hours after the plaintiff was in possession, the court doubted, but agreed to grant a new *habere facias*, &c. 1 *Salk.* 321. But where the party was put into possession in February, 1806, and the writ was never returned, and in October, 1807, he was turned out by the party against whom he had recovered the premises, the court refused a new writ. 1 *Taunt.* 55.

If the sheriff deliver possession of more than is contained in the writ of *habere facias possessionem*, an action on the case will lie against him, or an assize for the lands. *Style*, 238. The sheriff cannot return upon this writ that another is tenant of the land by right, but must execute the writ, for that will not come in issue between the defendant and him. 6 *Rep.* 52. See this Dict. tits. *Ejectionment*, VII.; *Execution*.

**HABERE FACIAS SEISINAM.** A writ directed to the sheriff, to give seisin of a freehold estate recovered in the king's courts, by *ejectione firmæ*, or other action. *Old Nat. Br.* 154. The sheriff may raise the *posse comitatus* in his assistance, to execute these writs; and where a house is recovered in a real action,

or by ejectionment, the sheriff may break open the doors to deliver possession and seisin thereof, but he ought to signify the cause of his coming, and request that the doors may be opened. 5 *Rep.* 91.

This writ also issued sometimes out of the records of a fine, to give the cognizee seisin of the land whereof the fine was levied. *West. Symb. par. 2.*

And there is a writ called *habere facias seisinam, ubi Rex habuit annum, diem et vastum*; for the delivery of lands to the lord of the fee, after the king hath had the year, day, and waste in the lands of a person convict of felony. *Reg. Orig.* 156. See tit. *Execution*.

**HABERE FACIAS VISUM.** A writ that lay in divers cases in real actions, as in *formedon*, &c., where a view was required to be taken of the lands in controversy. *Red. Jud.* 26. 28. &c. *F. N. B.* See tit. *Jury*.

**HABERGEON.** From Germ, *hals colthum*, and *bergen, tegere*.] An helmet which covered the head and shoulders. *Blount*.

**HABERJECTS, haubergetæ.**] A sort of cloths of a mixed colour, mentioned in *Magna Charta*, cap. 26.

**HABILIMENTS OF WAR.** Armour, utensils, or provisions for the maintaining of war. 3 *Eliz. c. 4.*

**HABIT AND REPUTE.** Held and reputed. *Scotch Dict.*

**HABLE, Fr.]** A sea-port town; this word was used in 27 H. 6. c. 3: repealed by 3 G. 4. c. 41. § 1.

**HACHIA.** A hack, pick, or instrument for digging. *Placit.* 2 Ed. 3.

**HACKNEY COACHES AND CHAIRS.** Hackney coaches were first regulated by the 9 Anne, c. 23. and various other statutes have been since passed for that purpose, all of which are repealed by the 1 and 2 W. 4. c. 22. Under this act the drivers are punishable summarily before a justice for any imposition or misbehaviour.

**HADBOTE, Sax.]** A recompence or amends for violence offered to persons in holy orders. *Sax. Dict.*

**HADE OF LAND, hada terræ.]** Is a small quantity of land, thus expressed;—*Sursum reddidit in manus domini duas acras terræ continentes decem feliones et duas hadas*, *Anglicè* ten ridges, and two hades, &c. *Rot. Cur. Manner. de Orleton, Anno 16 Jac.*

**HADERUNGA.** Respect or distinction of persons; from the Sax. *had, persona*, and *arung*, honoured and admired. *Leg. Ethelred.*

**HADGONEL, Sax.]** Seems to be a tax or mulct. *Mon. Angl. par. 1. fol. 302.*

**HÆREDE ABDUCTO.** A writ that anciently lay for the lord, who having by right the wardship of his tenant under age, could not



come by his body, the same being carried away by another person. *Old Nat. Br.* 93.

**HÆREDE DELIBERANDO ALTERI, QUI HABET CUSTODIAM TERRÆ.** A writ directed to the sheriff to require one that had the body of an heir being in ward, to deliver him to the person whose ward he was by reason of his land. *Reg. Orig.* 161.

**HÆREDE RAPTO.** See *Ravishment of Guard.* *Reg. Orig.* 163.

**HÆREDIPETA.** The next heir to lands. *Leg. H. 1. c.* 70.

**HÆREDITAS JACENS.** An estate to which the title has not been completed in the person of the heir. *Bell's Scotch Law Dict.*

**HÆRETICO COMBURENDO.** A writ that lay against an heretic, who having been convicted of heresy by the bishop, and abjured it, afterwards fell into the same again, or some other, and was thereupon delivered over to the secular power. *F. N. B.* 69. By this writ, grantable out of Chancery, upon a certificate of such conviction, heretics were burnt; and so were likewise witches, sorcerers, &c. But the writ *de heretico comburendo* lies not at this day. *12 Rep.* 93. *Stat. 29 Car. 2. c.* 9. See tit. *Heresy*.

**HAFNE**, Danish, a haven or port.] Hafne courts are granted, *inter alia*, by letters patent of Richard, Duke of Gloucester, Admiral of England. *14 Aug. anno 5 Ed.* 4.

**HAGA**, Sax. *mansio*.] A house in a city or borough. *Domesday.* An ancient anonymous author expounds *haga* to be a house and shop, *domus cum shopa*; and in a book which belonged to the abbey of St. Austin in Canterbury, mention is made of *hagan monachis*, &c. See *Co. Lit.* 56.

**HAGIA**, Sax. *hæg*, melted into *hay*, whence *haia*.] A hedge. *Mon. Angl. tom.* 2. p. 273.

**HAIA.** A hedge: sometimes taken for a park, &c. enclosed. *Bract. lib.* 2. c. 40. And *haimeint* is used for a hedge-fence. *Rot. inq.* 36 *Ed.* 3. And *haiebote* for the permission to take thorns, &c. to make or repair hedges.

**HAIL-SHOT.** The stat. 3 *Ed.* 6. against shooting of hail-shot, or more pellets than one, by any person under the degree of a lord, &c. is repealed. *Stat.* 6 and 7 *W.* 3. c. 13.

**HAIMSUCKEN.** See *Homesoken*.

**HAIR POWDER.** Not to be mixed with lime, alabaster, &c. *Stat. 4. G. 2. c.* 11. *Vide Starch Powder.* Persons wearing hair powder are subjected to certain annual duties. See *48 G. 3. c.* 55.

**HAKE.** A sort of fish dried and salted; hence the proverb obtains in Kent, *As dry as a hake.* *Paroch. Antiq.* 875. *Speln.*

**HAKETON.** A military coat of defence. *Wals. in Ed.* 3.

**HALF-BLOOD.** See tit. *Descent, Executor.*

**HALFENDEAL.** The moiety, or one half of a thing; as *fardingdeul* is a quarter, or fourth part of an acre of land, &c.

**HALF MARK**, *dimidia marka*.] A noble, or 6s. 8d. in money. If a writ of right is bought, and the seisin of the plaintiff or his ancestor be alledged, the seisin is not traversable by the defendant, but he must render the half mark for the inquiry of the seisin: which is as much as to say, that though the defendant shall not be admitted to deny that the plaintiff or his ancestors were seised of the land in question, and to prove his denial, yet he may be allowed to tender half a mark in money, to have an inquiry made, whether the plaintiff, &c. were so seised or not. *F. N. B.* 5: *Old Nat. Br.* 26. But in a writ of advowson brought by the king, the defendant may be permitted to traverse the seisin, by licence obtained from the king's serjeant, so that the defendant shall not be obliged to proffer the half mark, &c. *F. N. B.* 31.

**HALF-SEAL**, is what is used in Chancery, for sealing of commissions to delegates, upon any appeal to the Court of Delegates, either in ecclesiastical or marine causes. *3 Eliz. c.* 5.

**HALF-TONGUE.** *Stat.* 11 *H. 7. c.* 21. See *Medietas Lingua*, as to pleas and trials of foreigners, and tits. *Jury, Trial*.

**HALKE.** From Sax. *heall*, i. e. *angulus*.] An hole; seeking in every halke, &c.

**HALL**, Lat. *halla*, Sax. *heall*.] Was anciently taken for a mansion-house or habitation, being mentioned as such in *Domesday*, and other records; and this word is retained in many counties of England, especially in the county palatine of Chester, where almost every gentleman of quality's seat is called a hall. Public meetings of corporations are called common halls.

**HALLAGE.** Toll paid for goods or merchandize vended in a hall; and particularly applied to a fee or toll due for cloth brought for sale to Blackwell Hall in London. Lords of fairs or markets are entitled to this fee. *6 Rep.* 62.

**HALLAMAS.** The day of *All Hallows*, or *All Saints*, viz. *November 1*; and one of the cross quarters of the year was computed in ancient writings from *Hullamas* to *Candlemas*. *Cowel*.

**HALLAMSHIRE.** A part of the county of York; anciently so called, in which the town of Sheffield stands. See *stat.* 21 *Jac.* 1. c. 23.

**HALLMOTE**, or **HALLIMOTE**, Sax. *heall*, i. e. *aula*, and *gemote*, *conventus*.] That court among the Saxons which we now call a court baron: and the etymology is from the meeting of the tenants of one hall or manor. The name is still kept up in several places in

Herefordshire; and in the records of Hereford this court is entered as follows, viz. "Hereford palatium, *ad halimot ibidem tent*, 11 die Octob. Anno Regni Regis Hen. 6." &c. It has been sometimes taken for a convention of citizens in their public hall, where they held their courts, which was also called *foikmote* and *halimote*: but the word *halimote* is rather the lord's court held within the manor, in which the differences between the tenants were determined. See *Leg. H. 1. c. 10*.

**HALYMOTE**, is properly an holy or ecclesiastical court: but there is a court in London, formerly held on Sunday next before St. Thomas's day, called the *halymote* or *holy court*, *curia sanctimotus*, for regulating the baker's of the city, &c. *Blount*. See tit. *London*.

**HALYWERCFOLE**. *Holyworkfolk*, or people who enjoyed lands by the service of repairing or defending a church or sepulchre; for which pious labours they were exempt from all feudal and military services. It was signified such of the province of Durham in particular as held their lands to defend the corpse of St. Cuthbert, and who claimed the privilege not to be forced to go out of the bishoprick, either by the king or bishop. *Hist. Dunelm. apud War-toni Angl. Sax. par. 1. p. 749: Mon. Angl. 1. 512: Blount*.

**HAM**. A Saxon word, used for a place of dwelling; a village or town; hence the termination of some of our towns, as Nottingham, Buckingham, &c. Also a home close, or little narrow meadow, is called *ham*. *Blount*.

**HAMBLING** or **HAMELING OF DOGS**. The ancient term used by the foresters for expeditating. *Manwood*.

**HAMBURGH COMPANY**. The oldest of our trading companies, being first chartered by Henry IV. in 1406, and heretofore more usually called *Merchants Adventurers*. Its members took warning from the repeated complaints made of their monopoly (the last of which was in 1661), and facilitated the admission by private regulations made by themselves. Added to this, it was, like the Hudson's Bay Company, without any parliamentary sanction; and was not able even during the reigns of Charles II. and James II. to protect its exclusive privileges against the separate adventurers. See *Reeves's Law of Shipping and Navigation*.

**HAMESECKEN**. See *Homesoken*.

**HAMFARE**. Breach of the peace in a house. *Brompton in Legibus H. 1. c. 80*. See *Homesoken*.

**HAMLET**; **HEMEL**; **HAMPSEL**. From the Sax. *ham*, i. e. domus, and Germ. *Lat. membrum*.] A little village, or part of a village or parish; of which three words, hamlet is now only used, though *Kitchen* mentions the other two, *hamel* and *hampsel*. By *Speelman*

there is a difference between *villam integram*, *villam dimidiam*, and *hamletam*; a hamlet being *quæ medietatem friborgi non obtinuit, hoc est, ubi 5 capitales plegii non deprehensi sint*. *Stouce* expounds it to be the seat of a freeholder, Several country towns have hamlets, as there may be several hamlets in a parish; and some particular places may be out of a town or hamlet, though not out of the county. *Wood, 3*.

A vill and hamlet are, in common acceptation, synonymous terms. *4 T. R. 550*.

**HAMSOCA**, or **HAMSOKEN**. See *Homesoken*.

**HANAPER OFFICE**. One of the offices so called, belonging to the Court of Chancery. Writs relating to the business of the subject and their returns, were, according to the simplicity of the times, originally kept in an hamper, in *hanaperio*; and the others, relating to such matters wherein the crown is immediately or mediately concerned, were preserved in a little sack or bag, in *parva boga*; and thence hath arisen the distinction of the Hanaper Office, and Petty Bag Office, which both belong to the common law court in Chancery. *Comm. 49*. See tit. *Chancery*.

**HANDBOROW**. A surety or manual pledge, i. e. an inferior undertaker: for hand-borow is the superior or chief. *Spelman*.

**HAND IN AND OUT**, is the name of an unlawful game now disused, and prohibited by stat. 17 Ed. 4. c. 2.

**HANDFUL**, or **HAND-HIGH**, in measuring horses, is four inches by the standard *Stat. 3. 11. c. 5*.

**HANDGRITH**, from Sax. *hand*, manus, and *grith*, pax.] Peace or protection given by the king, with his own hand. *Leg. H. 1*.

**HAND-GUN**. An engine to destroy game. *Stat. 33 H. 8*. See tit. *Game*.

**HAND-HABEND**. A thief caught in the very fact, having the goods stolen in his hand. *Leg. H. 1. c. 59: Bract. lib. 3. tract. 5. c. 8. 32. 35: Fleta, lib. 1. c. 38*. See *Backberinde*.

**HAND-WRITING**. See *Evidence*.

**HANDY-WARP**. A kind of cloth. *Stat. 4 and 5. P. & M. c. 5*.

**HANGING**. See tits. *Execution, Homicide, III. 3*.

**HANGWITE**, or **HANGWIT**. From Sax. *hangen*, i. e. suspendere, and *wite*, mulcta.] A liberty granted to a person, whereby he is quit of a felon or thief hanged without judgment, or escaped out of custody. *Rastal*. We read it interpreted to be quit *de laron pendu sans serjeans le Roy*, i. e. without legal trial: and elsewhere *mulcta pro latrone præter juris exigentiam suspenso vel elapso*. And it may signify a liberty, whereby a lord challenges the forfeiture for him who hangs himself within the lord's fee. *Domesday*.

**HANIG.** A term for customary labour to be done and performed. *Mon. Angl. tom. 2. p. 264.*

**HANPER, or HANAPER,** *haniperium.*] The hanaper of the Chancery; it seems to be the same as *fiscus* originally in the Latin. 10 Ric. 2. c. 1. See *Hanaper*.

**HANSE.** An old Gothic word, or from the German *hansa.*] A society of merchants, for the good usage and safe passage of merchandize from one kingdom to another. The *hanse*, or *mercatorum societas*, was and in part yet is endowed with many large privileges by princes within their territories, and had four principal seats or staples, when the Almain, or German and Dutch merchants, being the founders of this society, had an especial house, one of which was here in London, called the *Steel Yard*. They had many privileges under ancient statutes.

Towards the middle of the thirteenth century the nations around the Baltic were extremely barbarous, and infested that sea with their piracies: this obliged the cities of Lubeck and Hamburg, soon after they began to open some trade with these people, to enter into a league of mutual defence. They derived such advantages from this union, that other towns, hence called *HANS-TOWNS*, acceded to their confederacy, and in a short time eighty of the most considerable cities scattered through those vast countries which stretch from the bottom of the Baltic to Cologne on the Rhine, joined in the famous Hanseatic language, which became so formidable, that its alliance was courted, and its enmity dreaded, by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce known in the middle ages, and conducted it by common laws enacted in their assemblies. *Robertson's Hist. Emp. Char. V. 2. 79, 80. 336.*

**HANTELODE.** An arrest, from the Germ. *hant*, an hand, and *load*, i. e. laid; *manus immissio*: as arrests are made by laying hold on the debtor, &c.

**HAP, Fr. *happer* i. e. *rapere*, to catch.**] Is of the same signification with us as in the French; as to *hap* the rent, is where partition being made between two parceners, and more land allowed to one than the other, she that has most of the land charges it to the other, and she *haps* the rent, whereon assise is brought, &c. The word is used by *Littleton*, where a person *happeth* the possession of a deed pool. *Lit. § 8.*

**HAQUE.** A little hand-gun, prohibited to be used by 33 H. 8. c. 6. (repealed by the new game act) and the 2 and 3 Ed. 6. c. 14. There is the half haque, or demy haque, with in those acts.

**HAQUEBUT.** A bigger sort of hand-gun than the haque, from the Teuton, *haeck huyse*; it is otherwise called an *harquebuss*, vulgarly a *hagbut*. See 2 and 3 Ed. 6. c. 14: 4 and 5 P. & M. c. 2.

**HARATHUM,** from the Fr. *haras.*] A race of horses and mares kept for breed; in some parts of England termed a *stud* of mares, &c. *Spehn. Gloss.*

**HARBINGER.** An officer of the king's house, &c.

**HARBOURS and HAVENS.** Upon the principles of our constitution, which places the executive power in the hands of the monarch, the king has the prerogative of appointing ports and havens, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom deems proper. By the feudal law all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereignty of the state. And in England it hath always been holden, that the king is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm. *F. N. B. 113: Dav. 9. 56.* Therefore, as early as the reign of King John, we find ships seized by the king's officers, for putting in at a place that was not a legal port. *Madox, Hist. Exc. 530.* These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident, the jurisdiction of which must flow from the royal authority. 4 *Inst. 148.* The great ports of the sea are also referred to, as well known and established by the 4 H. 4. c. 26, which prohibits the landing elsewhere under pain of confiscation. See tit. *Ports*.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to lade or discharge his merchandize in any part of the haven, whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the stats. 1 *Eliz. c. 11: 13 and 14 Car. 2. c. 11. § 14.* (all of which are now repealed by 6 G. 4. c. 105. § 18.) which enabled the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and lading of merchandize. 1 *Comm. 264. c. 7.* See further this Dict. tit. *Navigation Acts*.

By the 19 G. 2. c. 22. if any master of a ship shall cast out of any ship, riding in any haven, &c. any ballast, &c. but only on land, where the tide never flows or runs, he may be fined by the justices, not more than 5*l.* nor



less than 50s. As soon as any ship shall be sunk, stranded, or run on shore in any harbour, &c. or be brought or drove in, or be there in a ruinous condition, and there be suffered to remain, and the owner shall begin to carry away the rigging, on summons of the owner, or commander, a justice may seize the ship, &c., and by sale thereof raise money to clear the harbour. See *Burr.* 656.

Many local acts of parliament have been made for repairing and improving the port of London and particular harbours and havens of this kingdom. By 46 G. 3. c. 153. no pier, quay, wharf, jetty, breast, or embankment, in, or adjoining to, any public harbour in the United Kingdom, or any river immediately communicating therewith, so far as the tide flows up the same, shall be made or constructed by any person, without giving one month's notice to the Board of Admiralty, on penalty of 200*l.* The act contains a saving for the privileges of the corporation of London.

By 54 G. 3. c. 153. several provisions were made for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the kingdom; and of his Majesty's docks, dock-yards, arsenals, wharfs, moorings, and stores therein, under the direction of the Board of Admiralty.

**HARD LABOUR.** By 3 G. 4. c. 114. persons convicted of any assault with intent to commit felony, any attempt to commit felony, any riot, of receiving stolen goods, any assault on a peace officer, officer of customs or excise or revenue, or persons acting in their aid, any assault in pursuance of a conspiracy to raise the price of wages, uttering counterfeit money, obtaining money, goods, &c. by false pretences, keeping a gaming house, bawdy house, or disorderly house, perjury or subornation thereof, and persons entering open or enclosed grounds with intent to kill, or aid others to kill, game or rabbits, or being found there at night armed with an offensive weapon, may be sentenced to imprisonment with hard labour, in addition to, or in lieu of, any other punishment which might heretofore have been inflicted on such offenders.

Also by the Vagrant Act, 5 G. 4. c. 83; 7 and 8 G. 4. c. 28. § 9. for improving the administration of justice; the Larceny Act, 7 and 8 G. 4. c. 29. § 4; the 7 and 8 G. 4. c. 30. § 27. for publishing malicious injuries to property; and the 3 and 4 W. 4. c. 44. the punishment of hard labour may be inflicted for the offences therein mentioned in addition to that of imprisonment.

**HARDWIC.** Mentioned in *Domesday*, and by *Spelman*. See *Herdwick*.

**HARES.** See *tit. Game*.

**HARIOT.** See *Heriot*.

**HARNESS, Fr. *harnisch*.** Signifies all warlike instruments. *Hoved.* p. 725: *Matt. Paris*. The tackle or furniture of a ship was also called *harness* or *harnesium*. *Pl. Parl.* 22 Ed. 1.

**HARO, HARRON.** An outcry after felons and malefactors; and the original of this *clamour de haro* comes from the Normans. *Custom. de Norman.* 1. p. 104.

**HARPING-IRONS.** Are irons instruments for the striking and taking of whales: and those that strike the fish with them are called *harpiniers* or *harpooners*. *Merch. Dict.* See *tit. Fish, Fisheries, and Fishing*.

**HARRIERS, *harecti canes*.** Small hounds for hunting the hare: anciently several persons held lands of the king, by the tenure and service of keeping a pack of beagles and harriers. *Cart.* 12. Ed. 1.

**HART.** A stag, or male deer of the forest five years old complete; and if the king or queen do hunt any such, and he escape alive, then he is called an *hart royal*: and where by the hunting he is chased out of the forest, proclamation is usually made in the adjacent places that in the regard of the diversion the beast hath afforded the king or queen, none shall hurt or hinder him from returning to the forest; and then he is called a *hart royal proclaimed*. *Manwood's Forest Laws*, par. 2. cap. 4.

**HARVEST WORKMEN.** May be licensed by justices of peace to go into other counties to work, &c. *Stat.* 13 and 14 Car. 2. c. 12. See *tit. Labourers, Poor, Vagrants*.

**HASP AND STAPLE.** The form of the entry of an heir into premises situate in a royal borough in Scotland. The bailie, the town clerk, and the claimant, appear on the premises when the claimant alleges his title, and proves it by witnesses, on which the bailie declares him to be heir, and makes him take hold of the hasp and staple of the door as a symbol of possession, and then he enters the house and bolts himself in. On his coming out, the transaction is noted and registered, &c. See *Scotch Acts*, 1681. c. 11. and this *Dict. tit. Feoffment, III. Symbols*.

**HASTA PORCI.** A shield of brawn. *Paroch. Antiq.* 450.

**HATCHES.** Certain dams made of clay and earth, to prevent the water issuing from the works and tin washes in Cornwall from running into the fresh rivers: and the tenants of several manors there are bound to do certain days' works *ad le hatches*, or *hacches*. *Stat.* 27 H. 8. c. 23. And from a hatch, gate, or door, some houses, situate on the highway near a common gate, are called *hatches*.

**HATS.** See *stat.* 1 Jac. 1. c. 7. regulating the making of hats under survey of the Haberdasher's Company in London.—17 G. 3. c. 55. as to journeymen and apprentices in

that trade.—45 G. 3. c. 103. as to straw hats. Stamp duties were at one time imposed on hats (and gloves) sold by retail; but being found vexatious and trifling in their produce, were repealed.

HAVENS. See *Harbours*.

HAUR. From the Fr. *hair*.] Hatred. *Leg. W. 1. c. 16.*

HAUTHONER, *homo loricens*.] A man armed with a coat of mail. *Charla Galfredi de Dutton, temp. H. 3.*

HAW. A small parcel of land so called in Kent; as a *hemphaw* or *beanhaw*, lying near the house, and inclosed for those uses. *Sax. Dict.* But Sir Edward Coke, in an ancient plea concerning Feversham in Kent, says *hawes* are houses. *Co. Lit. 5.* See *Huga Hair*.

HAWARD. See *Hayward*.

HAUGH, or HOWGH. A green plot in a valley; a word used in the north of England. *Camd.*

HAWBERK, alias HAWBERT, Fr. i. e. *lorica*. He who held land in France by finding a coat or shirt of mail, and to be ready with it when he shall be called, was said to have *hauberticum feudum, fief de houbert*: and *hawberk*, with our ancestors, had the same signification, and so it seems to be used in the stat. 13 Ed. 1. c. 6.

HAWKS. It is a felony at common law to steal a hawk, or a falcon reclaimed; for though animals *feræ naturæ*, and not fit for the food of man, they are still, says Lord Coke, of such value in respect of their generous nature and courage, serving *ob vitæ solatium* of princes and noble persons to make them fitter for great employment, that larceny may be committed of them when reclaimed and known to be so. 3 Inst. 98. 109.

By the *Carta de Foresta*, c. 13. "every freeman shall have within his own woods aeries of hawks, sparrow hawks, falcons, eagles, and herons."

By the 34 Ed. 3. c. 2. every person who found a falcon, tercelet, laner, or laneret, or other hawk lost of their lord, was ordered to bring the same to the sheriff to be proclaimed. Concealing the hawk when found, or taking it from its lord, was punishable with two years' imprisonment and the price of the bird.

The 37 Ed. 3. c. 19. after reciting the above statute, enacted, "if any steal any hawk, or the same carry away, not doing the ordinance aforesaid, it shall be done of him as of a thief that stealeth a horse or other thing."

Lord Coke, however, says, that the word hawk was not in the original roll of the act; and that "the law extendeth only to such as be of the kind of falcons" long winged, and not to goss hawks or sparrow hawks. 3 Inst. 97.

The above acts, together with the 5 Eliz. c. 21. which inflicted three months' imprisonment, for taking any hawks or hawks' eggs out of any person's grounds, were repealed by the 7 and 8 G. 4. c. 27., leaving the offence of stealing a hawk that has been reclaimed as it stood at common law.

By the 11 H. 7. c. 17. (still unrepealed) no man, whatever his condition or degree, shall take even in his own ground the eggs of any falcon, goshawk, laner, or swan, out of the nest, upon pain of imprisonment for a year and a day and fine. And no man shall bear any hawk of the breed of England, called a nyesse, goshawk, tassel, laner, laneret, or falcon, on pain of forfeiting his hawk to the king. And if he bring any of them over sea, he shall bring a certificate thereof from the officer of the port, on the like pain of forfeiture. And the person that bringeth such hawk to the king shall have a reasonable reward, or else the hawk, for his labour.

By the same statute no man shall take any ayre, falcon, goshawk, tassel, laner, or laneret in their warren, wood, or other place; or purposely drive them out of their accustomed coverts, to cause them to go to their coverts to breed; or slay them for any hurt done by them, on pain of 10*l.*

By 23 Eliz. c. 10. § 4. if any person shall hawk in another man's corn, after it is eared, and whilst growing, and before it is shocked, and be convicted at the assizes, sessions, or leet, he shall forfeit 40*s.* to the owner, and if not paid in ten days, he shall be imprisoned one month.

An action of trover and conversion lies for an hawk reclaimed, and which may be known by her vervels, bells, &c.

HAWKERS. Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it. They are mentioned in the (repealed) stat. 33 H. 8. c. 4.

HAWKERS, PEDLARS, and PETTY CHAPMEN. Persons travelling from town to town with goods and merchandise. These were under the control of commissioners for licensing them for that purpose under stats. 8 and 9 W. 3. c. 25: 9 and 10 W. 3. c. 25: 29 G. 3. c. 26. &c.

The above, and all other statutes for regulating hawkers and pedlars, are repealed by the 50 G. 3. c. 41. by which the duties on such licenses, and the regulation of the parties licensed, are placed under the management of the commissioners of hackney coaches in London.

The act does not extend to hinder any person from selling any goods in any public mart, market, or fair. § 5.

By § 16. hawkers dealing in smuggled goods shall forfeit their licences.

By § 23. the act is not to extend to persons selling printed papers, licensed by authority, or fish, fruit, or victuals, or any goods, wares, or manufactures of their own making in any mart, market, fair, city, borough, town corporate, or market town, nor to travelling tinkers, &c.

By 52 G. 3. c. 108. it is enacted, that no wholesale trader in lace, or in woollen, linen, silk, cotton, or mixed goods, or in any British manufactures, and selling the same by wholesale, shall be deemed a hawker, &c.; and all such traders and their servants, or agents selling by wholesale only, may go from house to house, and shop to shop, to any of their customers, who sell by wholesale or retail. And, by this statute, the former act shall not extend to persons carrying about coals by carts, horses, &c., and so retailing them. See *stat.* 55 G. 3. c. 71. for regulating hawkers in Scotland.

A licensed hawker opening a house in a place where he is not an householder, and that not being the usual place of his abode, and selling there by retail, does not commit an offence against § 7. of the said act 50 G. 3. c. 41. forbidding sales by auction by such hawkers; to constitute such offence, the selling must be by outcry, &c., or by some mode of sale at auction. 1 B. & Ald. 100.

A licensed auctioneer going from town to town in a stage coach, and sending goods by public wagons, and selling the same on commission, by retail or by auction, at the different towns, is a trading person within the meaning of the 50 G. 3. c. 41., and must take out a hawker's licence. 4 B. & A. 510; and see *ibid.* 517.

A person exposing to sale, and selling tea as a hawker, without a licence, is liable to the penalty of 10*l.* imposed by 50 G. 3. c. 41. although even with a licence he would be liable, under the 10 G. 1. c. 10. § 14. to a penalty for selling tea in an unentered place. 2 Barn. & Cres. 142: S. P. 10 B. & C. 734.

The exemption in § 23. as to the real workers and makers of goods, their children, apprentices, or servants usually residing with them, only applies to such agents or servants as reside in the same house with the maker of goods as part of his family. 10 Barn. & C. 66. A manufacturer on an extensive scale, employing many workmen, but not residing on the premises, or doing any manual labour there, is within the exception. 1 B. & Ald. 275. Barm or yeast is victuals within the above clause; and, therefore, a person buying

it of brewers, and carrying it from town to town, and selling it, is not liable to the penalty for hawking without a licence. 10 Barn. & Cres. 74.

A hawker's licence does not privilege the bearer to trade in corporate towns where the charter limits the right. 2 B. & Ald. 543.

HAY, *haya*, Fr. *haye*.] A hedge or inclosure; also a net to take game. See *Huia*.

HAY. Maliciously setting fire to stacks of hay is a capital felony, by 7 and 8 G. 4. c. 30. § 17.

Certain provisions of the 36 G. 3. c. 38., relative to the buying and selling of hay and straw, have been repealed by the 4 and 5 W. 4. c. 20. so far as regards any market through which there does not exist any public right of way for carts and carriages.

HAY-BOTE. A liberty to take thorns and other wood to make and repair hedges, gates, fences, &c. either by tenant for life or years; it is also said to be wood, for the making of rakes and forks, with which men make hay. See *Co. Lit.* 41; and *tit.* Bote, *Common of Estovers*.

HAY AND STRAW, AND HAY-MARKET. Hay sold in London, &c. between the first of June and the last of August, being new hay, is to weigh 60 pounds a truss; and old hay the rest of the year 56 pounds, under the penalty of 1*s.* 6*d.* for every truss offered to sale, &c. See *stats.* 2 W. & M. st. 2. c. 8. § 16, 17: 8 and 9 W. 3. c. 17. § 1: 31 G. 2. c. 40: and 11 G. 3. c. 15.

HAYWARD. From the Fr. *haye*, *sepes*, and *garde*, *custodia*.] One who keeps a common herd of cattle of a town; and the reason of his being called hayward may be, because one part of his office is to see that they neither break nor crop the hedges of inclosed grounds, or for that he keeps the grass from hurt and destruction. He is an officer appointed in the lord's court; and is to look to the fields, and impound cattle that do trespass therein; to inspect that no pound breaches be made, and if any be to present them at the leet, &c. *Kitch.* 46. There may be a custom in a manor, to have a surveyor of the fields or hayward, and for him to distrain cattle damage feasant. See *Agillarius*.

HAZARD. An unlawful game at dice. See *tit.* Gaming.

HEADBOROW, or HEADBOROUGH. From Sax. *head*, caput, and *borg*, hidejussor.] Signifies him who is head of the frank pledge in boroughs; and who has a principal government within his own pledge: as he was called *headborow*, so he was also styled *borowhead*, *master*, *lordborough*, *take man*, &c., according to the usage and diversity of speech in several places. *Lamb.* These headboroughs



were the chief of the ten pledges; the other nine being denominated *handborrows*, or inferior pledges. *Headborrows* are now a kind of *constables*. See *tit. Constable, Tithing*.

In Scotland each shire has a head or principal borough, where the sheriff's court is held, and jurisdiction exercised. *Bell's Scotch Law Dict.*

**HEAD COURTS** in Scotland, abolished by the act 20 G. 2. c. 50.

**HEADLAND.** The upper part of ground left for the turning of the plough; whence the *headway*. *Paroch. Antig.* 587.

**HEAD-PENCE.** Was an exaction of a certain sum collected by the sheriff of Northumberland, of the inhabitants of that county, without any account thereof to be made to the king: it was abolished by 23 H. 6. c. 7.

**HEAD-SILVER.** Paid to lords of fiefs. See *Common Fine*.

**HEALFANG, or HALSFANG.** From Sax. *hals, collum, and fang, capere*.] That punishment, *quæ allicui collum stringatur. Collistrigium*. The pillory. Sometimes it is taken for a pecuniary mulct, to commute for standing in the pillory; payable to the king or chief lord. *Leg. H. 1. c. 11*.

**HEALTH, Injuries to.]** Injuries affecting a man's health are, where, by any unwholesome practices of another, a man sustains any apparent damage in his vigour or constitution; as by selling him bad provisions or wine (1 *Roll. Abr.* 90.); by the exercise of a noisome trade, which infects the air in his neighbourhood (9 *Rep.* 57: *Hut.* 135.); or by the neglect, or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved, that *mala praxis* is a great misdemeanor and offence at common-law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to his destruction. *Ld. Raym.* 214. These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by special action of *trespass on the case*. 3 *Comm.* 122.

As to offences against the public health of the nation, with respect to the plague, see *tit. Plague, Quarantine*. As to unwholesome provisions, see *tit. Butchers, Food, Wines, &c.*

**HEARTH MONEY.** A tax established by the 13 and 14 Car. 2. c. 10. whereby a hereditary revenue of 2s. for every hearth in all houses paying the church and poor rates, was granted to the king. It was abolished upon the revolution by the 1 W. & M. st. 1. c. 10. See *Chimney-Money, Taxes*.

**HEATH.** Maliciously setting fire to, wherever growing, is felony by 7 and 8 G. 4. c. 30. § 17.

**HEBBER-MEN.** Fishermen, or poachers below London-bridge, who fish for whittings, smelts, &c., commonly at ebbing water; mentioned in one of the articles of the Thames Jury, at the Court of Conservancy of the river Thames, printed anno 1632. And those persons are punishable by 4 H. 7. c. 15. See *tit. London*.

**HEBBING WEARS.** Are wears or engines made or laid at ebbing water. *Stat.* 23 H. 8. c. 5. See *tit. Sewers*.

**HEBDOMAS, Lat.]** A week. See *Week*.

**HEBDOMADIUS.** The week's man, canon, or prebendary in the cathedral church, who hath the care of the choir, and the officers belonging to it, for his own week. *Reg. Episc. Hereford, MS.* See *Ebdomadarius*.

**HECK.** An engine to take fish in the river *Ouse*. 23 H. 8. c. 18.

**HECCAGIUM.** Is supposed to be rent paid to the lord of the fee for liberty to use the engines called *hecks*.

**HEDA.** A small haven, wharf, or landing place. *Domesd.* See *Hith*.

**HEDAGIUM.** Toll, or customary duties paid at the *hith* or wharf, for the landing goods, &c. from which exemption was granted by the king to some particular persons and societies. *Cartular. Abbat. de Radings, MS. f. 7*.

**HEDGE-BOTE.** Is necessary stuff to make hedges, which the lessee for years, &c., may of common right take in his ground leased. See *Hay-bote, Bote*.

**HEDGES.** See *tit. Fence*.

**HEGIRA.** The Mahometan *era*, or computation of time; beginning from the flight of Mahomet from Mecca, 16 July, anno 622. As the years of the *Hegira* consist of only 354 days, they are reduced to the Julian calendar by multiplying the year of the *Hegira* by 354, dividing the product by 365, subtracting the intercalary days, or as many times as there are four years in the quotient, and adding 622 to the remainder.

## HEIR.

**HÆRES; AB HÆREDITATE.]** Is one *ex justis nuptiis procreatus*, who succeeds by descent to lands, tenements, and hereditaments, being an estate of inheritance. The estate must be a fee, because nothing passeth *jure hereditatis* but a fee; and by the common law a man cannot be heir to goods and chattels: though the civilians call him *hæredem, qui ex testamento succedit in universum jus testatoris*.

Heirs are included in the word assigns in grants, &c. If a woman keeps lands from the heir, on pretence, of being big with child by the heir's ancestor, her deceased husband, the writ *de ventre inspiciendo* is to be granted to

search her, &c. that the heir be not defrauded. *F. N. B.* 227.

In the Scotch law, the term heir does not mean merely the heir-at-law; it means also the heir by destination or limitation: neither is it confined to lands only, as it is applied to the successors to personal property; who in the English law are distinguished as next of kin.

- I. *The several Kinds of Heirs; and of relieving them against imprudent Contracts.*
- II. *Who may be Heirs, what Persons are excluded from being Heirs; and of the Effect of the word Heirs in Limitations. And see tits. Purchase, Remainder.*
- III. 1. *Where the Heir shall take Advantage of Conditions, Covenantants, &c. entered into with his Ancestor.*—2. *Where he shall be bound by Conditions, &c.*—3. *What shall go to the Heir.*—4. *Of Suits by and against an Heir.*

See further, as connected with this subject, this Dict. *tits. Agreement, Assets, Condition, Covenant, Executor, Fraud, Hereditaments, Limitation, Real Estate, Will, &c.*

I. Some writers have made a distinction of *hæres sanguinis et hæreditatis*; a man may be *hæres sanguinis* to a father or ancestor, and yet upon displeasure be defeated of his inheritance. And there is an *ultimus hæres*, being he to whom lands come by *escheat*, for want of lawful heir, &c. i. e. the lord of whom the lands are held, or the king. *Bract. lib. 7. c. 17.* See *tits. Escheat, Tenure.* But the most usual division is, that of *heir apparent, heir presumptive* (as to both which see tit. *Descent*), *heir general, heir special, heir by custom, and heir by devise*, called *hæres factus*.

Bonds and bargains with an *heir apparent*, &c. to have double or treble the money lent, after his father's death, &c. are set aside in equity; but it is by paying what was lent *bona fide*, with interest, if the obligor applies for relief: though in case the obligee sues, he shall not recover what was really lent; for that would be to assist fraud. 1 *Vern.* 141. 359. Where *young heirs* enter into any bond, Chancery relieves against it, without evidence of actual imposition; because there is a supposed distress and presumption of a liahleness to be imposed on. *Barnadist.* 481. See *Treat. Eq.*

A devisee under a will defectively executed, represented the will as duly executed, and for a small sum gained a release from the heir; the release was set aside. 1 *P. Wms.* 239. So where a son, who on his father's death was remainder man in tail, sold his remainder at

an under rate, the Court of Chancery set aside the conveyance. *Id.* 310.

The rule upon which courts of equity in these cases proceed, is not merely in respect of the age of the heir contracting. 3 *P. Wms.* 131: *Evans v. Cheshire*, 1 *Mad. Chan.* 119. In *Wiseman v. Beake*, Mr. Wiseman was nearly 40 years of age, and a proctor in the Commons. In *Curwyn v. Milner*, the heir was about 27 years of age; and in *Gwynne v. Heaton*, the plaintiff was 23 years old; which though not an advanced age, is beyond that which the law recognises as the age of discretion. But the real object which the rule proposes is, to restrain the anticipation of expectancies, which must from its very nature furnish to designing men an opportunity to practise upon the inexperience or passions of a dissipated man. And this being the object of the rule, its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealings. 2 *Vern.* 346: *Forest*, 111: 2 *Atk.* 34: and see 2 *Ves.* 281. 516: 1 *Wils.* 229: and this Dict. *tits. Agreement, Fraud.*

It has been said, that if the heir has no maintenance from the father, but is turned out upon unreasonable displeasure, there, perhaps, the bargain, if not excessively beyond the proportion of such assurances, shall stand, because it is not to supply the luxury and prodigality of the heir, but to keep him from starving. *Treat. Eq. c. 2. § 12.* But in *Gwynne v. Heaton*, *Thurlow*, C. was of opinion that this circumstance was entitled to no weight whatever; nor does there appear to be any case in which such difference has been proceeded upon by the Court of Chancery; and there are several cases where it has been entirely disregarded. See 2 *Ch. Ca.* 120: 1 *P. Wms.* 310: 1 *Wils.* 320.

However, an expectancy may be sold, provided the bargain is a fair one (1 *Vern.* 167); but the court in favour of young heirs will throw the onus upon the vendee of showing that it was so. 9 *Ves.* 246.

*Heir at law*, or heir-general by the common-law, is he who, after his father or ancestor's death, hath a right to, and is introduced into, all his lands, tenements, and hereditaments. He must not be a bastard, alien, &c. And formerly he must have been of the whole blood; but now by the 3 and 4 *W. 4. c.* 106. § 9. the half blood is allowed to inherit. See tit. *Descent*.

Heirs at law are in the Scotch law termed *heirs whatsoever*.

*Special heir*, is the issue in tail claiming, *per*

*formam doni*; and as the statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any rightful estate of freehold to another, but for term of his own life. *Lit.* § 613. See *Limitation of Estate*.

**Heir by custom.** A custom in particular places varying the rules of descent at common-law is good; such as the custom of gavelkind, by which all the sons shall inherit and make but one heir to their ancestor; but the general custom of gavelkind lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good. *Co. Lit.* 140.

**Heir by devise, or hæres factus,** is only a devisee of lands, being made so by the will of the testator, and has no other right or interest than the will gives him. 3 *Co.* 42. a.

It has been held in Chancery, that such an heir shall have the aid of the personal estate in discharging the debts of the testator. 1 *Vern.* 36, 37. But this must be understood of an hæres factus of the whole estate, who shall have the benefit of the personal estate, but a devisee of particular lands shall not. *Preced. Chanc.*

The Scotch law distributes heirs into the following classes:—

**Heir active.** He who is served heir, and has the right of action.

**Heir by conquest.** Is he who succeeds to the deceased in lands and other heritable rights: to which the deceased did not himself succeed, as heir to his predecessors; as when a father leaves an estate purchased to his second son.

**Heir of line.** He who succeeds lineally, by right of blood.

**Heir male.** The nearest male heir who can succeed.

**Heir passive.** He whom the law makes liable to be heir.

**Heirs portioners.** Is when women succeed: in that case they have all equal portions. See tit. *Parceners*.

**Heirs of provision, or heirs by destination,** are those who succeed by virtue of a particular provision in a deed or instrument.

**Heir of tailzie.** Is he to whom an estate is entailed. *Scotch Dict.* See tit. *Tail*.

II. The eldest son, after the death of his father, is at common-law his heir, &c. And if there be grandfather, father, and son, and the father die before the grandfather, and after the grandfather die seized; the land shall go to the son or daughter of the father, and not to any other children of the grandfather. *Bro.* 303. And this heir is called *hæres jure representationis*, because he doth represent his father's person: but if, in this case, the father

die without any child, his next eldest brother shall have the land as heir, or for want of a brother, it descends to the sisters of the father.

*Ibid.* A man having issue only a daughter, dies, leaving his wife with child of a son, which is afterwards born: here the son after his birth is heir to the land, but till then the daughter is to have it. 9 *H.* 6. 23; *Perk.* 521. See at large tit. *Descent*.

There are some persons who cannot be heirs; as a bastard born out of lawful wedlock; an alien born out of the king's allegiance, though in wedlock (see 4 *T. R.* 300.); a man attainted of treason or felony, whose blood is corrupted; these last cannot be heirs *propter delictum*; and an alien cannot be heir *propter defectum subjectionis*; nor may one made denizen by letters patent; thought it is otherwise of a person naturalized by act of parliament. *Co. Lit.* 8: 2 *Danv. Ab.* 552. A bastard by continuance, may be heir against a stranger; and a hermaphrodite may be heir, and take according to that sex which is most prevalent; but a monster, who hath not human shape, cannot be heir; although a person deformed may. *Co. Lit.* 7. Idiots and lunatics, persons excommunicate, attainted in premunire, outlaws in debt, &c. may be heirs. 2 *Danv.* 553.

The heir is favoured by the common law; and the ancestor could not give away his lands by will from his heir at law, without the consent of the heir, till the statute 32 *H.* 8. c. 1. 2 *Lill.* 11. Dubious words in a will shall be construed for the benefit of the heir, and not to disinherit him: and the heir at law is preferred in Chancery in a doubtful case. *Noy,* 185: *Chanc. Rep.* 7.

The word heir is not a good description of a person in the life-time of the ancestor; and an eldest son shall not take by the name of heir in the life-time of his father. 2 *Leon.* 70.

But where lands were devised to the heirs of J. S. then living, it was held that his eldest son should have them, though in strictness he was not heir during his father's life, but heir apparent. But this was by reason of the words *then living*, which make it a description of the person. *Preced. Chanc.* 57.

And as a limitation to the heirs of the body of A. then living, shall be good as a *designatio personæ*, notwithstanding the rule *non est hæres viventis*; so a limitation to the heirs of the body of A. then begotten shall prevail. See 1 *P. Wms.* 229: 1 *Bro. P. C.* 489: 2 *Black. Rep.* 1010.

At common law a man cannot raise a fee-simple estate to his right heirs, by the name of heirs, as a word of purchase by conveyance or otherwise; but in such case the heir shall be in by descent. *Fortior et potentior est dispositio legis quam hominis.* *Mob.* 30: 2 *Lill.*



Ab. 11. But the rule is now altered by the 3 and 4 W. 4. c. 106. § 3. See tit. *Descent*.

By the law of England, no person can take to himself an inheritance in fee-simple by deed, without the word heirs; but he may by devise; though, in cases where the word heir is wanting, it has been adjudged that if there were other words equivalent, and the interest in the thing granted passeth by the consideration only, without any further ceremony in the law, an estate in fee may pass. 2 *Nels. Abr.* 928. In a devise by will or exchange, &c. the word heirs is not necessary: but estates of inheritance which are otherwise conveyed require it. *Jenk. Cent.* 196.

The general rule is that the word "heirs" is necessary in a deed to give a fee. See the exceptions, tit. *Fee*, III.

The word heir is *nomen collectivum*, and extends unto all heirs; and under heirs the heirs of heirs are comprehended in *infinitum*. If lands are given to a man and his heirs, all his heirs are so totally in him, that he may give his lands to whom he will. *Trin.* 23 *Jac.* 1. *Noy*, 56.

The cases in which it has been held that the person described as an heir special, need not answer both parts of the description, by being actually heir, as well as that species of heir denoted by the description, seem to have materially broken in upon the doctrine of *Lord Coke* on the subject; see 1 *Inst.* 24. b.; and which doctrine of *Lord Coke* has been pursued in many cases, exclusive of those on which he relied particularly in *Counden v. Clerke*, *Hob.* 29: *Southcott v. Stowell*, 1 *Freem.* 216: *Lord Ossulston's case*, 3 *Salk.* 336: and *Dawes v. Ferrars*, 2 *P. Wms.* 1: *Starling v. Ettrick*, *Pre. Ch.* 54. *Mr. Hargrave* has very ably attempted to vindicate the propriety of *Lord Coke's* doctrine observing that it may be doubted whether there is a passage in all his works more capable of standing the severest test of modern criticism; and having examined the circumstances of the cases supposed to have weakened its authority, concludes his note (p. 32. a.) with remarking, that *Lord Cowper's* judgment in *Newcomen v. Barkham*, or *Brown v. Barkham*, 1 *Eq. Ab.* 215. c. 14: *Rep. Eq.* 116. 131: *Pre. Ch.* 442. 461: 2 *Vern.* 729: 1 *Str.* 35: which was materially shaken in its principle by what fell from *Lord Hardwicke*, in decreeing upon the bill of review, is the only direct authority against *Lord Coke*. In a following note, however (p. 164. a.) *Mr. Hargrave* candidly admits, that since his writing his former note, a case has been published in which the Court of King's Bench, after three arguments, decided against applying the above rule to a will; *Wills v. Pal-*

*mer*, 5 *Burr.* 2615; and that in another, which was also three times argued, the Court of Exchequer had refused to apply the rule to a marriage settlement. *Evans, d. Burstenshaw, v. Weston*, *M.* 1774. or *H.* 1775. This concurrence of authority, the result of so much deliberation, for both courts appear to have weighed the subject with the most anxious attention, seems to have given a weight to the decree in *Newcomen v. Barkham*, beyond that to which *Lord Hardwicke* thought the principle entitled. It is, however, well worth the student's while to consult *Mr. Hargrave's* observations in support of *Lord Coke's* doctrine, that to take as a purchaser by description of a special heir, every part of the description must unite in the claimant. See also *Fearne on Cont. Rem.* 4th edit. p. 319: and 2 *Wils.* p. 20.

The heir of the conusor was heard to oppose a fine being amended to his disherison 5 *W. P. Taunton*, 204.

III. 1. Conditions and covenants *real*, or such as are annexed to estates, shall descend to the heir, and he alone shall take advantage of them. 43 *Ed.* 3. c. 4: 1 *And.* 55.

And this is not only where there are express words, but also where there are none; for the law by implication reserves the condition to the heir of the feoffor, &c.; for being prejudiced by the disposition, it is but reasonable that he should take the same advantage his ancestor whom he represents might. 1 *Rol. Ab.* 407. 472.

If a man leases for years, and the lessee covenants with the lessor, his executors, and administrators, to repair and leave it in good repair at the end of the term, and the lessor dies, &c., his heir may have an action upon this covenant; for this is a covenant which runs with the land, and shall go to the heir, though he is not named; and it appears that it was intended to continue after the death of the lessor, inasmuch as his executors, &c., are named. 2 *Lev* 92: *Skin.* 305.

And the heir may have an action on a covenant real, although nothing has descended on him from the ancestor with which the covenant can run; as if a covenant with B. and his heirs to infeoff B. and his heirs, and B. dies before it can be done; in this case his heirs shall take advantage of it. *Fitz. N. B.* 145: *Touch.* 175.

None but the heir general, according to the course of the common law, can be heir to a warranty, or sue an appeal of the death of his ancestor. *Co. Lit.* 14. a: *Cro. Jac.* 217, 218.

But warranties are now abolished by the 3 and 4 W. 4. c. 27. § 39; and the 3 and 4 W. 4. c. 74. § 14; and appeals of death

were taken away by the 59 G. 3. c. 46. See *tits. Appeal, Warranty*.

If a condition be annexed to borough English or gavelkind lands, and the condition is broken, the heir at common law shall enter; for the condition is a thing of new creation, and collateral to the land. But when the eldest son enters, the heir, or heirs by custom, shall enjoy the land; for by breach of the condition they are restored to their ancient estates. *Cro. Eliz.* 204: *Plow.* 28: *Co. Lit.* 11, 12.

If a man seized of lands in right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the heir of the husband shall enter; for though no right descended to him, yet the title of entry by force of the condition which was created upon the feoffment, and reserved to the feoffor and his heirs, descended. 8 *Co.* 43: *Co. Lit.* 202. a. 336. b.

The heir shall take advantage of a *nomine pænæ*; for being incident to the rent, it shall descend to the heir, being a security or penalty to engage the payment of the rent; therefore, whoever has a right to the rent, ought in reason to have the penalty, which is to oblige the tenant to pay it. *Co. Lit.* 162. b.

If A. infeoff B. upon condition that if the heir of A. pay to E. &c. 20s., then he and his heirs may re-enter: this is a good condition, of which the heir of A. may take advantage, and yet A. himself never can. *Co. Lit.* 214. b.

The grantor of an estate subject to a condition of re-entry cannot devise the same, because the grantor that has the benefit of the condition vested in him, though he has an estate in the condition, yet has not the land until the condition is broken. And the devisee over cannot take advantage of the breach merely as such; for the benefit thereof is not devisable, but must go in priority to the heir at law of the grantor, who must enter for it. 1 *Ves.* 223. 422.

Where lands are devised upon condition that the devisee pay a sum of money within a given period, and the condition is not performed, there being no devise over, the heir may enter. 2 *Vern.* 366: 1 *Eq. Ca. Ab.* 109. pl. 8. But in such a case, as the condition is of a nature which admits of subsequent compensation, equity will relieve against the forfeiture on payment of principal, interest, and costs. 1 *Ch. Cas.* 89: 2 *Vent.* 352: 1 *Salk.* 156: 2 *Vern.* 594. And it would seem that relief will be given, where the condition was to execute a release within a prescribed period. 1 *B. C. C.* 168.

The right of action upon a covenant real will not be transferred from the heir to the executor, from the mere circumstance that a

breach has been incurred in the life-time of the testator; for the executor shall have no action on such breach unless the personal estate was thereby prejudiced. See 1 *M. & S.* 355: 2 *M. & S.* 408: 4 *M. & S.* 53.

Thus, upon a covenant with A. and his heirs to do all lawful and reasonable acts, for further assecurance upon request, and a request made by the purchaser in his life to levy a fine, and neglect so to do, the ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of his ancestor, and refusal made by the vendor. 5 *Taunt.* 418: 4 *M. & S.* 188.

But when the ultimate damage is sustained in the ancestor's life-time, as where he is evicted, and the land, and consequently the covenant, does not descent to the heir, there the executor only can sue upon the covenant. 2 *Lev.* 26: 1 *Vent.* 175: 1 *M. & S.* 365: 5 *Taunt.* 427. And it seems clear that where, by a breach of covenant relating to land in the time of the testator, the personal estate of the testator is lessened, his executor and not his heir, is the proper person to sue. *Roscoe on Real Actions*, 441.

2. As the heir at law is the proper and only person who can take advantage of conditions, &c., annexed to the real estate; so he shall be bound by all such conditions, &c., which run with the land, whether such conditions were annexed to the estate by the original feoffor, grantor, or immediate ancestor. 1 *Roll.* Ab. 421.

If a gift be made in tail on condition that the donee should not discontinue, and the donee hath issue two daughters, and one of them discontinues, the donor shall enter and evict them both; because it was the original condition annexed to the whole estate, that no part of it should be discontinued. *Co. Lit.* 165.

Also where a condition is annexed to the estate given to the heir, and which goes in abridgment and restraint thereof, the same shall in some cases be construed a *limitation*; for if it were a condition, nobody could take advantage of it but the heir. *Dyer*, 316: 10 *Co.* 41: 1 *Vent.* 199. As if a copy-holder in borough English surrender to the use of his will and after devises to his wife for life, remainder to his eldest son, paying 40s. to each of his brothers and sisters within two years after the death of his wife, &c., this is a *limitation*, and not a *condition*; for if it should be a *condition* it would extinguish the heir, and there would be no remedy for the money. *Cro. Eliz.* 204: 3 *Co.* 20, b: 2 *Leon.* 114. *S. C.* Vide further as to the doctrine of the heir being bound, &c., *Vaughan*, 271: 2 *Mood.* 26. *S. C.*: *Cro. Eliz.* 833. 919: *Moor*, 644. pl. 891: *Noy*, 51.

But wherever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgment of the estate of the heir, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his peril, as others must do. 8 *Co. Francia's case: Amb.* 256: 11 *East*, 457.

Heir is *nomen collectivum*; and therefore, if a condition be, that if his heir does not pay such a rent-charge, the estate shall go to B. if the heir of the heir does not pay, the condition is broken. *R. Cro. Jac.* 145.

3. It has been already observed, that the heir can only succeed to estates of inheritance. Where, however, an estate is limited to A. and his heirs during the life of B., and A. dies in B.'s life-time, the heir is held to be entitled, not as heir, but as special occupant. And it has also been decided that where an estate *pour autre vie* is limited to a man, his heirs, executors, and administrators, the heir is to be preferred to the personal representatives. 4 *T. R.* 229. But where there is no special occupant of such an estate, it goes to the executor by virtue of the provisions of the 29 *Car.* 2. c. 3. § 12.

When a man seized in fee makes a gift in tail, or lease for life or for years, reserving rent, the rent which becomes due after his death shall go with the reversion, as an incident thereof, to his heir, and not to his executor. *Co. Lit.* 47. a: *Hardw.* 95: 3 *Bac. Abr.* 62, *Executors* (H. 3.) But the arrears which accrued during his life shall in all cases go to his executor. 3 *Bac. Abr.* 62, *Executors* (H. 3.)

With regard to mortgages, it is now fully settled, that although, in the case of a mortgage in fee, the legal estate descend to the heir, the executor is entitled to the money, according to the rule in equity that the satisfaction shall accrue to the fund which sustained the loss. 1 *Chanc. Cas.* 283: 1 *Vern.* 3: 3 *Swans.* 636. But if a man purchase an estate which afterwards proves subject to an equity of redemption, and dies, the money will belong to the heir, and not to the executor. 1 *Vern.* 271.

Where money is covenanted to be laid out in a purchase of land to be settled on A. in fee; on A.'s dying before the money is laid out, his heir, and not his executor, shall have it. 1 *P. Wms.* 483. So where, though by a voluntary contract, money is agreed to be laid out in land, the court will execute such agreement in favour of the heir. 2 *P. Wms.* 171. On the same principle, where one articed to buy land and died, his executor shall pay the money, but his heir shall have the lands. *Id.* 632. And in all cases where it is a measuring cast

between an executor and an heir, the latter shall in equity have the preference. *Id.* 176.

A younger brother beyond sea having contracted to buy a real estate of his elder brother, made his will, charging his estate with great legacies, but his will was attested by only two witnesses. Afterwards the testator died without issue, leaving his elder brother his executor and heir: the heir may retain out of the assets the whole purchase money, though entitled to the land again as heir. 2 *P. Wms.* 291.

With respect to the cases in which the heir can call upon the executor to exonerate the real estate from the debts of the deceased, see tit. *Real Estate*.

The following is a specification of what goods and chattels go to the heir in England. As to Scotland, see tit. *Heirship Moveables*.

Goods and chattels annexed to the freehold go to the heir, and not to the executor or administrator: as the glass in a window, the doors and locks of a house. *Off. Ex.* 86: 21 *H. 7.* 26. b. 4: *Co.* 63. b. So the pales, posts, and rails, for an enclosure. 12 *H. 7.* 26. b. So furnaces, coppers, &c., fixed to the freehold: *R.* 21 *H. 7.* 26. b: *R.* 20 *H. 7.* 13. b., unless they are severed in the life-time of the testator. *Semb.* 1 *Salk.* 368. *Vide Com. Dig.* tit. *Execution* (C. 4.) tit. *Wast.* (D. 2.) Salt pans necessary to the use of salt-works, and without which they would be of no value. 1 *H. Blackst.* 259. n. So wainscot fixed to a house. 4 *Co. a.* So pictures, glasses &c., fixed instead of wainscot. 2 *Vern.* 508. So millstones, &c., fixed to a mill. So set pots, ovens, and ranges. 5 *B. & A.* 625. Stoves, cooling coppers, mash tubs, water tubs and blinds. 1 *B. & C.* 76. Stoves, grates and cupboards. *Per Bayley, J.* 4 *B. & C.* 686. So charters, deeds, and evidences of lands, with the chests in which they are preserved. See *Com. Dig.* tit. *Biens* (B.), *Charters*: 1 *Inst.* 18. b: 4 *Burn's Ecc. L.* 304. An ancient horn where the tenure is by coruage. 1 *Vern.* 273.

So a term for years to attend the inheritance does not go to the Executor, but to the heir. *R.* 2 *Ch. Ca.* 156. 160. So deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the heir. So fish in a pond, or piscary. *Co. Lit.* 8. a: *R. Owen* 20: 1 *Rol.* 916. l. 45. 50. So, unless they have been severed, trees, apples, and other fruits growing at the death of the ancestor. *Com. Dig.* *Biens*, (H.): *Off. Ex.* 84.

It is also said by *Wentworth* that roots in the ground shall go to the heir. *Off. Ex.* 89. But it appears now to be generally understood that the executors shall have annual crops sown by the testator and growing at his decease. 1 *Rol. Ab.* 728: *Com. Dig.* *Biens* (G. 1): 3 *Bac. Abr.* 64. *Harg. Co. Lit.* 55. b. n. 2 *Comm.* 123.



The heir shall have the growing crop of and see *Bridgm.* 71. So if there be an error, grass, even if sown from seed, and though neous judgment against tenant in tail female, ready to be cut. *5th. Ex.* 215. 16 *Com.* the issue female, and not the son, shall bring *Dig. Brens.* (G. 1.) See also 5 *B. & C.* 832 a writ of error *Dyer*, 90: 1 *Leon* 961: 1 But it would appear that all artificial grasses, *Rot. Ab.* 747. See farther *Dyer*, 89: *Cro.* as clover, saintfoin, and the like, by reason of *Ehz* 469; 3 *Lev.* 36: and tit. *Error*, I. 1. the greater care and labour necessary for their Heirs may have divers writs, as writ of production, are within the rule of emblements, *M et d' ancestor*, *Entre ad communem legem*, *In* and belong to the executor. 1 *Rot. Ab.* 728 *casu proviso*, and *consimili casu*, *quod permut-* 2 *Freem.* 210; 3 *Salk.* 160; 4 *Burn's Ecc. tat.*, &c. C. 299.

As to heir looms, see that tit.

In Scotland, the heir is entitled to all the heritage, and the executor to all the moveables of the deceased, with the exception of heirship moveables. (See that tit.) But where the heir and executor stand in an equal degree of relationship to the ancestor, it is competent to the heir to insist that the whole estate, heritable and moveable, shall be thrown together, and that he shall be entitled to his share of the whole equally with the executor. This is a privilege which it is obvious will be used only where the moveables greatly exceed the heritage in value.

In the division of the rents of land betwixt an heir and executor, the latter has right to the rent of the lands due at the death of the ancestor, the heir to what was not at that time due, and a rule has been adopted for regulating what parts of the rents shall be considered as due or not. The terms of Whitsunday and Martinmas are received as the legal terms by which those interests are regulated, whatever the conventional terms of payment may be. If, therefore, the landlord has survived Whitsunday, his executor has right to half of that year's rent; and if he survived Martinmas, the executor has a right to the whole of that year's rent. But where the lands have been in possession of the proprietor, whatever has been sown by the proprietor must be reaped by the executor. See *Bell's Scotch Law Dict.*

4. It is clear that the heir may bring any real action *droitural*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets, or personal contracts, of his ancestor. *Co. Lit.* 164. If an erroneous judgment shall be given against the ancestor, by which he loseth the lands, the heir may bring a writ of error. 1 *Rot. Ab.* 747: *Dyer*, 90: *Godh.* 337. And if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. 1 *Leon.* 261: 2 *Sid.* 56. So the younger son, when entitled to the land by the custom of the borough English, shall bring the writ of error, and not the heir at common law, for this remedy descends with the land. *Owen*, 68: 1 *Leon* 261: 4 *Leon.* 5:

But by the 3 and 4 *W. 4. c.* 27. § 36. the above, as well as all other real and mixed actions, save for dower *quars impedit*, and ejectment, are abolished after the 31st December, 1834, except in the cases mentioned in the two following sections.

The heir may bring an ejectment of copyhold lands before admittance. 2 *Wils.* 14.

The heir at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease made by his ancestor (accrued after the death of the ancestor); for the rent is part of the lands, and incident to the reversion.

Where the executor is remiss in removing the testator's goods within a reasonable time, the heir may distrain them as *damage feasant*. *Wentw. Off. Ex.* 202. 2nd edit.: *Cro. Jac.* 204.

As to the liability of the heir to the payment of debts, &c. of his ancestor out of the estates descended, see tit. *Real Estate*.

**HEIRESS.** The female heir to a man, having an estate of inheritance in lands; and where there are several joint heirs, they are called *co-heirs* or *co-heiresses*. See tit. *Parteners*. As to stealing an heiress, and marrying her against her will, see tit. *Abduction*.

**HEIR LOOM.** From the Sax. *heir*, i. e. *hares*, and *leone*, *membrum*. So that heir loom is nothing else but a limb or member of the inheritance. 2 *Comm.* 427.

Heir looms are such goods and personal chattels as shall go by special custom to the heir along with the inheritance, and not to the executor or administrator.

They comprehend divers implements of household, such as the first best bed and other things, which, by the custom of some countries, have belonged to a house for certain descents, and are never inventoried after the decease of the owner as chattels, nor do they go to the executor, but accrue to the heir with the house itself by custom, and not by the common law: these are *not devisable by testament*; for the law prefers the custom before a devise, which takes not effect till after the death of the testator, and then they are vested in the heir by the custom. *Co. Lit.* 18. 185. But sale in a man's lifetime might make it otherwise.

Heir looms in general are said to extend to

all large household implements not easily moved. See *Spelman*.

But it is said, that the word by time hath attained a more general signification than at first it did bear, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscot, and such like: which, by the custom of some countries, have belonged to a house during certain descents, as before mentioned.

*Holt*, Ch. J., is reported to have said that goods in gross cannot be heir looms, but they must be things fixed to the freehold, as old benches, tables, &c. 12 *Mod.* 519, 520. However, the case is differently reported in 1 *Ray.* 728. There his definition of heir looms, as "things ponderous," agrees with that of *Spelman*.

And notwithstanding *Blackstone* describes them as being generally such things as cannot be taken away without damaging or dismembering the freehold (2 *Comm.* 428.), heir looms seem, properly speaking, to be loose moveable chattels, which, but for the custom, would go to the executor. *Co. Lit.* 18. b. 185. b. Indeed, in another part of this work he says, that an heir loom is "a mere moveable." 2 *Comm.* 17. And the inconsistency into which he has fallen in the former passage is to be attributed to his having, for the moment, confounded them with fixtures.

Besides heir looms, there are certain chattels which may be considered in the nature of heir looms, and go to the heir with the inheritance.

Thus if a nobleman, knight, esquire, &c. be buried in a church, and have his coat of arms, and pennons with his arms, and such other ensigns of honour as belong to his degree, set up in the church, or if a grave-stone or tomb be laid or made, &c. for a monument of him; in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any, take them or deface them, but he is liable to an action from the heir, and his heirs, in the honour and memory of whose ancestor they were set up. *Co. Lit.* 18. b. And see 1 *Roll. Ab.* 625: *Noy*, 104: *Godbolt*, 200: *Cro. Jac.* 367: *Bulst.* 151. See 2 *Comm.* c. 28. p. 428, 429.

And in like manner, ancient portraits and family pictures, though not fastened to the walls of the house. So with the inheritance. 12 *Rep.* 105: *Godb.* 199: 1 *Brownl.* 45: 2 *Bulst.* 151.

So, although a testator devises all his jewels to his wife, his garter and collar of S. S. shall descend to his heir as ensigns of honour and state, in the way of heir looms. *Owen*, 124.

So the ancient jewels of the crown are heir looms, and shall descend to the next successor, and are not devisable by will. 1 *Inst.* 185.

A man may also by will constitute what are termed *quasi* heir looms, by devising or limiting in strict settlement, plate, pictures, books, furniture, &c., to be held with a mansion and estate so long as the law will permit. These articles, however, vest absolutely in the parson who becomes entitled to the first estate of inheritance, whether in tail or in fee; and on his death pass to his executor. 1 *Bro. C. C.* 274: 3 *Bro. C. C.* 101: 14 *Ves.* 478. See tit. *Fixtures*.

**HEIRSHIP MOVEABLES.** In the law of Scotland are defined the moveables which the law withholds from the executors, or next of kin, and gives to the heir that he may not succeed to a house and land completely dismantled. They consist of the best of every thing, as the Scotch Act, 1474, c. 54. expresses it; meaning furniture, horses, cows, oxen, farming utensils, &c., but not including *fungibles* (see that title). Where articles go in pairs or dozens, it is the best pair or dozen, &c. Under these are comprehended the family seal of arms, and the ornament of the seat in the church.

Heirship moveables are due only to the heir of a baron, or of a burghess. In this sense of a person *infeft* in lands, or even in an annual rent out of lands, is held a baron: the burghess must be an actual trading burghess in a royal borough.

The heir of line is the only heir who has a right to claim heirship moveables, and of this right he cannot be deprived by will, or death-bed deed. Where there are heirs portioners the eldest heir portioner alone is entitled. *Bell's Scotch Law Dict.*

**HELING.** A brass coin among the Saxons, equivalent to our half-penny.

**HELM.** Thatch or straw. *Cowell*. Sometimes called *Hahn*. *Helm* is also a Saxon word, signifying a covering for the head in war: also that of a coat of arms which bears the crest. The *steerage* or rudder in a ship or other vessel.

**HELOWE-WALL,** the *hell-wall* or end wall, that covers and defends the rest of the building. From Saxon, *helan*, to cover or heal; whence a thatcher, salter, or tiler, who covers the roof of a house, is in the western parts called a *hellner*. *Paroch. Antq.* p. 573. See *Kennet's Glossary*.

**HEMP AND FLAX.** By stat. 33 *H. 8* c. 17. none may water hemp or flax in any river running water, stream, brook, or common pond, where beasts are used to be watered, but only in their several ponds, &c. for that purpose, on pain of 20s. By stat. 1 *Car.* 2. c. 15.

any persons may in any place or corporate town, privileged or unprivileged, set up manufactures of hemp or flax, and persons coming from abroad using the trade of flax or hemp dressing, and of making thread, weaving cloth made of hemp or flax, or making tapestry hangings, twine or nets for fishery, cordage &c. after three years, shall have the privileges of natural born subjects.

See 4 *G. 3. c. 26.* (a temporary act, continued by subsequent acts) for granting a bounty on the importation of hemp and rough, and undressed flax from the British colonies in America. See also 23 *G. 3. c. 77.* (a like temporary and continued act) for the encouragement of the manufacture of flax and cotton in Great Britain. See also the Irish act 3 *G. 3. c. 12.* for encouraging the flaxen and hempen manufacture in Ireland.

The tithe of hemp and flax is by 11 and 12 *W. 3. c. 16.* ascertained at 5s. an acre in England; and the same in Ireland, by Irish act, 28 *G. 3. c. 29.*

For penalties on workmen embezzling it, see stats. 1 *Anne, st. 2. c. 18. § 1.* Against frauds in manufactures of hemp, flax, &c. 22 *G. 2. c. 27.*

So much of the 27 *G. 2. c. 13.*, or of any other act as authorises the issuing of money out of the consolidated fund for encouraging the raising and dressing of hemp and flax, is repealed by the 4 and 5 *W. 4. c. 14.*

**HENCHMAN**, *hensman*, *qui equo innititur bellicosus*, from the German *hengst*, a war horse.] One who runs on foot, attending upon a person of honour or worship: a sort of herald. See 3 *Ed. 4. c. 5:* 6 *H. 8. c. 1:* 24 *H. 8. c. 14.*

**HENEDPENNY**. A customary payment of money instead of hens at Christmas: from the Saxon *hen*, *gallina* and *penning*, *denarius*. *Monast. 2 tom. 327. 827.* *Du Fresne* thinks it may be *henpenny*, *gallinagium*, or a composition for eggs. But possibly it is misprinted *henedpenny* for *heved peny*, or *head-peny*. *Cowell, edit. 1727.*

**HENGHEN**, *Sax. hongen*.] A prison, gaol, or house of correction. *LL. H. 1. c. 65.*

**HENGWITE**. See *Hangwite*.

**HEORDFESTE**. The same with *husfastne* or *husfastane*, i. e. the master of a family: from the Saxon *hearthfast*, i. e. fixed to the house or hearth. *Leges Canuti, cap. 40.* See *Hurdereferst*.

**HEORDPENNY**, *olim Romescot et postea Peterpence*, from the Saxon *hearth, focus*, and *pening, denarius*. See *Peterpence, Romescot*.—*Leges Edgari Regis, cap. 5. apud Bromptonum.*

**HEPTARCHY**. The kingdom of England was formerly, under the Saxons, divided into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different

clans and colonies; these were all reduced into one kingdom by Egbert, King of the West Saxons in the year 827 or 828. Egbert is therefore styled the first king of England. See 4 *Comm. c. 33.*

**HERALD**, **HERALT**, or **HEROLD**, *Ital. heraldo, Fr. herault*, quasi *herus altus*.] An officer at arms. *Verstegan* thinks it may be derived from two Dutch words, viz. *Here, exercitus et healt, pugil magnanimus*; as if he should be called the *Champion of the Army*: and the Romans called *heralds, feciales*. *Polydore, lib. 19.* describes them thus; *heralds, insuper apparitores ministros, quas heraldos dicunt quorum præfectus Armorum Rex vocitatur; li belli et pacis Nuncii; Ducibus Comitibusque a Rege factis insignia aptant, ac eorum funera curant*. The functions of these officers, as now exercised with us, is to denounce war, proclaim peace, and to be employed by the king in martial messages: they are examiners and judges of gentlemen's *coat of arms*, and conservators of *genealogies*; and they marshal the solemnities at the coronations and funerals of princes and other great men.

The three chief heralds are called *kings at arms*: of which *Garter* is the principal, instituted by King Henry V. whose office is to attend the *knights of the Garter* at their solemnities, and to marshal the funerals of the nobilities: and King Edward IV. granted the office of *King of Herald*s to one *Garter*, *cum feudis et proficiis ab antiquo, &c.* The next is *Clarenceux* or *Clarentius*, ordained by Edward IV. who, attaining the dukedom of Clarence by the death of George his brother (whom he beheaded for aspiring to the crown), made the herald who belonged to that dukedom a king at arms, and called him *Clarenceux*; his proper office is to marshal and dispose the funerals of all the lesser nobility, knights and esquires, through the realm, on the south side of the Trent. The third is *Norroy*, quasi *North Roy*, whose office and business is the same on the north side of Trent, as *Clarentius* on the south, which is intimated by his name, signifying the *northern king*, or *king at arms* of the north parts. These three officers are distinguished as follows, viz. *Garter Rex Armorum Anglicorum*; *indefinitè*; *Clarenceux, Rex Armorum partium Australium*; *Norroy Rex Armorum partium Borealiūm*.

Besides the *kings at arms*, there are six inferior heralds, according to their original, as they were created to attend dukes and great lords in martial expeditions, i. e. *York, Lancaster, Chester, Windsor, Richmond, and Somerset*; the four former instituted by King Edward III., and the two latter by Edward IV. and Henry VIII. And lastly, to the superior and inferior heralds, are added four others,



called *marshals*, or *pursuivants at arms*, who commonly succeed in the places of such heralds as die, or are preferred; and they are *Blue-mantle*, *Rouge-cross*, *Rouge-dragon*, and *Port-cullis*: all equipped with proper ensigns and distinctions.

The ancient *kings at arms*, *heralds*, and *pursuivants*, were made a corporation or college under the *Earl Marshal* of England, with certain privileges by the kings of this realm: *Concesserunt, &c. Heraldi Armorum, et omnes alii Heraldi prosecutores sive Pursuivandi armorum, qui pro tempore fuerint, in perpetuum sint unum corpus corporatum in re, facto, et nomine; habeantque successionem perpetuam, nec non quoddam sigillum commune, &c. Dat. &c. Spelm. Gloss. Herald's Court of Honour. See tits. Honour, Courts, Court of Chivalry.*

Since the establishment of this corporation or college of arms, some heralds and pursuivants extraordinary have been made, but these are considered as merely honorary, and not part of the establishment.

On the accession of King George, Elector of Hanover, to the crown of Great Britain, a *Hanover herald* was then appointed; and afterwards, in 1815, on the erection of Hanover into a kingdom, *Blanc Coursier*, King of Arms in Hanover, was appointed, and his duties are confined to that kingdom. *Gloucester herald*, first appointed 11 George I. is an officer of the Order of the Bath, and the office of Bath King at Arms is vested in him, but has nothing to do with the College of Arms.

In Scotland the chief herald of the Court of Arms there is called *Lyon King of Arms*, from the armorial bearing of the king, as king of Scotland, the lion rampant: and he has serving under him heralds, pursuivants, and messengers. By Scotch acts 1592. c. 127. 1672. c. 21. he is authorised to inspect the arms and ensigns armorial of the noblemen and gentlemen of Scotland, to distinguish the arms of the younger members of families; and to give grants of arms; to matriculate such arms, and to fine those who wore arms not matriculated, in 100*l.* Scots [8*l.* 6*s.* 8*d.*], with the forfeiture of the goods and furniture on which the arms are represented.

In Ireland there is also a Court of Arms, of which *Ulster King of Arms* is the principal; there are also *Dublin* and *Cork heralds* at arms, *Athlone pursuivants*, and inferior officers.

For the ceremony of creating a king at arms, see *Detthick's Case*, *Ley's Reports*, 248.

**HERBAGE**, *herbagium*.] The green pasture and fruit of the earth, provided by nature for the bite or food of cattle: it is also used for a liberty that a person hath to feed his cattle in the ground of another person; or, in the forest, &c. *Crompt. Jurisd.* 197.

He that hath herbage of a forest by patent may have trespass for the grass, but not for trees or the fruit of them; and he may take beasts damage-feeasant, and have *quare clausum fregit*, and by such grant may inclose the forest. Yet grantee of herbage may inclose, and may have action of trespass *quare clausum fregit*. But though he that hath herbage may inclose, yet he that hath reasonable herbage cannot. *Dyer*, 285: and see 2 *Ro. Rep.* 356.

Grantee of herbage of a park cannot dispark it. *Godb.* 419. A lease was made of a manor with all gardens, orchards, yards, &c., and with all the profits of a wood, excepting to lessor forty acres, to take at his pleasure. *Per Dyer*, the wood is not comprised within the lease, but the lessee shall only have the profits, as pannage, herbage, &c. 4 *Leon.* 8.

A right to the herbage is sufficient to support an ejectment, because he who has a grant of the herbage has a particular interest in the soil, although by such grant the soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself. *Hard.* 330. See tits. *Lease*, *Trespass*, &c.

**HERBAGIUM ANTERIUS**. The first crop of grass or hay, in opposition to after-math and second cutting. *Paroch. Antiq.* p. 459.

**HERBERY**, or **HERBURY**. An inn. *Cowell*.

**HERBENGER**, or **HARBINGER**, from the French *herberger*, that is *hospitio accipere*. An officer in the king's house, who goes before and allots the noblemen, and those of the household, their lodgings. *Kitchin.* fol. 176. It is also used for an innkeeper.

**HERBERGAGIUM**. Lodgings to receive guests in the way of hospitality. *Cowell*.

**HERBERGATUS**. Spent in an inn. *Cowell*.

**HERBERGARE**. To harbour, to entertain, from *heribergum*, *heriberga*, Saxon *hære berg*, a house of entertainment. *Sommer's Antiq.* p. 248. Hence our *herbinger* or *harbinger*, who provides harbour, or house room, &c.

**HERCE**, **HERCIA**. An harrow. *Fleta*, lib. 2. c. 77. It signifies also a candlestick set up in churches, made in the form of an harrow, in which many candles were placed at the head of a cenotaph.

**HERCIARE**, from the French *hercer*, to harrow. See 4 *Inst.* fol. 270.

**HERDEWICH**, or **HERDEWIC**, *herde-woycha*.] A grange or place for cattle and husbandry. *Mon. Angl.* 3. part.

**HERDWERCH**, **HEORDWERCH**.—Herdsmen's work, or customary labours done by the shepherds, herdsmen, and other inferior tenants, at the will of their lord. *Cowell, edit.* 1627. *Regist. Eccles. Christi. Cant.* MS.

**HEREBANNUM**, Sax. *here*, *exercitus*, et

ban, *edictum, mulcta*.] A mulct, for not going armed into the field, when called forth. *Spelm.* Under the feudal policy, every free man was under an obligation to serve the state. If, upon being summoned into the field, any free man refused to obey, a full *herebannum*, i. e. a fine of sixty crowns was to be exacted from him, according to the law of the Franks. This fine was levied with such rigour, that if any person was insolvent, he was reduced to servitude, and continued in that state until such time as his labour should amount to the value of the *herebannum*. The Emperor Lothar rendered the penalty more severe, by confiscating the goods of the persons refusing, and banishing him. *Robertson's Char. V.* vol. i. 216, 217.

HEREBOTE, from the Sax. *here* and *bote*, a messenger.] The king's edict commanding his subjects into the field; from the Saxon *here exercitus*, and *bode*, a messenger. *Cowell.*

HEREDITAMENTS, *hereditamenta*.] All such immovable things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance; and which, if they are not otherwise devised, descend to him that is next heir, and fall not to the executor as chattels do. See 32 *H. 8. c. 2.* It is a word of very great extent, comprehending whatever may be inherited or come to the heir; be it real, personal, or mixed, and though it is not holden, or lieth not in tenure. *Co. Lit. 6. 16.* And by the grant of hereditaments in conveyances, manors, houses, and lands of all sorts, rent, services, advowsons, &c. pass. *Co. Lit. 16. Hereditamentum est omne quod jure hereditario ad heredem transcat.*

Hereditaments are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen or handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only. For *land*, says *Coke*, comprehendeth in its legal signification any ground, soil, or earth whatsoever, as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. 1 *Inst. 4.* It legally includes also all castles, houses, and other buildings; for they consist, saith he, of two things; *land*, which is the foundation, and the *structure* thereupon: so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore one cannot

bring an action to recover possession of a pool, or other piece of water, by the name of *water* only; either by calculating its capacity, as for so many cubical yards: or by superficial measure, for twenty acres of water, or by general description, as for a pond, or water-course, or rivulet; but he must bring his action for the land that lies at the bottom, and must call it twenty acres of *land covered with water.* *Brownl. 142.* For water is a moveable wandering thing, and must of necessity continue common by the law of nature: so that there can only be a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of A.'s pond into B.'s, A. has no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable; and therefore in this there may be a certain substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum* is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word land includes not only the face of the earth, but every thing under or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing. *Co. Lit. 1.*

But the capital distinction is this; that by the name of a castle, messuages, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the nature of land, which is *nomen generalissimum*, every thing terrestrial will pass. 1 *Inst. 4, 5, 6.* By the name of a castle, one or more manors may be conveyed; and *é converso* by the name of a manor, a castle may pass. 1 *Inst. 5: 2 Inst. 31.* See 2 *Comm. 17. 19.*

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within the same. *Co. Lit. 19, 20.* It is not the thing corporate itself, but something collateral thereto; as a rent issuing out of lands, &c. or an office belonging to jewels, &c. Or, according to logicians, corporeal hereditaments are the substance which may be always seen, always handled; incorporeal here-

Hereditaments are but a sort of accidents, which inhere in, and are supported by, that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea, and abstract contemplation, though their effects and profits, which are totally distinct, may be frequently objects of our bodily senses. 2 *Comm.* 20. These incorporeal hereditaments are stated in the Commentaries to be principally of ten sorts: *Advowsons, Tithes, Commons, Ways, Offices, Dignities, Franchises, Liberties, or Pensions, Annuities, and Rents.* As to all which see those several titles in this Dict.

HEREDITARY RIGHT TO THE CROWN. See tit. *King*.

HEREDITARY REVENUE OF THE KING. See tit. *King*.

HEREFARE, Saxon.] *Profectio militaris et expeditionis.* See *Subsidy*. A military expedition, a going to warfare.

HEREGELD, Saxon.] *Pecunia seu tributum alendo exercitui collatum.* A tribute or tax levied for the maintenance of an army. Heregeld, or heregeld, is also sometimes synonymous with *Hindol*.

HERELLUS. A sort of little fish, perhaps minnows, or rather gudgeons. *Cowell, edit.* 1727.

HEREMITORIUM. A solitary place of retirement for hermits. *Mon. Angl. tom.* 3. *p.* 18.

HERENACH. An archdeacon. *Cowell, edit.* 1727.

HEREMONES, or HERETEAMS. Followers of an army. *Lamb Leges Inæ, cap.* 15. *In exercitu perditorum, &c.* from *here*, *exercitus*, and *team*, *sequela*.

HERESLITA, or HERESSA, or HERESIZ. A hired soldier, that departs without licence; derived from the Saxon *here*, *exercitus*, and *sliten*, to depart, according to *Co. 4. Inst.* f. 128.

HERESY, *hæresis*.] Among Protestants, is said to be a false opinion repugnant to some point of doctrine clearly revealed in Scripture, and either absolutely essential to the Christian faith, or at least of most high importance. 1 *Hawk. P. C. c.* 2. § 1.

Anciently, under the general name of heresy, there have been comprehended three sorts of crimes; *Apostacy*, when a Christian apostatises to Paganism. 2. *Witchcraft*. 3. *Formal Heresy*, which seems to be an apostacy from the established religion; for which, and the several ways of determining, and the difference between the civil and imperial laws, popish canons, and the laws of England, concerning heresy, see a full account in 1 *Hal. Hist. P. C.* 383. 410.

It seems difficult precisely to determine what error shall amount to heresy, and what not;

but the 1 *Eliz. c.* 1. which erected the High Commission Court, having restrained it from adjudging any points to be heretical but such as are so determined either by Scripture, or by one of the first four general councils, or by some other council, by express words of Scripture, or by parliament, with the ascent of the Convocation; these rules are at present generally thought the best directions concerning this matter. 2 *Hawk. P. C. c.* 2. § 2.

By the common law one convicted of heresy, and refusing to abjure it, or falling into it again after he abjured it, might be burnt, by force of the writ *de hæretico comburendo*, which issued out of Chancery upon a certificate of such conviction; but he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. *F. N. B.* 269: 3 *Inst.* 43; *Doctor and Student*, lib. 2. *c.* 29: 1 *Hawk. P. C. c.* 2. § 10.

This writ *de hæretico comburendo* is thought by some to be as ancient as the common law itself. However, it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him; so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council. *F. N. B.* 269: 1 *Hal. P. C.* 395.

But in the reign of Henry IV. when the eyes of the Christian world began to be open, and the seeds of the Protestant religion (though under the opprobrious name of Lollardy) took root in this kingdom, the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament (stat. 2 *H. 4. c.* 15.) which sharpened the edge of persecution to its utmost keenness. For by that statute the diocesan alone, without the intervention of a synod, might convict of heretical tenants; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By stat. 2 *H. 5. c.* 7. Lollardy was also made a temporal offence and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

Afterwards when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated; for though what heresy is was not then precisely



defined, yet we are told in some points what it is not. The stat. 25 H. 8. c. 14, declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case from mere suspicion; that is, unless the party be accused by two creditable witnesses, or an indictment for heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel; for in six years afterwards, by stat. 31 H. 8. c. 14. the bloody law of the *Six Articles* was made, which established the six most contested points of Popery:—transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were “determined and resolved by the most godly study, pain, and travail of his Majesty: for which his most humble and obedient subjects, the lords spiritual and temporal, and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks,” but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity, for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the Bishop of Rome, and establishing all other Romish corruptions of the Christian religion.

It would be unnecessary to perplex this detail with the various repeals and revivals of the sanguinary laws in the two succeeding reigns; we may therefore proceed directly to the reign of Queen Elizabeth, when the reformation was finally established. By stat. 1 Eliz. c. 1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; viz. as to the infliction of common censures in the ecclesiastical courts, and in case of burning the heretic, in the provincial synod only. 5 Rep. 23: 12 Rep. 56. 92. Sir Matthew Hale, indeed, is of a different opinion, and holds that such power resides in the diocesan also, though he agrees that in either case the writ *de heretico comburendo* was not demandable of common right, but grantable or otherwise at the king's discretion. 1 Hal. P. C. 405. But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being so to be determined, but only such tenets which have been heretofore so declared: 1. By the words of the canonical Scriptures; 2. By the first four general councils, or such others,

as have only used the words of the Holy Scripture: or 3. Which shall be hereafter so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty, than before; though it might not have been the worse to have defined it in terms still more precise and particular; as a man continued still liable to be burnt for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words of the canonical Scriptures.

For the writ *de heretico comburendo* remained still in force, and there are instances of its being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James I. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animæ* by virtue of stat. 29 Car. 2. c. 9; for in one and the same reign our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the Habeas Corpus Act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law. 4 Comm. 46. 49.

The following determinations will further explain the history and progress of proceedings in heresy; and those relative to the temporal courts seem to be yet undisputed law, as far as they are now applicable.

By the common law with us, the convocation of the clergy, or provincial synod, might, and frequently did, proceed to the sentencing of heretics, and, when convicted, left them to the secular power, whereupon the writ of *heretico comburendo* might issue. Bro. tit. Heresy: 2 Rol. Ab. 226.

It is also agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said that no spiritual judge who is not a bishop hath this power; and it hath been questioned, whether a conviction before the ordinary were a sufficient foundation whereon to ground the writ *de heretico comburendo*, as it is agreed that a conviction before the Convocation was. F. N. B. 269: 12 Co. 56, 57: 3 Inst. 40: Gibb. Codex, 401: 1 Hawk. P. C. c. 2. § 4: State Trials. vol. 2. 275.

It seems agreed that, regularly, the temporal courts have no cognisance of heresy, either to determine what it is, or to punish the heretic as such, but only as a disturber of the public peace; that, therefore, if a man be proceeded against as an heretic in the spiritual court *pro salute animæ*, and think himself aggrieved, his proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a pro-

hibition from a temporal one. 27 H. 8. 14. b. 5 Co. 58: *Hob.* 236.

Yet a temporal judge may incidentally take knowledge whether a tenet be heretical or not; as where one was committed by force of stat. 2 H. 4. c. 15. for saying, that he was not bound by the law of God to pay tithes to the curate; another for saying, that though he was excommunicated before men, he was not so before God; the temporal courts, on an habeas corpus in the first case, and in an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute, for the king's courts will examine all things which are ordained by statute. 3 Inst. 42: 1 *Roll. Rep.* 110: 2 *Bulst.* 300.

In *quare impedit*, if the bishop plead that he refused the clerk for heresy, it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action is brought. 5 Co. 58: 1 *And.* 191: 3 *Leon.* 199: 3 *Lev.* 314. See tit. *Quare Impedit*.

HERETABIE. See *Heritable*.

HERETIC, *hæreticus*. One that adheres to, and is convicted of heresy. See tit. *Heresy*.

HERETICO COMBURENDO. See *Heresy*.

HERETOCHE. From Sax. *here*, *exercitus*, and *togen*, *ducere*.] The general of an army; a leader or commander of military. *LL. Ed. Conf.* c. 35. *Ducange* says the *heretochu* were the barons of the realm. *Leg. H. 1. Du Fresne.* See tit. *Peer*.

HERETOCIAS. A leader or commander of military forces. See at large the name and office in the laws of *Edward the Confessor*, c. 35. *De Heretochiis*.

HERETUM. A court or yard; perhaps an orchard. *Hist. Dunelm.*

HEREZELD. See *Hergeld Heriot*.

HERGRIPA. Pulling by the hair; from the Sax. *her*, *capillus*, and *grypan*, *capere*. *Leg. H. 1. c. 94.*

HERIGALDS. A sort of garment. *Cowell*.

## HERIOT.

HERIOTUM, Sax. *heregeat*; *bellicus apparatus*, from *here*, *exercitus*, an army, and *geat*, *fusus*, *effusus*.] Signified originally a tribute given to the lord of the manor, for his better preparation for war. By the laws of Canutus, at the death of the great men of this realm, so many horses and arms were to be paid as they were in their respective life-times obliged to keep for the king's service. *Spelm.* Sir *Edward Coke* makes heriot, or heregat, (from *herus*, lord,) the lord's beast: and it is now taken for the best beast, whether it be horse, ox, or cow, that the tenant dies possessed of, due and

payable to the lord of the manor: and in some manors, the best goods, piece of plate, &c. *Kitch.* 133.

There is this difference between heriot and relief; heriot has been generally a personal, and relief always a predial service.

Moreover the heriot was paid on the determination on the tenancy—the relief on the accession of the heir. *Co. Copyh.* § 25. *Tr.* 33. 4: *Fitzh. Harriott*, pl. 6.

It appears, not only from *Spelman's* conjectures, but likewise from the laws themselves of King Canutus, that the Danes were the first inventors of heriots, and that it was a political institution of theirs, whereby the Danish tenants were to hold by the military service, and their arms and horses at their deaths to revert to the public; by that means putting the whole strength and defence of the kingdom into their hands: committing only the affairs of agriculture, and the improvement of the nation, to the English, though they thereby enjoyed greater freedom and immunities in their tenures than the Danish tenants. *Spelm.* 287.

Upon the plan of the Danish establishment did William the Conqueror fashion his laws of reliefs, when he ascertained the precise relief to be taken of every tenant of chivalry; and contrary to the feudal custom, and the usage of his own duchy in Normandy, required arms and implements of war to be paid instead of money. *LL. Guil. Cong.* c. 22, 23, 24. See this Dict. tits. *Relief*; *Tenure*, II. 5.

The Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day, in the shape of a double rent, payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary. *Lambard, Peramb. of Kent*, 492.

As to the several kinds of heriots, some are due by custom, some by tenure, and some by reservation on deeds executed within time of memory. Those due by custom are the most frequent, and arose by the contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant: and for which an heriot, as the best beast, best piece of household furniture, &c. became due and belonged to the lord, either on the death or alienation of the tenant, and which the lord may seize either within the manor or without, at his election. *Dyer*, 199. b: *Bro. tit. Heriot*, 2, 3.

Heriots are therefore now to be considered as usually divided into two sorts—heriot service and heriot custom. The former, being

such as are due upon a special reservation in a grant or lease of lands, therefore amount to little more than a mere rent. 2 *Saund.* 166. The latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom. *Co. Cop.* § 24. The latter, of which we are here principally to speak, are defined to be "a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land." 2 *Comm.* c. 28.

These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy, and perhaps is the only instance where custom has favoured the lord. For this payment was originally a voluntary donation or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villeinage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the one hand confirmed the tenant's interest, in exclusion of the lord's will, has, on the other hand, established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land that is held by service and suit of court; in which it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. *Bracton* speaks of heriots as frequently due on the death of both species of tenants, which he observes, *magis fit de gratia quam de jure*; in which *Fleta* and *Britton* agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant, though now the immemorial usage has established it as of right in the lord. *Bract.* l. 2. c. 36. § 9: *Fleta*, l. 3. c. 18: *Britton*, c. 69.

And it appears that on the death of a tenant, a heriot (either by custom or service) may be claimed, whether such tenant be a tenant in fee; *Bro. Har.* 5; for life; *Ibid.* *Kitch.* 133. a: 2 *Saund.* 165: 3 *Salk.* 181; for years; *Kitch.* 133. a; 2 *Saund.* 165; or at will; 2 *Bulst.* 196.

Where a copyhold tenement holden by heriot custom becomes the property of several as tenants in common, the lord is entitled to a heriot from each of them: but if the several portions are re-united in one person, one heriot only is payable. 6 *B. & C.* 2.

This heriot is, as has been said, sometimes the best live beast, or *averium*, which the tenant dies possessed of, which is particularly denominated the villein's relief, in the 29th law of King William the Conqueror; sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is a personal chattel, which immediately, on the death of the tenant who was the owner of it being ascertained, by the option of the lord becomes vested in him as his property; and is no

charge upon the lands, but merely on the goods and chattels. *Hob.* 60. The tenant must be the owner of it, or else it cannot be due; and, therefore, on the death of a feme-covert, no heriot can be taken; for she can have no ownership in things personal. *Kilw.* 84: 4 *Leon.* 239.

If the beast or good be due to the lord on the death or alienation of his tenant, the property in it becomes vested in the lord immediately on such death or alienation, whether the heriot be a heriot-custom or a heriot-service. *Brow. pl.* 2: *Plow.* 96. And, consequently, he may seize it wherever it may be found, or bring trover (1 *Show.* 81.), or detainue, (*Bro. Har. pl.* 9: *Kitch.* 133. b. 135. b: *Co. Copyh.* § 31.) against the person eloining or detaining it; and if it be reserved on a grant or lease, he may have an action of debt or covenant. 2 *Saund.* 167.

If the tenant at the time of death or alienation have no beast, the lord must of necessity lose his heriot; *Kilw.* 84. b.: *Carter*, 86: 4 *Leon.* 239. pt. 377: 2 *Comm.* 424; and therefore if the tenant parted with his property in his beasts before his death or alienation, he prevented the lord's claim. This was frequently done in order to defraud the lord of his rights previous to the 13 *Eliz. c.* 5. against fraudulent deeds, gifts, alienations, &c., by which it is enacted that gifts intended to defraud lords, &c. of their heriots, mortuaries, or reliefs, shall be void against the parties injured by the gifts.

In some places there is a customary composition in money, as 10s. or 20s. in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputable ancient custom; but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible. *Co. Cop.* § 31. See 2 *Comm.* 422. 4. c. 28: 2 *Watkins on Copyholds*, c. 6: and this *Dict. tit. Copyhold.*

The following extracts will further elucidate this subject.—Heriot-service is payable on the death of tenant in fee-simple; and heriot custom upon the death of tenant for life. *Co. Lit.* 185.

As, however, a heriot-service is due by reservation, it may be reserved on the grant of a less estate than fee-simple. 2 *Saund.* 165. It has been suggested that a distinction may be made thus: if the heriot be claimed after the death of a tenant for life or years, who was in by the grant of the lord, the lord might show the deed by which it was reserved, or otherwise prove the express reservation; but if the grant of the lands was so distant that the deed of creation cannot be shown, nor the precise term of reservation be otherwise proved,



the lord might prescribe; for it is not, by the terms, due by custom, as it is only claimed on the death of the tenant of particular lands, and not on the death generally of the tenants of the manor. And as the grant must of necessity have been in fee, the heriot shall be considered as due only on the death of such tenant in fee. *Watk. Cop. ii. c. 6.*

If an heriot is reserved upon a lease, it is heriot-service, and incident to the reversion. *Lutw. 1366, 7.* For a heriot goes with the reversion, as well as rent; and the grantee of the reversion shall have it. *2 Saund. 166.*

If the lord purchase part of the tenancy, heriot-service is extinguished; but it is not so of heriot-custom. *8 Rep. 105.*

Although a heriot reserved upon a lease is called a heriot-service; yet it is not like the case where a man holds land by the service of paying a heriot, &c. because where a heriot is reserved on lease, the proper remedy is either a distress, or action of covenant grounded on the contract; for the lessor cannot seize, as the lord of a manor may do, the beast of his tenant who holds of him by heriot-service. *Keilw. 82. 84. See post.*

There may be a covenant in leases for lives, &c. to render the best beast, or so much money for an heriot, at the election of the lessor; in which case the lessor must give notice which he will accept, before action can be brought for it, or a distress taken, &c. *2 Lill. Abr. 19.* When a heriot is to be paid by a certain life-holder of his own goods, an assignee is not liable to pay the heriot; his goods not being the goods of such life. *Cro. Car. 313: 2 Nels. 932.*

It hath been solemnly adjudged, that for a heriot-service, or for a heriot reserved by way of tenure, the lord may either seize or distrain; for when the tenant agrees that the lord shall on his death have the best beast, &c., the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves 20s. or a robe; for there the lessee has his election which he will pay, and being to do the first act the lord cannot seize, but must distrain. *Plow. 96. adjudged, Cro. Eliz. 589.*

For heriot-service, the lord may distrain any beast belonging to the tenant on the land: also it has been held, that the lord may distrain any man's beasts which are upon the land, and retain them until the heriot is satisfied. *Co. Lit. 185: Lit. Rep. 33: Cro. Car. 260.*

So it hath been ruled, that for a heriot custom or service the lord may seize as well in the manor as out; but if he distrain it must

be in the manor. See *1 Salk. 356: 1 Show. 81. S. P.: 3 Mod. 231.* But it is now stated as positive law, that for heriot custom, which *Clearys, Co. Cop. 525* lies only in prender, and not in render, the lord may seize the identical thing itself, but cannot distrain any other chattel for it. *Cro. Eliz. 590: Cro. Car. 260: 3 Comm. 15. c. 1.* And this is confirmed by the following authorities.

For heriot custom, the lord is to seize, not distrain; and he may seize the best beast, &c., though out of the manor, or in the king's highway, because he claims it as his proper goods, by the death of the tenant, which he may seize in any place where he finds it. *Kitch. 267: 2 Inst. 132: 2 Nels. Abr. 931: Plowd. 96; Keilw. 82. 84: 1 Salk. 356: Bro. tit. Heriot, 2, 3.*

And it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations. See *1 Show. 81: 3 Mod. 231.*

**HERISCHILD.** Military service, or knight's fee; from the Sax. *here*, an army, and *scyld*, scutum. *Cowell.*

**HERISCINDIUM.** A division of household goods; *non toties fieri placet herescindia mecum, i. e.* I am not pleased so often to divide my goods. *Blount.*

**HERISLIT.** Laying down of arms; from the Sax. *here*, exercitus, and *slitan*, scissura. *Blount. See Spelm.*

**HERISTALL.** A castle; from the Sax. *here*, an army, and *stall*, statio. *Blount, Spelm.*

**HERITABLE (and MOVEABLE) RIGHTS.**

The natural division of things is into corporeal and incorporeal, moveable and immoveable; the first including things corporeal and the objects of touch, the latter things incorporeal, as rights of property, succession, &c. In the Scotch law these distinctions are lost in those of heritable and moveable, drawn more from the rights of the heir and executor, than from the nature of the things themselves; in this view all rights to land or whatever is connected with land, as mills, fishings, titles, &c. are heritable. And whatever moves itself or can be moved, and is not united to land, is moveable. These general rules are subject to exception and modification. The distinction, in the law of England, is between real and personal property; real property answering nearly to the heritable rights in Scotland, and personal property moveable rights.

**HERITABLE BOND.** A bond in Scotland for money, joined with a conveyance of land or heritage, to be held by the creditor in security for the debt. See *Mortgage.*

**HERITABLE JURISDICTIONS.** Grants

of criminal jurisdiction heretofore bestowed on great families in Scotland, with a view to the more easy administration of justice. These, with other powers possessed by landed proprietors, were abolished by the effect of the 20 G. 2. c. 50; and see 20 G. 2. c. 43. and *Dalrymple on Feuds*, 292.

**HERMAPHRODITE**, *hermaphroditus*.] A person that is both man and woman. *Lit. Dict.* It is said that as hermaphrodites partake of both sexes, they may give or grant lands, or inherit as heirs to any, and shall take according to the prevailing sex. *Co. Lit.* 2. 7. See *tit. Descent, Grant, Heirs, &c.*

**HERMER**, among the Saxons was a great lord; from the Sax. *hera*, i. e. *major mare, dominus*.

**HERMINUS**, *mus ponticus*.] A mouse, of whose skins we have ermine. See *Fur*.

**HERMITAGE**, *hermitagium*.] The habitation of a hermit, a solitary place. *Mon. Angl.* 2 *par. fol.* 339. b.

**HERMITORIUM**. The chapel or place of prayer, belonging to a hermitage. *Cowell*.

**HERNECUS**. A heron. *Cowell*.

**HERNESSUM**. Tackle or furniture of a ship. *Pl. Parl.* 22 *Ed.* 1. It is also called *hernasium*, *harnas*, English *harness*, and signified any sort of furniture of a house, implements of trade, or rigging of a ship. *Howell*.

**HEROUDES**, heralds. *Knighdon*, p. 2571.

**HERRINGS**. None shall buy and sell herrings at sea, before the fishermen come into the haven, and the cable of the ship be drawn to the land. 31 *Ed.* 3. *stat.* 2. The vessels for herrings are to be marked with the quantity, and place where packed; and packets are to be appointed and sworn in all fishing ports, &c. under the penalty of 100*l.* 15 *Car.* 2. c. 16. For the acts regulating the herring fisheries, see *tit. Fish, Navigation Acts*.

**HERRING SILVER**. Seems to be a composition in money, for the custom of paying such a number of herrings, for the provision of a religious house. *Plac. Trin.* T. 18 *Ed.* 1.

**HERSHIP**. The illegally driving off cattle from the grounds of the proprietor. *Scotch. Dict.*

**HESIA**, an easement. *Chart Antiq.*

**HESTIA**, or **HESTHA**. A corruption of the Latin *hecta*.] A little loaf of bread. *Domesday*, *Cowell edit.* 1727. See *Rusca. Query? a capon*.

**HESTCORN**. Perhaps vowed or devoted corn. See *Mon. Angl. tom.* 2. p. 367.

**HEUVELBORGH**, from the Sax. *healf*, i. e. *dimidium*, and *borgh*, *debitor vel fidejussor*.] A surety for debt, *quia qui fidejubeat, debitorem se quodammodo constituit*. *Du Fresne*.

**HEXAM**, or **HEXHAM**; and **HEXAM-**

**SHIRE**. Anciently *Hagustald*; was a county of itself, and likewise a bishopric, endowed with great privileges: but by the 14 *Eliz. c.* 13. it is enacted, that the franchise of Hexham and Hexhamshire shall be within and accounted part of the county of Northumberland, saving to the bailiffs return of writs, &c.

**HEYBOTE**. See *Caybote*.

**HEYLOED**. Seems to signify a customary load or burden laid upon the inferior tenants for mending or repairing the heys or hedge. *Cowell*.

**HEYMECTUS**. A net for catching conies; a hay-net. *Placit. temp. Ed.* 3. *Cowell*.

**HIBERNAGIUM**. See *Ibernagium*.

**HIDAGE**, *hidagium*.] An extraordinary tax formerly payable to the king for every hide of land. *Bract. lib.* 2. c. 6. This taxation was levied, not only in money, but provision of armour, &c. And when the Danes landed at Sandwich, in the 994, King Ethelred taxed all his lands by hides, so that every 310 hides found one ship furnished; and every 8 hides found one jack and one saddle, to arm for the defence of the kingdom, &c. Sometimes the word *hidage* was used for the being quit of that tax; which was also called *hidegild*, and interpreted from the Saxon, a price or ransom paid to save one's skin or hide from beating. *Sax. Dict.* See *tit. Taxes*.

**HIDEGILD**. See *Hidgild*.

**HIDES**. See *Leather and Skins*.

**HIDE AND GAIN**, did anciently signify arable land. *Coke Lit.* 85. b. For of old, to gain the land was as much as to till it. See *Gainage*.

**HIDELANDS**, Sax. *hydelandes*.] *Terræ ad hydum seu tectum pertinentes*.

**HIDE OF LAND**, Sax. *hyde lands*, from *hyden*, *tegere*.] A ploughland (see *Plow-land*.) In an old manuscript it is said to be 120 acres. *Bede* calls it *Familiam*, and says it is as much as will maintain a family; others call it *Mansum*, *Manentem*, *Casatam*, *Carucatam*, *Sullingham*, &c. *Crompton*, in his *Jurisdickt. fol.* 222. says, a hide of land contains one hundred acres, and eight hides make a knight's fee. *Henry Hunting. Hist. lib.* 6. *fol.* 206. b. But Sir Edward Coke holds, that a knight's fee, a hide or plough land, a yard land, or an oxgang of land, do not contain any certain number of acres. *Co. Lit. fol.* 69. The distribution of England by hides of land is very ancient; for there is mention of them in the laws of King *Ina*, c. 14. *Spelm.* And see *Camd. Brit.*

**HIDEL**. A place of protection or sanctuary. See *stat.* 1 *H. 7. c.* 6: *Cowell, edit.* 1727.

**HIDGILD**, **HIDEGILD**, in *LL. Canuti R.* Sometimes written *Hinegild* and *Hudegeld*. From the Sax. *hide*, i. e. the skin: and *geld*, *pretium*.] The price by which a villen or

servant redeemed his skin from being whipped in such trespasses as anciently incurred that corporeal punishment. *Cowell. See Flea*, lib. 1. c. 47. § 20.

**HIERLOOM.** See *Heirloom*.

**HIGH TREASON.** See *Treason*.

**HIGHWAY.** See tit. *Ways*.

**HIGHWAY ROBBERY.** By the 23 H. 8. c. 1. and other subsequent statutes, a robbery in or near the king's highway was made a capital offence; and as robbery elsewhere was not subject to so heavy a punishment, it was material, under those statutes, to state correctly in the indictment, whether the offence was committed in or near a highway; while many points of much nicety arose as to the manner of such statement, and also as to what should be considered a highway robbery. 1 *Hale*, 535, 6. 2 *East*, P. C. 781, 5. But by the 3 and 4. W. & M. c. 9. all robberies, wherever committed, were made punishable with death, so that it became unnecessary to state the place, or if stated, to prove it as land. The last mentioned statute is now repealed, but the provisions of the present act (7 and 8 G. 4. c. 29. § 6.) are quite general, making no distinction of place. See tit. *Robbery*.

**HIGHWAYMEN.** See tit. *Robbery*.

**HIGLER.** A name frequently mentioned in our statutes, for a person who carries from door to door, and sells by retail, small articles of provisions, &c. They are laid under various restraints by the statute laws. See tits. *Game*, VI., *Hawkers*, *Holidays*.

**HIIS TESTIBUS.** [*These being Witnesses.*] Words anciently added in deeds, after *In cujus rei testimonium*: which witnesses were first called, then the deed read, and their names entered down: but this clause of *hiis testibus* in the deeds of subjects has been disused since the reign of King Henry VIII. Co. Lit. 6. See. tit. *Deed*.

**HINDENI HOMINES.** From the Sax. *hindene*, i. e. *societas*.] A society of men: in the time of the Saxons, all men were ranked into three classes, and valued, as to satisfaction for injuries, &c. according to the class they were in; the highest class were valued at twelve hundred shillings, and were called *twelf hindmen*; the middle class valued at six hundred shillings, and called *sexhindmen*; and the lowest at ten pounds, or two hundred shillings, called *tyghindmen*; their wives were termed *hindas*. *Brompt. Leg. Alfred*, c. 12. 30, 31.

**HINE, Sax.**] Rather perhaps *hind*. A servant, or one of the family; but is properly a term for a servant in husbandry, and he that oversees the rest is called the masterhine. 12 R. 2. c. 4.

**HINEFARE, Sax.** *hine*, a servant, and fare, VOL. II.

a going or passage.] Signifies the loss or departure of a servant from his master.

*Domesday*

**HINEGELD.** See *Hidgild*.

**HIRCISCUNDA.** The division of an inheritance among heirs. *Sax*.

**HIRD, domestica vel intrinseca familia.** *Inter Pla. Trin.* 12 Ed. 2: *Ebor.* 48. MS.

**HIREMAN.** A subject; from the Sax. *hiran*, i. e. *obedire*, to obey; or it may be one who serves in the king's hall, to guard him; from *hird*, *aula*, and *man*, *homo*. *Du Fresne: Cowell*.

**HIRING.** A contract by which a qualified property may be transferred to the hirer. Hiring is always for a price, stipend or recompence. By this contract the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods, &c. so hired, as soon as the time is expired or use performed, together with the price or stipend, either expressly agreed on by the parties, or left to be implied by law, according to the value of the service. 2 *Comm.* 454. See tits. *Bailment*, *Poor* (*Settlement of*).

**HIRST, or HURST.** A little wood. *Domesday*.

**HITH.** See *Hythe*.

**HLAFORDSOCNA.** The Lord's protection: from the Sax. *hlaforð*, *dominus*, and *socn*, *libertas*. *Nec dominus homini libero hlaforðsocnam prohibeat. Leg. Adelstan*, cap. 5.

**HLASOCNER.** The benefit of the law; from the Sax. *lega*, *lex*, and *socn*, *libertas*.

**HLOTH.** An unlawful company, from seven to thirty-five. *Qui de hloth fuerit accusatus, abneget per centum viginti hidas, vel se emendet*; that is, he who is accused for being at an unlawful rout, let him purge himself *tot sacramentatibus quot is qui 120 hidas aestimatur*; or, let him clear himself by a mulct, which is called *hlothbota*. *Cowell*.

**HLOTHBOTE.** A mulct set on him who is in a riot. From the Sax. *hloth*, *turma*, and *bote*, *compensatio*. See the preceding article.

**HOASTMEN.** An ancient gild or fraternity in New-castle-upon-Tyne, who were concerned in selling and shipping coal. They are mentioned in the 21 *Jac.* 1. c. 3. § 12.

**HOBLERS, or HOBILERS, hobellarii.** Were light horse-men; or certain tenants bound by their tenure to maintain a little light horse, for giving notice of any invasion made by enemies, or such like peril towards the sea-side: of which mention is made in stats. 18 Ed. 3. c. 7: 25 Ed. 3. st. 5. c. 8. See *Camd. Britan.* They were to be *ad omnem motum Agiles*, &c. And we read, *Duravit vocabulum usque ad aetatem H. 8, Gentzdamnes and hobelours. Spelm.: Pryn's Animad. on 4 Inst. f.*



307: *Hobeleris, Rot. Parl.* 21 Ed. 3. Sometimes the word signifies those who used bows and arrows. See *Thorn. anno* 1364. *Cowell.*

**HOCCUS SALTIS.** Seems to be a *hoke*, hole, or lessor pit of salt. See *Domesday* (*Worcestershire*).

**HOCKETTOR, or HOCQUETEUR.** An old French word for a knight of the post, a decayed man, a basket-carrier. 3 *Par. Inst. f.* 373: *Stat. Ragman. Cowell.*

**HOCK-TUESDAY-MONDAY.** Was a duty given to the landlord, that his tenants and bondmen might solemnize that day on which the English mastered the Danes, being the second Tuesday after Easter week. *Cowell.* See *Hokeday*.

**HOGA, HOGIUM, HOCH.** A mountain or hill, from the Germ. *hough, altus*; or from the Sax. *hou.* *Du Cange.*

**HOGASTER, hogastrum.]** A little hog; it also signifies a young sheep. *Fleta, lib.* 2 c. 79. See *Hoggacius*.

**HOGENHINE, Sax.]** See *Third-night.* *Awn-hind.*

**HOGGACIUS, HOGGASTER.** A sheep of the second year. *Regula computi domus de Farendon; MS. Cartular: Abbat. Glaston. MS.* In many, especially the northern parts of England, sheep, after they lose the name of lambs, are called *hogs*; as in Kent, *ta.* *Cowell.*

**HOGGUS, HOGIETUS.** A hog or swine, beyond the growth of a pig, *Chart. Antiq.*

**HOGS.** The keeping of hogs in any city or market-town is indictable as a public nuisance. *Salk.* 460. But it must be understood that they are kept in such inconvenient parts of the city or town that they cannot but greatly incommode the neighbourhood. 5 *Bac. Abr. Nuisance.*

It seems the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See tit. *London, Nuisance*, and the stat. 2 *W. & M. st.* 2. c. 8. § 20.

**HOGSHEAD.** A vessel of wine or oil, &c., containing in measure 63 gallons; i. e. half a pipe, and the fourth part of a ton. 1 *Ric.* 3. c. 13. repealed.

**HOKEDAY**, called otherwise *Hock Tuesday, dies Martis, quam quindenam Pasche vocant.]* Was a day so remarkable in ancient times, that rents were reserved payable thereon, and in the accounts of Magdalene College in Oxford, there is a yearly allowance *pro metheribus hockantibus* in some manors of theirs in Hampshire, where the men hock the women on Monday, and *contra* on Tuesday: the meaning of it is, that on that day the women, in merriment, stop the way with ropes, and pull passengers to them, desiring some-

thing to be laid out in pious uses. See *Hock-Tuesday-Monday.*

**HOLDES.** Bailiffs of a town or city, from the Sax. *hold, i. e. status, piositus.* Others are of opinion that it signifies a general; for hold in Saxon doth also signify summus imperator. *Leges Alured. de Weregildis.*

**HOLDINS.** The Scotch term for *Tenures.* See that tit.

**HOLDING OVER A TERM, &c.,** is where a term is expired, and premises are held by the tenant or person in possession, afterwards, against the will of the landlord, or person claiming the estate and possession.

By 4 *G. 2. c.* 28. in case any tenant for years &c., or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of such term, and demand made in writing for recovering possession of the premises, he shall pay for the time he continues at the rate of double the yearly value.

And by 11 *G. 2. c.* 19. § 18. where tenants give notice to quit, and do not deliver up possession at the time mentioned in the notice, they are liable to double rent. See further tits. *Distress, Ejectment, Lease, Rent.*

**HOLM.** Sax. *hulmus, insula amnica.]* An island or fenny ground, according to *Bede*; or a river island. And where any place is called by that name, or this syllable is joined with any other in the names of places, it signifies a place surrounded with water; as the Flat-holmes and Stepholmes in the Severn near Bristol; but if the situation of the place is not near the water, it may then signify a hilly place; holm in Saxon being also a hill or cant. *Cum duobus holmis in campis de Wedone. Mon. Angl. tom.* 2. p. 262.

**HOLOGRAPH DEED.** A deed written entirely by the grantor's own hand; which, on account of the difficulty with which the forgery of such a document can be accomplished, is held by the Scotch law valid without witnesses. *Bell's Scotch Law Dict.* See also tit. *Will.*

**HOLT, Sax.]** A wood; whence the names of towns beginning or ending with *holt*, as *Buckholt*, &c. denote that formerly there was great plenty of wood at those places.

**HOLY-DAYS and FASTING-DAYS.** See stat. *West.* 1. 3 Ed. 1. c. 51. as to holding assizes in Lent, and this Dict. tit. *Justices of Assize.*

Fairs and markets not to be kept on Sundays and principal festivals, except four Sundays in Autumn. 27 *H. 6. c.* 5. Shoe-makers in London not to sell or fit on their goods on Sundays, &c. 4 Ed. 4. c. 7: 1 *Jac.* 1. c. 22. § 29. (obsolete.) Penalty for not resorting to church on Sundays and holidays. 1 *Eliz. c.* 2. § 14.

By the 5 and 6 *Ed. 6. c. 3.* certain holidays were appointed, generally called *red letter days*.

State holidays are either appointed by act of parliament, or founded on ancient usage. The former are, the 5th of Nov. to be kept as a day of thanksgiving. 3 *Jac. 1. c. 1.*—The 29th of May, to be an anniversary thanksgiving. 12 *Car. 2. c. 14.*—The 30th of Jan. to be kept as an anniversary day of humiliation. 12 *Car. 2. c. 30. § 1.*—The 2d of September to be annually kept as a fast in London. 19 *Car. 2. c. 3. § 28.*

The latter are the birth-day, accession, proclamation, and coronation of the reigning monarch; and the birth-day of his consort, and the Prince of Wales.

Besides these, fast or thanksgiving days are occasionally appointed by his Majesty's proclamation.

By the 7 and 8 *G. 4. c. 15.* notice of the dishonor of bills of exchange and promissory notes payable on the day preceding Good Friday and Christmas-day, need not be given until the day after such Good Friday, &c.; and when Christmas-day falls on a Monday, such notice of bills, &c., payable on the preceding Saturday, need not be given until the Tuesday.

§ 2. Bills, &c. becoming due on fast or thanksgiving days, appointed by his Majesty's proclamation, are payable the day preceding; and notice of dishonor of such bills, and also of bills becoming due on such preceding day, need not be given until the day after such fast or thanksgiving days; and when these happen on a Monday, notice of bills, &c. due on the preceding Saturday need not be given until the Tuesday.

§ 3. Good Friday and Christmas-day, and such fast or thanksgiving days, are, as regards bills of exchange, &c., to be considered as Sundays.

By the 7 and 8 *G. 4. c. 53. § 16.* no holidays are to be kept in the offices of Exchequer, except Christmas-day and Good Friday, days appointed by his Majesty's proclamation for a general fast or thanksgiving, the anniversary of Charles the Second's restoration, the birth-day of the Prince of Wales, and likewise such days as shall be appointed by the lord high treasurer; or three or more of the Treasury commissioners.

By the 3 and 4 *W. 4. c. 51.* the holidays to be kept by the Customs are Christmas-day, Good-Friday, general fast and thanksgiving days, their Majesties' birthdays, and such holidays as are kept by the Dock Companies.

The 29th of May (King Charles II.'s restoration) is not a holiday in any of the law offices: and no officer can take an extraor-

dinary fee for business done on that day. The only allowed holidays are Candlemas or the Purification; the Ascension, or Holy Thursday; and St. John Baptist. 7 *T. R. 336.*

By the 3 and 4 *W. 4. c. 42. § 43.* none of the days mentioned in the 5 and 6 *Ed. 6.* shall be kept in the courts of common law, or in the offices belonging thereto, except Sundays, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter-week. ■

See further tit. *Sunday.*

**HOMAGE**, *homagium*.] Is a French word derived from *home*, because, when the tenant does his service to the lord, he says, *I become your man.* *Co. Lit. 64.*

The 12 *Car. 2. c. 24.* which was made to free the subject from the burthen of knight's service, and the oppressive consequences of tenures in *capite*, amongst other provisions wholly discharges all tenures from the incident of homage; not because homage itself was any grievance, but because, though not wholly, yet it was more properly an incident to knight's service which that statute abolished. But, while homage continued, it was far from being a mere ceremony; for the performance of it, where due, materially concerned both lord and tenant in point of interest and advantage. See 1 *Inst. 67. b.* in *n.* at length, as also 65. *a. 67. a. 68. a.* in the notes; and this Dict. tit. *Tenures.*

Notwithstanding the law on this subject is thus become obsolete, the curious reader may not be displeased with the following short extracts relative thereto.

In the original grants of lands and tenelements by way of fee, the lord did not only oblige his tenants to certain services, but also took a submission with promise and oath, to be true to him as their lord and benefactor; and this submission, which is the most honourable, being from a freehold tenant, is called homage. 17 *Ed. 2. st. 2.* The lord of the fee, for which homage is due, takes homage of every tenant, as he comes to the land or fee: but women perform not homage but by their husbands, as homage especially relates to service in war; and a corporation cannot do homage, which is personal, and they cannot appear but by attorney; also a bishop or religious man may not do homage, only fealty; but the Archbishop of Canterbury does homage on his knees to our kings at their coronation; and it is said the Bishop of the Isle of Man did homage to the *Earl of Derby*; though *Fulbeo* reconciles this, when he says that a religious man may do homage, but may not say to his lord, *Ego devenio hominester*, I become your man, because he has

professed himself to be *God's man*, but he may say, *I do unto you homage, and to you shall be faithful and loyal.* Britton, cap. 68.

Homage, say the ancient authors, is either by ligeance; by reason of tenure; or homage ancestral.

Homage by *ligeance* is inherent and inseparable to every subject. See tits. *Allegiance, Oaths.* Homage by tenure is a service made by tenants to their lords according to their estate; and homage *ancestral*, is where a man and his ancestors have time out of mind held their land of the lord by homage; and such service draws to it warranty from the lord, and acquittal of all other services to other lords, &c. *Bract. lib. 3: F. N. B. 269: Lit. sect. 85.* But, according to *Sir Edward Coke*, there must be a double prescription for homage *ancestral*, both in the blood of the lord and of the tenant; so that the same tenant and his ancestors, whose heir he is, is to hold the same land of the same lord and his ancestors, whose heir the lord is, time out of memory by homage, &c., and therefore there was but little land holden by homage *ancestral.* *Co. Lit. 100. b.* Though in the manor of Witney in Herefordshire, there was one *West* who held lands by this tenure. *Dict.*

Homage tenure is incident to a freehold, and none shall do or receive homage but such as have estates in fee-simple, or fee-tail, in their own right, or right of another. *Kitch. 131.* For it a maxim of law, that he who hath an estate but for term of life, shall neither do homage nor take homage. *Lit. § 90.*

Seisin of homage is seisin of fealty, and inferior services, &c. And the lord only shall take homage, and not the steward, whose power extends but to fealty. *4 Rep. 8.*

When a tenant made his homage to the lord, he was to be ungirt, and his head uncovered, and his lord was to sit, and he should kneel, and hold his hands together between his lord's hands, and say; *I become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, saving the faith that I owe to our Sovereign Lord the King:* and the lord, so sitting, should kiss the tenant, &c. *17 Ed. 3: Lit. § 85. See 2 Comm. 53. c. 4.*

When sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between simple homage, which was only an acknowledgment of tenure (*7 Rep. 7.*), and liege homage, which included fealty, and the services consequent upon it. Thus when Edward III. in 1329, did homage to Philip VI. of France, for his ducal dominions on that continent, it was warmly disputed of what

species the homage was to be, whether liege or simple homage. *1 Comm. 367. c. 10. See tit. Fealty.*

HOMAGE JURY. A jury in a court baron, consisting of tenants that do homage to the lord of the fee; and these by the feudists are called *pares curiæ*; they inquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the lord's court, &c. *Kitch. See tit. Court Baron.*

HOMAGER. One that does or is bound to do homage to another.

HOMAGIO RESPECTUANDO, *respecting of homage.* Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the king's tenant, notwithstanding his homage not done. *F. N. B. 269.* And the heir at full age was to do homage to the king, or agree with him for respecting the same. *New Nat. Br. 563.*

HOMAGIUM REDDERE, to renounce homage, when the vassal made a solemn declaration of disowning and defying his lord; for which, there was a set form and method prescribed by the feudal laws. *Bracton, lib. 2. cap. 35. § 35.* This is the meaning of a passage in *Richardus Hostoldnesis de Bello Standard, p. 321.* And of *Mut. Paris. sub anno 1188: Cowell, edit. 1727.*

HOMESOKEN, HOMSOKEN, or HAM-SOKEN, and HAMSOKA, from the Sax. *ham, i. e. domus habitatio*; and *soene, libertas, immunitas.*] The privilege or freedom which every man hath in his house; and he who invades that freedom is properly said *facere homesoken.* This we take to be what we now call burglary, a crime of a very heinous nature, because it is not only a breach of the king's peace, but a breach of that liberty which a man hath in his house, which should be his castle, and therefore ought not to be invaded. See *Bracton, lib. 3. tract. 2. c. 23: Du Cange, L. L. Canuti, cap. 39: Rastal:* and this *Dict. tit. Burglary.*

It is also taken for an impunity to those who commit this crime. *W. Thorn, p. 2030.*

In the Scotch law *hainsucken* is defined to be the crime of beating or assaulting a person in his own house, and was anciently punishable by death. *Bell's Scotch Law Dict. See 4 Comm. 223.*

HOMESTALL. A mansion-house. See *Frumstol.*

## HOMICIDE.

HOMICIDIUM.] The killing of any human creature. This is of three kinds; *justifiable, excusable, and felonious.* The first has no share of guilt at all; the second very little; but the third is the highest crime against the



law of nature that a man is capable of committing; 4 *Comm. c.* 14; from whence the plan of this title, and much of the subsequent matter is extracted.

Offences against the life of a man come under the general name of homicide, which in our law signifies the killing of a man by a man. 1 *Hawk. P. C. c.* 26. § 2: *Bracton, lib.* 3. c. 4.

**I. Of Justifiable Homicide.** 1. *By unavoidable Necessity; under command of the Law.* 2. *By Permission of Law; in advancement of Public Justice.* 3. *By Permission of Law; for the Prevention of Crimes.*

**II. Of Excusable Homicide per Infortunium, or Misadventure: See Defendo.** 1. *Wherein these are distinct.* 2. *Wherein they agree.*

**III. Of Felonious Homicide.** 1. *Self-Murder; or where the Offender is Felo de se.* 2. *Manslaughter.* 3. *Murder.* 4. *Petit Treason (now abolished).* 5. *Of Attempts to Murder.*

**I. 1. JUSTIFIABLE HOMICIDE** may be owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame; it is either of a public or private nature.

That of a public nature is such as is occasioned by the due execution or advancement of public justice. That of a private nature is such as happens in the just defence of a man's person, house, or goods, 1 *Hawk. P. C. c.* 28. § 3. The first of these may happen by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty, and therefore not only justifiable, but commendable; where the law requires it. But the law must require it, otherwise it is not justifiable: therefore, wantonly, to kill the greatest of malefactors, a felon, or a traitor, attainted or outlawed, deliberately, uncompelled, and extra-judicially, is murder. 1 *Hal. P. C.* 497: *Bract. fol.* 120.

There must be no malice coloured under pretence of necessity; for wherever a person, who kills another, acts in truth upon malice, and takes occasion, from the appearance of necessity, to execute his revenge, he is guilty of murder. 1 *Hawk. P. C. c.* 28. § 2: 2 *Roll. Rep.* 120, 121: *Kelynge*, 28: *Bract. lib.* 3. cap. 4.

Further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge

is guilty of murder. 1 *Hawk. P. C. c.* 28. § 4: 1 *Hal. P. C.* 427. And upon this account Sir Matthew Hale himself, though he accepted the place of a judge of the Common Pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times), yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission; a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to society as maintaining the boundaries of property.

The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony. 1 *Hawk. P. C. c.* 28: *Dalt. c.* 98: 10 *Co.* 76: 22 *Ed.* 4. 33. a: *H. P. C.* 35. And therefore, if the Court of Common Pleas give a judgment on an appeal of death (while that proceeding was in force), or justices of peace on an indictment for treason, and award execution, which is executed, both the judge who gives, and the officers who execute the sentence, are guilty of felony; because the courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without foundation. But if the justices of peace, on an indictment for trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence; for the justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void. 1 *Hawk. P. C. c.* 23. § 5, 6. and the authorities there cited.

Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it; which requisition it is that justifies the homicide. If another person does it of his own head, it is held to be murder, even though it be the judge himself. 1 *Hal. P. C.* 501: 1 *Hawk. P. C. c.* 28: *Dalt. Jus. c.* 150. It was formerly held, that any one might as lawfully kill a person attainted of treason or felony, as a wolf, or other wild beast; and anciently a person condemned in appeal of death, was delivered to the relations of the deceased, in order to be executed by them. 1 *Inst.* 128. b: 2 *Ass. pl.* 3: *S. P. C.* 13. a: 11 *H.* 4. 12. a: *Plowd. Com.* 306. b: 3 *Inst.* 131. But at this day it seems agreed, if the judge, who gives the sentence of death, and *à fortiori* if any private person execute the same, or if the proper officer himself do it without lawful command, they are guilty of felony. 27 *Ass.* 41: *Bro. Appeal*, 69: 1 *Hawk. P. C. c.* 28. § 8, 9.

This judgment must also be executed *servato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder; for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of a death to another, he then acts by his own authority, which extends not to the commission of homicide; and besides, this licence might occasion a very gross abuse of his power. *Finch, L. 31: 3 Inst. 52: 1 Hal. P. C. 501.* The king, indeed, may remit part of a sentence; as in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be hanged, the king (it hath been said) cannot legally order even a peer to be beheaded. *3 Inst. 52. 212. See Fost. 267;* where it is said that if the officer varieth from the judgment of his own head, and without warrant, or the colour of authority, he is guilty of felony at least, if not of murder; but not if he is authorized by custom or warrant from the crown. For although the king cannot by his prerogative vary the execution, so as to aggravate the punishment beyond the intention of the law, yet it doth not follow, that he who may remit part of the judgment, or wholly pardon the offender, cannot mitigate his punishment with regard to the pain or infamy of it. But this doctrine is more fully considered in another place. See *tit. Execution (Criminal), Judgment (Criminal), Pardon.*

2. Homicides committed for the advancement of public justice, are:—Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. *1 Hal. P. C. 494: 1 Hawk. P. C.: 1 East's P. C.* If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and in the endeavour to take him, kills him. *1 Hal. P. C. 494: 1 East's P. C. c. 5. § 74.*

So if a person having actually committed felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. So, if even an innocent person be indicted of a felony, where no felony was committed, yet if he will not suffer himself to be arrested by an officer who has a warrant, he may be lawfully killed, for there is a charge against him on record, to which he is bound on his peril to answer. *1 Hawk. P. C. c. 28. § 11, 12: 22 Ass. 55: Bro. Car. 87. 89: S. P. C. 13: 3 Inst. 221: Dalt. cap. 98: H. P.*

*C. 36: Crom. 30.* Where a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party and unavoidably kills him in the affray. *1 Hawk. P. C. c. 28. § 17: 1 Rol. Rep. 189: H. P. C. 37: 3 Inst. 56: Crom. 24. a.: Dalt. cap. 98.* And in such case, the officer is not bound to give back, but may stand his ground, and attack the party. *1 Hawk. P. C. c. 28. § 18: H. P. C. 31: 1 East's P. C. c. 5. § 74.* But no private person, of his own authority, can arrest a man for a civil matter, as he may for felony, &c. *1 Hawk. c. 28. § 19: Crom. 30. b.* Neither can the sheriff himself lawfully kill those who barely fly from the execution of any civil process. *1 Hawk. c. 28. § 20: H. P. C. 37: and see 1 East's P. C. c. 5.* See further *tit. Arrest; and post. III.*

In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob, are justifiable in killing them, both at common law and by the riot act. *Stat. 1 G. 1. c. 5: 1 Hal. P. C. 495: 1 Hawk. P. C. 161.*

Also where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. *1 Hal. P. C. 496.*

And in all these cases there must be an apparent necessity on the officer's side, *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, unless such homicide were committed: otherwise without such absolute necessity it is not justifiable.

If the champions in a trial by battle, killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth. *1 Hawk. P. C. 71.* See *tit. Battle; Wager of Battel;* now abolished by *stat. 59 G. 3. c. 41.*

And in case a stranger interposes to part the combatants in an affray, giving notice to them of that intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. *Fost. 272*

By the *7 and 8 G. 4. c. 53. § 40.* if any person armed with an offensive weapon shall assault or resist any officer of excise, &c. in the execution of his duty, such officer, &c. may oppose force to force; and if the person so assaulting, &c. shall be wounded or killed, and the officer, &c. be prosecuted, the latter may plead the general issue, and give the statute and the special matter in evidence. And jus-

tices of peace are directed to admit the officer, those who attack it from without, and endeavour to burn it. 1 Hawk. P. C. c. 28. § 22: &c. to bail.

And by the 3 and 4 W. 4. c. 53. § 9. for the prevention of smuggling, ships or boats liable to seizure not bringing to on being chased, may be fired into by the vessels of the royal navy, or vessels employed in the preventive service, and the officers and persons aboard are thereby indemnified and discharged from any indictment, &c. for so doing.

3. Such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it was expressly declared by stat. 24 H. 8. c. 5. See Bract. fol. 155. If any person attempts a robbery or murder of another, or attempts to break open a house in the night time, which extends also to an attempt to burn it, and shall be aided in their endeavouring to defend him or herself from such an attempt, the slayer shall be acquitted without impeachment of blood, and shall be justly acquitted. 1 Hal. P. C. 488. And the fact, that a man has not as he only does his duty, and only to the defence of a house, but a robbery or a murder, is a public offence. 1 Hawk. P. C. c. 28. § 23. 8. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. According to the opinion of Mr. Serjeant

Justification of the law. 1 Hal. P. C. 488. This is a homicide, a person who, without provocation, refuses not to any crime, but to a robbery or a murder, is a public offence. 1 Hawk. P. C. c. 28. § 23. 8. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of the manslaughter at least: as where divers rioters wrongfully withhold a house by force, and kill



other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 *Comm. c. 14.*

Y In these instances of justifiable homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is, therefore, to be totally acquitted and discharged, with commendation rather than blame. 1 *Hawk. P. C. c. 28. § 3: 1 East, P. C. c. 5.*

II. EXCUSABLE HOMICIDE.—1. Homicide *per infortunium*, or misadventure, is where a man doing a lawful act, without any intention of hurt, and using proper precaution to prevent danger, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. 1 *Hawk. P. C. c. 29: 1 East, P. C. c. 5: Fost. 258.*

So where a workman throws rubbish from a house, in the ordinary course of his work, by which a person underneath is killed, this is homicide by misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before; or if timely and proper warning were given to such as might be below. *Fost. 263.*

So where a person is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal (as by whipping), and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least; and in some cases (according to circumstances) murder; for the act of immoderate correction is unlawful. 1 *Hal. P. C. 473, 474.*

A tilt or a tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword-playing, the succeeding amusements of their posterity: and therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But if the king command or permit such diversion, it is said only to be misadventure: for then the act is lawful. 1 *Hal. P. C. 473: 1 Hawk. P. C. c. 29. § 8.* Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental death in the rider, for he has done nothing unlawful: but it is manslaughter in the person who whipped him; for the act was

a trespass, and at best a piece of idleness of inevitable dangerous consequence. 1 *Hawk. P. C. c. 29. § 3.*

Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such like accident, kills another, this is only homicide by misadventure. *Keilw. 108: Bro. Cor. 118. See Kelynge, 41.* So where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports, which are attended with no apparent danger of life, and intended only for the trial, exercise, and improvement of the strength, courage, and activity of the parties. *Keilw. 108, 136: Crom. 29. a.: 11 H. 7. 23. a.: 1 Hawk. P. C. 29. §§ 6, 7, 8.*

In general, if death ensues in consequence of an idle, dangerous, and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts. 1 *Hawk. P. C. c. 29. § 9: 1 Hal. P. C. 472: Fost. 261.* Thus, if a man, by shooting of a gun, or throwing stones in a city or highway, or other place where men usually resort, by throwing stones at another wantonly, in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at hand-sword without the king's command; or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. 1 *Hawk. P. C. 29. § 9: H. P. C. 31, 32. 58: Hob. 134.* But see *post*, III. 2.

Mr. Justice Foster includes under the term lawful every act not unlawful *in se*, although it may be *malum prohibitum*. *Fost. 259.*

But the distinction between *malum prohibitum* and *malum in se* has been disallowed in modern cases, in which it has been held, that a court of justice is bound to consider every act to be unlawful which the law has prohibited to be done. 3 *B. & A. 183: 2 B. & P. 371.*

Where the defendant came to town in a chaise, and before he got out of it, fired his pistols, which by accident killed a woman, *King, Ch. J.* ruled it to be manslaughter. *Str. 481.*

Homicide, in self-defence, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that already mentioned, *ante*, I. 3., as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault or

the 'like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the words *chance-medley*, or (as some rather choose to write it) *chaud-medley*; the former of which, in its etymology, signifies a casual affray, the latter an affray in the heat of blood or passion, both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the stat. 24 H. 8. c. 5., and our ancient books (*Stoun. P. C.* 16.), that it is properly applied to such killing as happens in self-defence, upon a sudden rencounter. *3 Inst.* 55. 57: *Post.* 275, 276. This right of natural defence does not imply a right of attacking: for instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice: they cannot therefore legally exercise this right of preventive defence, except in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide, by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon *chance-medley*, in self-defence), from that of manslaughter, in the proper legal sense of the word. *3 Inst.* 55. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. *Post.* 277. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant: and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy, yet between two fellow-subjects, the law countenances no such point of honour; because the king and his courts are the *iudices injurarum*, and will give to the party wronged all the satisfaction he deserves. *1 Hal. P. C.* 481. 483. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so

fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, he may kill his assailant instantly. *1 Hal. P. C.* 483. And as the manner of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A., this is murder; because of the previous malice and concerted design. *1 Hal. P. C.* 479. But if A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flees, and being driven to the wall, turns again upon B. and kills him; this may be *se defendendo*, according to some of our writers. *1 Hal. P. C.* 482. Though others have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. *1 Hawk. P. C. c.* 29. § 17.

It is agreed, that if a man strike another upon *malice prepense*, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. *1 Hawk. P. C. c.* 29. § 17: *S. P. C.* 15. a.: *Crom.* 28. a.: *Dalt. cap.* 98: *Kelynge*, 58: *H. P. C.* 42. See *1 East's P. C. c.* 5. § 53: and *post.* III. 3.

Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. *1 Hal. P. C.* 484.

Homicide *se defendendo*, or by self-defence, says Hawkins, seems to be, where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempts be made upon him in his own house), kills the person by whom he is reduced to such an inevitable necessity. *1 Hawk. P. C. c.* 22. § 13, &c.: *H. P. C.* 40: *S. P. C.* 15.

And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable necessity: but also he who, being assaulted in such a manner and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. *1 Hawk. P. C. c.* 29. § 14: *Bro. Cor.* 125: 43 *Ass.* 31: *3 Inst.* 56: *H. P. C.* 41.

And notwithstanding a person, who retreats from an assault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 *Hawk. P. C. c. 29. § 15: H. P. C. 41: Crom. 28: S. P. C. 15. a.*

And an officer who kills one who resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all. 1 *Hawk. P. C. c. 29. § 16: H. P. C. 41: 3 Inst. 56: Crom. 28. a.*

Y There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another; where one of them must inevitably perish. As, among others, in the case mentioned by Lord Bacon, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable, through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and endangering of each other's life. See *Bac. Elem. c. 5: 4 Conn. c. 14.*

According to Lord Hale, a man cannot excuse the killing of another who is innocent, under a threat of assault however urgent, endangering the losing his own life if he do not comply; but the person threatened or assailed ought rather to die himself than kill an innocent person. See 1 *Hale P. C. c. 5. § 61.*

2. The circumstances wherein these two species of homicide, by misadventure and self-defence, agree, are in the blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who is therefore not altogether faultless. And as to the necessity which excuses a man who kills another *se defendendo*, Lord Bacon entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. *Bac. Elem. c. 5.* For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed; and since, in quarrels, both parties may be, and

usually are, in some fault, and it scarcely can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original fault can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgments, by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

The penalty inflicted by our laws in these cases is said, by Sir Edward Coke, to have been anciently no less than death (2 *Inst.* 248. 315.); which however is with reason denied by later and more accurate writers. 1 *Hul. P. C. 423: 1 Hawk. P. C. c. 29. § 20: Fost. 282, &c.* It seems rather to have consisted in a forfeiture, some say, of all the goods and chattels, others of only part of them, by way of fine or *weregild*: which was probably disposed of, in *pious usus*, according to the humane superstition of the times, for the benefit of his soul, who was thus suddenly sent to his account, "with all his imperfections on his head." *Fost.* 287. But that reason having ceased, and the penalty (especially of a total forfeiture) growing more severe than was intended, in proportion as personal property became more considerable, the delinquent had, as early as our records will reach, a pardon, and a writ of restitution of his goods as a matter of course and right, only paying for suing out the same. *Fost.* 283: 2 *Hawk. P. C. c. 37. § 2.* And indeed to prevent this expense, in cases where the death notoriously happened by misadventure or in self-defence, the judges permitted (if they did not direct) a general verdict of acquittal. *Fost.* 288.

Now by stat. 9 *G. 4. c. 31. § 10.* it is enacted that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

It seems clear that neither of these homicides, by *misadventure* or *se defendendo*, are felonious, because they are not accompanied with a felonious intent, which is necessary in every felony. 1 *Hawk. P. C. c. 29. § 19: 3 Inst. 56: 2 Inst. 149.*

And from hence it seems plainly to follow, that they were never punishable with loss of life; and the same also farther appears from the writ *de odio et atia*, by virtue whereof, if any person committed for killing another, were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death, for what is



owing rather to his misfortune than his fault. *1 Hawk. P. C. c. 29. § 20.*

It is true indeed, that some of our best authors have argued from the statute of *Murbridge, ch. 26.* which enacts, that *murdrum de cætero non adjudicetur, ubi infortunium tantummodo adjudicatum est, &c.* that, before this statute, homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death. *1 Hawk. P. C. c. 29. § 21: 2 Inst. 56: S. P. C. 16.*

But to this it may be answered, that murder in those days signified only the private killing of a man, by one who was neither seen nor heard by any witness; for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an Englishman: otherwise it was presumed he was a Dane or Norman, who in those days were often privately made away with by the English. And it being a doubt whether homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of that statute to settle this question. *1 Hawk. P. C. c. 29. § 22: Bract. 134. b. 135. a.: Ke. lynge, 121.*

III. FELONIOUS HOMICIDE is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another person.

1. SELF-MURDER is ranked among the highest crimes, being a peculiar species of felony; a felony committed on one's self. The party must be in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are too apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, and therefore if a real lunatic kills himself in a lucid interval, he is *felo de se* as much as another man. *1 Hale, P. C. 412.*

In this as well as all other felonies, the offender must be of the age of discretion, and *compos mentis*; and, therefore, an infant killing himself under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de*

*se. 1 Hawk. P. C. c. 27. § 1: Crom. 30. a. b. 31. a: H. P. C. 28: Dalt. c. 92: 3 Inst. 54.*

Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such an attempt unwillingly kills himself, shall be judged in the eye of the law a *felo de se*; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer. *1 Hawk. P. C. c. 27. § 4: Dalt. c. 92. 144: 44 Ed. 3. 44: 44. Ass. 55: Bro. Cor. 12. 14: S. P. C. 16: Pult. 119. b: Crom. 28: 1 Hale, P. C. 412.*

Where a woman took poison to produce abortion, and died, it was held she was guilty of self-murder, whether she was quick with child or not. In the same case it was decided that a person who furnished her with the poison for that purpose, but was absent when she took it, was an accessory before the fact to the *felo de se*, and that he could not be tried for a substantive felony under the 7 *G. 4. c. 64. § 9*: as that section only makes accessories so triable who might have been tried before the act. *1 Moo. C. C. 356.*

He who kills another upon his desire or command, is in the judgment of the law as much a murderer as if he had done it merely of his own head: and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, being against the law of God and man. *1 Hawk. P. C. c. 27. § 6: Keilo. 136: Moor, 754.*

Where two persons agree to die together, and one at the persuasion of the other buys poison and mixes it in a potion, and both drink of it, it is held the better opinion that the one who dies shall be adjudged *felo de se. 1 Hawk. P. C. c. 27. § 6.*

A *felo de se* forfeits all chattels real or personal which he hath in his own right; and all chattels real whercof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession to which he was entitled jointly with another, on any account, except that of merchandize. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed as executor or administrator. *1 Hawk. P. C. c. 27. § 7.* The offence was never attended with corruption of blood, and the lands of inheritance of a *felo de se* are not forfeited, or his wife barred of her dower. *1 Hawk. P. C. c. 27. § 8: Plowd. Com. 261. b. 262. a: 1 Hal. P. C. 413.* The will of a *felo*

*de se* therefore becomes void as to his personal property, but not as to his real estate. *Plowd.* 261.

No part of the personal estate is vested in the king, before the self-murder is found by some inquisition; and consequently, the forfeiture thereof is saved by a pardon of the offence before such finding. 5 *Co.* 110. *b.*: 3 *Inst.* 54: 1 *Saund.* 362: 1 *Sid.* 150. 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles are avoided. *Plowd. Com.* 260: *H. P. C.* 29: 5 *Co.* 110: *Finch, L.* 216. All such inquisitions ought to be by the coroner *super visum corporis*, if the body can be found; and an inquisition so taken, as some say, cannot be traversed. *H. P. C.* 29: 3 *Inst.* 55. See 1 *Hawk. P. C. c.* 27. § 9, 10, 11. But see 3 *Mod.* 238.

But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of peace; (who by their commission have a general power to inquire of all felonies;) or in the King's Bench, if the felony were committed in the county where that court sits: and such inquisitions are traversable by the executor, &c. 1 *Hawk. P. C. c.* 27. § 12: 3 *Inst.* 55: *H. P. C.* 29: 2 *Lev.* 141.

Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact: and in conclusion add, that the party in such manner murdered himself. 1 *Hawk. P. C. c.* 27. § 13: 3 *Lev.* 140: 3 *Mod.* 100: 2 *Lev.* 152. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form. 1 *Sid.* 225. 259: 3 *Mod.* 101: 1 *Keb.* 907: 1 *Hawk. P. C. c.* 27. § 15.

If a person is unduly found *felo de se*, or on the other hand found to be a lunatic, when in fact he was not so, and therefore *felo de se*, although a writ of *melius inquirendum* will not be granted, yet the inquisition is traversable in the King's Bench. 3 *Mod.* 238.

The law formerly required a *felo de se* to be buried in a highway, with a stake driven through the body; but now by the 4 *G.* 4. *c.* 52. the remains are to be privately buried in the churchyard or burial ground of the parish between the hours of 9 and 12 at night. The act does not authorize the performing of the rites of Christian burial, which are forbid to be used by the rubric in the Common Prayer book, (confirmed by 13 and 14 *C.* 2. *c.* 4.) upon the interment of such as have laid violent hands upon themselves.

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into manslaughter and murder. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles; and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of passion: murder from the wickedness of the heart.

2. MANSLAUGHTER is therefore thus defined: the unlawful killing of another, without malice, either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. 1 *Hal. P. C.* 466. And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation. But there may be accessories after the fact. 1 *Hale P. C.* 450: 1 *East's P. C. c.* 5. § 123. See this Dict. tit. Accessory: 2 *Hawk. P. C. c.* 29. § 4.

As to the first, or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. 1 *Hawk. P. C. c.* 31. § 29, 30. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it, to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. *Kelynge*, 135. But in this, and in every other case of homicide, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Fost.* 296. So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, this is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. 1 *Hal. P. C.* 486. It is however the lowest degree of it, and therefore in such a case, the court directed the burning in the hand to be gently indicted, because there could not be a greater provocation. *Rumyn.* 212. Manslaughter therefore on sudden provocation differs from excusable homicide *se defendendo* in this; that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no

necessity at all, being only a sudden act of revenge. 4 *Comm. c. 14.*

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief 3 *Inst.* 56. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstance under which the original act was done; if it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. *Kel.* 43: 3 *Inst.* And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. 4 *Comm. c. 14.* See *post*, 3; more at large.

Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by 16 *G. 2. c. 31.* if any waterman between Gravesend and Windsor receives into his boat of barge a greater number of persons than the act allows, and any passengers shall then be drowned, such waterman is guilty of felony; and shall be transported as a felon.

Next as to the punishment of this degree of homicide; the crime of manslaughter amounts to felony. And by 9 *G. 4. c. 31. § 9.* (which repealed the 1 *J. 1.* and the other statutes relating to this offence) persons convicted of manslaughter are liable to be transported for life, or not less than 7 years, or to be imprisoned with or without hard labour, in the gaol or house of correction, not exceeding 4 years, or to be fined.

anciently applied only to the secret killing of another; *Dial de Scacch. l. 1. c. 10.* which the word *moerda* signifies in the Teutonic language; and it was defined, "*homicidium quod, nullo vidente, nullo sciente, clam perpetratur.*" *Glanv. lib. 14. c. 3:* for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement: which amercement itself was also denominated *murdrum*. *Bract. l. 3. tr. 2. c. 15. § 7: stat. Marl. c. 26: Fost. 281.* The word *murdre* in our old statutes also signified any kind of concealment or stifling: so in the stat. of Exeter, 14 *Ed. 1.* "*je riens ne celerai ne souffrirai etre celé ne murdré,*" which is thus translated in *Fleta, l. 1. c. 18. § 4:* "*Nullam veritatem celabo, nec celari permittam, nec murdruri.*" And the words "*pur murdre le droit*" in the articles of that statute, are rendered in *Fleta, ibid. § 8.* "*pro jure alicujus muirdrendo.*" The word *murdrum*, (by some derived from the Saxon *morth*,) whence, as it is said, comes the barbarous Latin *mordrum*, and *murdrum*, in French *meurtre*; though the word *murdrure* evidently comes from the Latin *morti dare*, was a word in use long before the reign of King Canutus, which some would have to signify a violent death; and sometimes the Saxons expressed it by *morthdæd* and *morth weorc*, a deadly work: but the Sax. *morth* relates generally to *mors*.

The usage of fining the vill or the hundred was common among the ancient Goths, in Sweden and Denmark, who supposed the neighbourhood, unless they produced the murderer, to have perpetrated, or at least connived at, the murder; and, according to *Bracton*, it was introduced into this kingdom by King Canute to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans. *Bract. l. 3. tr. 2. c. 15: 1 Hal. P. C. 447.* And therefore if, upon inquisition had; it appeared that the person slain was an Englishman, (the presentment whereof was denominated *Englescherie*) the county seems to have been excused from this burthen. *Bract. ubi supra.* See this Dict. tit. *Englecery*. But, this difference being totally abolished by stat. 14 *Ed. 3. c. 4.* we must define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction. See *Stanf. P. C. l. 1. c. 10.* as also 1 *Hawk. P. C. 31.* where it is said that in the ancient times above alluded to, the open killing of a man through anger or malice was not called murder; but voluntary homicide. *Bract. 121. a. 134. b. 135. a: Kel. 121.*

3. The term of MURDER (as a crime) was

The law concerning *Englescherie* having



been abolished by stat. 14 Ed. 3. c. 4 the killing of an Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and stat. 13 Ric. 2. c. 1. which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and, in the body of the act, expresses the same by *murder*, or killing by *await, assault, or malice prepensed*. 1 Hawk. P. C. c. 31. § 2: S. P. C. 18. b. 19. a.

By *murder*, therefore, says *Hawkins*, at this day, we understand, the wilful killing of any subject whomsoever, through *malice forethought*, whether the person slain be an *Englishman* or foreigner. 1 Hawk. P. C. c. 31. § 3.

*Murder* is thus defined or rather described, by *Sir Edward Coke*: "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either expressed or implied." 3 Inst. 47: 1 Hale, P. C. 424. 448. 9: 1 Hawk. P. C. c. 31. § 3: *Fost.* 256: 1 *East's P. C. c.* 5. § 2.

The best way of examining the nature of this crime will be by considering the several branches of the above definition; all of which are included with other matters in the following division of the subject.

- I. Of the Persons committing Murder.
- II. What is an unlawful killing.
- III. Of the Persons murdered.
- IV. Of the Malice necessary to constitute the Offence.
- V. Where it is committed under Provocation.
- VI. Where in the Prosecution of some unlawful Act:
- VII. Where in resisting a civil or criminal Arrest:
- VIII. Of Aiders and Abettors.
- IX. The Time within which the Death must take place.
- X. Of the Place where the crime is committed, and where it may be tried.
- XI. Of the Punishment, &c.

I. Murder must be committed by a person of sound memory and discretion: for lunatics or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil. See tit. *Idiots*.

One under the age of discretion, or non compos mentis, cannot be guilty of murder; though if it appears by circumstances, as that

the infant did hide the body, &c., it is felony. H. P. C. 43: 3 Inst. 46. 54.

If an infant under twelve years old hath an extraordinary wit, that it may be presumed he knows what he does, and he kill another, it may be felony and murder; otherwise it shall not. 3 H. 7. 13: *Plowd.* 191.

See the case of *William York* at Bury Summer assizes in 1741, *Foster's Rep.* 70. and this Dict. tit. *Infant*, I.

II. What is an unlawful killing.—Next, murder happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. See 1 Hal. P. C. 425. and *post*, 5.

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstances, as if a wound be alleged to be given by a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial. 3 Inst. 319: 2 Hal. P. C. 185. Of all species of death, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought; 3 Inst. 481. And, therefore, by the 22 H. 8. c. 9. it was made treason, and was punishable by boiling to death; but this act was repealed by the 1 E. 6. c. 12. § 10., which reduced the crime again to murder.

There was also by the ancient common law, one species of killing held to be murder which may be dubious at this day, as there hath not been an instance wherein it hath been held to be murder for many ages past; namely, by bearing false witness against another, with an express, premeditated design to take away his life, so as the innocent person be condemned and executed. *Mirror*, c. 1. § 9. 19: *Brit. c.* 52: *Bracton*, l. 3. c. 4. There is no doubt but this is equally murder in foro conscientia and in principle of law, as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives,) has not yet punished it as such. See 3 Inst. 48: *Fost.* 131: 4 *Comm.* 196: 1 *East's P. C. c.* 5. § 94. n: and this Dict. tit. *Perjury*.

A gaoler knowing a prisoner to be affected with an epidemic distemper, confines another prisoner, against his will, in the same room with him, by which he catches the infection, of which the gaoler had notice, and the prisoner dies; this is a felonious killing. *Stra.* 856: 9 *St. Tr.* 146. So to confine a prisoner in a low, damp, unwholesome room, not allowing him the common conveniences, which the deconencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies; this is also a felonious homicide. *Stra.* 884: *Ld. Raym.* 1578. For though the law invests gaolers with all necessary powers, for the interests of the commonwealth, they are not to behave with the least degree of wanton cruelty to their prisoners, *O. B.* 1784. p. 1177. And those were deliberate acts of cruelty, and enormous violations of the trust the law reposes in its ministers of justice. *Fost.* 322.

In some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress of imprisonment compels a man to accuse an innocent person, who, on his evidence, is condemned and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof. 1 *Hawk. P. C.* 31. § 7: *S. P. C.* 36: 3 *Inst.* 91: *Dalt. c.* 93: *Plowd. Com.* 474.

If a man, however, does such an act, of which the probable consequence may be, and eventually is death, such killing may be murder, although no stroke be struck by himself, and though no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died. 1 *Hawk. P. C.* 31. § 5. Of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it. 1 *Hal. P. C.* 132. And of the parish officers who shifted a child from parish to parish, till it died for want of care and sustenance. *Palm.* 545. And where a child was placed in a hog-stye where it was devoured. 1 *East's P. C.* c. 5. § 13. So also, in general, any one who, assuming to take care of another, refuses them necessary subsistence, or by any other severity, though not of a nature to produce immediate death, as by putting a party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder. And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation, and reflection. *Self's*

*Case*, 1 *East's P. C.* c. 5. § 13: and *Squire's Case*, *Staffordshire Ass.* 1799: *Russell on Crimes*, lib. 3. c. 1.

If a man bath a beast that is used to do mischief; and he, knowing it, suffers it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is as much murder, as if he had incited a bear or dog to worry them. See 1 *Hal. P. C.* 431.

*Hawkins* says, that he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself killed him; and this is agreeable to the Mosaic law. However, it is agreed by all, such a person is guilty of a very gross misdemeanor. 1 *Hawk. P. C.* c. 31. § 1: *Fitz. Corone*, 311: *S. P. C.* 17. a: *Crom.* 24. b. *Dalt. cap.* 93: *Pult.* 122. b: *H. P. C.* 53: *Exodus*, c. 2. v. 29.

If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action, for neglect or ignorance. *Mirror*, c. 4. § 16. But it hath been holden, that if he is not a regular physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least. *Britt. c.* 5: 4 *Inst.* 251. Yet Sir Matthew Hale very justly questions the law of this determination. 1 *Hale, P. C.* 430.

And it seems that if a person, whether he be a regular practitioner or not, honestly and bona fide performs an operation which causes the patient's death, he is not guilty of manslaughter; 3 *C. & P.* 333; but he is if he be guilty of criminal misconduct arising from gross ignorance or inattention. 3 *C. & P.* 635; 5 *C. & P.* 333. In a late case, *R. v. Long*, 4 *C. & P.* 398. where the defendant, who was not a regular practitioner, killed a woman by an application, and the jury found that he entertained a criminal disregard for life; he was convicted of, and punished for, manslaughter. See also 4 *C. & P.* 423: *Moo. C.* 346.

A question has been raised whether an indictment for murder could be maintained for killing a female infant by ravishing her, but

the point was not decided; the judges to whom the point was referred gave no opinion, as the indictment was held defective in not having stated that the prisoner gave the deceased a mortal wound. *Ladd's Ca.* 1 *Leach*, 96: 1 *East*, P. C. 226.

III. *Of the persons murdered.*—The person killed must be “a reasonable creature in being, and under the king’s peace,” at the time of the killing: therefore to kill an alien, a Jew, or an outlaw, who are all under the king’s peace and protection, is as much murder as to kill the most regular born Englishman, except he be an alien enemy in time of war. 3 *Inst.* 50: 1 *Hal. P. C.* 433. To kill a child in its mother’s womb was formerly not held murder, but a great misprision. 3 *Inst.* 50: 1 *Hal. P. C. c.* 31. § 16. But see 1 *Hawk. P. C.* 433.

By various statutes, now repealed, the crime was made a capital felony: and by the 9 *G.* 4 c. 41. § 13. any one administering poison, or using any other means to procure the miscarriage of any woman quick with child, and every person counselling, aiding, or abetting, such offender, shall suffer death. In case the woman is not proved to be quick with child, the offence is felony punishable with fourteen years’ transportation or imprisonment. And by § 14. a woman secreting the body of her child to conceal its birth, is guilty of a misdemeanor, punishable with two years’ imprisonment; and on an indictment for murder she may be acquitted of the murder, and convicted of the misdemeanor. See tit. *Bastard*, II. 2.

It seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards kills it in pursuance of such advice, he is an accessory to the murder. 1 *Hawk. P. C. c.* 31. § 17: *Dyer*, 186: 3 *Inst.* 51.

IV. *Of the malice necessary to constitute the crime.*—The killing must be committed with malice aforethought, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing, and this malice prepenſe, *malicia præcognitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general, the dictate of a wicked, depraved, and malignant heart: *Fost.* 256: *un disposition à faire un mal chose*: 2 *Rol. Rep.* 461: and it may be either express or implied in law. Express is, when one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 *Hal. P. C.* 451. This takes in the case of deliberate duelling,

where both parties meet avowedly with an intent to murder; thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power, either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also. 1 *Hawk. P. C. c.* 31. § 21. *et seq.*

As to the first instance of this kind, it seems agreed, that wherever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act in defiance of the laws, he must at his peril abide the consequences thereof. 1 *Hawk. P. C. c.* 31. § 21: 1 *Bulst.* 86, 87: 2 *Bulst.* 147: *Crom.* 22. b: 1 *Rol. Rep.* 360: 3 *Bulst.* 171: *H. P. C.* 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 *Hawk. P. C. c.* 31. § 22: 3 *Inst.* 51: *H. P. C.* 48: *Kelynge*, 56: 1 *Lev.* 180.

And wherever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after quarrel he fall into other discourse, and talk calmly thereon; or perhaps, if he has so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c. 1 *Hawk. P. C. c.* 31. § 23: *Kelynge*, 56; 1 *Sid.* 177: 1 *Lev.* 180.

The law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds, are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the persons killed are also equally guilty, in respect of that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them:



but perhaps the contrary opinion is the more plausible; for it seems too severe a construction to make a man by such reasoning the murderer of his friend, whom he was so far from intending a mischief, that he was ready to hazard his own life in his quarrel. 1 *Hawk. P. C. c. 31. § 32: H. P. C. 51: Dalt. c. 93.*

But there is no doubt at the present day, that the second of the party killed is equally guilty of murder with the principal and his second. See the charge of Mr. Justice Pattison in a recent trial at Exeter, 10 *Law Mag.* 383.

If A. on a quarrel with B. tells him that he will not strike him, but that he will give B. a pot of ale to strike him, and thereupon B. strikes, and A. kills him, he is guilty of murder; for he shall not elude the justice of the law by such pretence to cover his malice. 1 *Hawk. P. C. c. 31. § 24: H. P. C. 48.*

In like manner, if B. challenge A. and A. refuse to meet him; but in order to evade the law, tells B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B. he is, in the opinion of *Hawkins*, guilty of murder; unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. 1 *Hawk. P. C. c. 31. § 25: Crom. 22. b: H. P. C. 48.*

And at this day it seems to be settled, that if a man assaults another with malice prepense, and after he driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent. *Hawk. P. C. c. 31. § 26: Crom. 22. b: Dalt. c. 93: H. P. C. 47: Kelynge, 58: Mawgridge's case.*

If A. and B. meet deliberately to fight, and A. strike B. and pursue B. so closely, that B. in safeguard of his life kills A. this is murder in B. because their meeting was a compact and an act of deliberation, in pursuance of which all that follows is presumed to be done. 1 *Hale, 452. 480. See 1 East's P. C. c. 5. § 54.*

It hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another as to make a push at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended not to fight with him but to kill him, which violent revenge is no more excused by such slight provocation,

than if there had been none at all. 1 *Hawk. P. C. c. 31. § 27: Crom. 23. a. b: Dalt. c. 93: Kelynge, 61: Mawgridge's case.*

But it is said, that if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himself, with like hazard to both, he shewed that his intent was not so much to kill, as to combat with the other; in compliance with those common notions of honour, which, prevailing over reason during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense. *Hawk. P. C. c. 31. § 28: Kelynge, 55. 61. 131: Rol. Rep. 461.*

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kills the other, he is guilty of manslaughter only, because he did it in the heat of blood. 1 *Hawk. P. C. c. 31. § 29: H. P. C. 48: 3 Inst. 51.*

And where after mutual blows between the defendant and the deceased, the defendant knocked the deceased down, and after he was on the ground stamped upon his stomach and belly with great force and thereby killed him, this was held to be manslaughter only. *Russ. & Ry. 166.* Where the defendant and others quarrelled in a public-house, and there was an affray amongst them, and the defendant threw the deceased on the ground, and was beating him severely, when some person called out to him not to murder the man, he said, "Damn him, I will murder him;" upon which one of the party gave the defendant a blow and knocked him down; the defendant then went into the yard, and in about a minute returned in a violent passion with a pitchfork; in the mean time the deceased had armed himself with a fire shovel, and had struck one of the defendant's party on the head, when the defendant not having seen the blow by the deceased, returned from the yard, and from behind ran one of the prongs of the fork into the deceased's temple, of which he died; it was doubted by some of the judges whether this was more than manslaughter, and accordingly the defendant was recommended for a conditional pardon. *Rez v. Rankin, Russ. & Ry. 43.*

And such an indulgence is shown to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circum-

stances of the fact. 1 *Hawk. P. C. c. 31. § 30*: *Crom. 33. a*: *Dalt. c. 93*: *H. P. C. 49*: 1 *Roll. Rep. 360*.

Any formed design of doing mischief may be called malice, and therefore not only such killing as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be of malice prepense or aforethought, and consequently murder. 1 *Hawk. P. C. c. 31. § 18*: *Kelynge, 127*: *Stran. 766*.

Neither shall he be guilty of a less crime who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. *Id. Rayn. 143*: 1 *Hawk. P. C. c. 29. § 12*.

And it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. *H. P. C. 32. 44*: 3 *Inst. 59*: *Dalt. c. 93. 97*: 11 *H. 7. 23. a*: *Bro. Coro. 229*.

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kill a man, it is murder in them all, because of the unlawful act, the *voluntarius persequutus*, or evil intended beforehand. 1 *Hawk. P. C. c. 31. § 46*.

Murder occasioned through an express purpose to do some personal injury to him who is slain, is properly said to be of express malice: such as happens in the execution of an unlawful action, principally intended for some other purpose, and not expressed in its nature to do a personal injury to him in particular that is killed, is most properly malice implied. *Act. 129, 130*.

In many cases where no malice is expressed, the law will imply it; as where a man wilfully poisons another, the law presumes malice, though no particular enmity can be proved. 1 *Hal. P. C. 455*. See farther, *post, V*.

V. Where it is committed under provocation.—If upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper beat a boy, that was stealing wood, to a horse's tail

and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died: these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 1 *H. P. C. 454, 473, 474*.

And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gesture only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. 1 *Hawk. P. C. c. 31. § 33*: 1 *Hal. P. C. 455, 456*. But if the person so provoked had unfortunately killed the other by beating him in such a manner as showed only an intent to chastise, and not to kill him, the law so far considers the provocation of contumelious behaviour as to judge it only manslaughter, and not murder. *Fost. 291*. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray, or apprehends a felon, knowing his authority, or the intention with which he intends, the law will imply malice; and the killer shall be guilty of murder. 1 *Hal. P. C. 457*: *Fost. 308, &c.* And if one intends to do another felony, and unadvisedly kill a man, this is also murder. 1 *Hal. P. C. 465*. Thus if one shoots at A. and misses him, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A., and B., against whom the prisoner had no felonious intent, takes it, and it kills him; this is likewise a murder. 1 *Hal. P. C. 466*. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. 1 *Hal. P. C. 429*.

As to such murder as happens in killing another without any provocation, or but upon a slight one; it is to be observed, that wherever it appears that a man killed another, it shall be intended *in malicia* that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, &c. 1 *Hawk. P. C. c. 31. § 32*: *Kelynge, 27*.

As the indulgence which is shown by the law in some cases to the first transport of passion is a condescension to human frailty, to

that *furor brevis* which, while the frenzy lasts, renders a man deaf to the voice of reason, so the provocation which is allowed to extenuate in the case of homicide, must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. *Post.* 315. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. 1 *East*, P. C. c. 5. § 19. For there are many trivial, and some considerable, provocations which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead. See *Russell on Crimes*, lib. 3. c. 1. § 1.

It seems agreed that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not; for so base and cruel a revenge cannot have too severe a construction. 1 *Hawk.* P. C. c. 31. § 33: *Kelynge*, 131. 135: 2 *Rol. Rep.* 460, 461: *Dalt.* c. 93: *Cro. Eliz.* 779: *Noy*, 171: 1 *Sid.* 277. 1 *Levinz.* 180: 121. *con.*: 1 *Jon.* 432. *a.*

But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then, in fighting with him, had killed him, he had been guilty of manslaughter only. 1 *Hawk.* P. C. c. 31. § 34: *Kelynge*, 55. 61. 131.

And of the like offence shall he be judged guilty, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. 1 *Hawk.* P. C. c. 31. § 35: *Kelynge*, 61. 136: *Cro. Jac.* 296: 12 *Co.* 87.

He cannot be thought guilty of a greater crime than manslaughter, who, finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or filipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his person from an unlawful arrest; or in the defence of his house from those who, claiming a title to it, attempt

forcibly to enter it, and to that purpose shoot at it, &c.; or in the defence of his possession of a room in a public-house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable; but it is certain that it can amount to no more than manslaughter. 1 *Hawk.* P. C. c. 31. § 36: *H. P. C.* 57: 3 *Inst.* 57: *Kelynge*, 51. 137: *Crom.* 27. *a.*

Nor was he judged criminal in a higher degree, who, seeing his son's nose bloody, and being told by him that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel, whereof he afterwards died. 1 *Hawk.* P. C. c. 31. § 48: *Cro. Jac.* 296: 12 *Co.* 87.

Nor was he thought more criminal, who, encouraged by a concourse of people, threw a pickpocket into a pond adjoining to the road, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned; for although this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given. *O. B.* 85. No. 751. So also where three Scotch soldiers were drinking together in a public house, one of them struck some strangers that were drinking in another box, with a small rattan, they having used several opprobrious epithets, reviling the character of the Scotch nation; an altercation ensued, and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased, and when the soldiers had paid the reckoning, the strangers again shoved him from the room into the passage; upon this the soldier exclaimed, that "he did not mind killing an Englishman more than eating a mess of crowdy;" the strangers, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter. 5 *Burr.* 2799. But in every case of homicide, upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. *Post.* 278. 296: 1 *Hale*, 486: 1 *Vent.* 158: *Raym.* 212: *Leach's Hawk.* P. C. i. c. 31. § 37. in *n.*

When one executes his revenge, upon a sudden provocation, in such a cruel manner, with a dangerous weapon, as shows a malicious intention to do mischief, and death ensues, it is express malice and murder from the nature of the fact. *Kel.* 55. 61. 65. 130. A man chided his servant, and upon some cross answer given,



he having a hot iron in his hand, ran it into the servants belly, of which he died, this was adjudged murder. *Kel.* 64.

If a person is trespassing upon another, by breaking his hedges, &c., and the owner, upon sight thereof, take up a hedge-stake, and give him a stroke on his head, whereof he dies, this is murder, because it is a violent act beyond the proportion of the provocation. *H. P. C.* And where a boy was upon a tree in a park cutting of wood, and the keeper bids him come down, which he did; and then the keeper struck him several blows with a cudgel, and afterwards, with a rope, tied him to his horse's tail, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. *Gro. Car.* 139: *H. P. C.*

As to such murder as happens in killing one whom the person killing intended to hurt in a less degree; it is to be observed, that wherever a person in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Hawk. P. C. c.* 31. § 38: *Kelym.* 119: *Mauwgridge's case, H. P. C.* 49—52.

Also, it seems, that he who, upon a sudden provocation, executeth his revenge in such a cruel manner, as shows a cool and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away with him and killed him. 1 *Hawk. P. C. c.* 31. § 39: *Gro. Car.* 181: 1 *Jon.* 198: *Palm.* 545: *H. P. C.* 49.

Wherever there is evidence of express malice, the plea of provocation will not avail; and in most cases, not even previous blows or struggling will extenuate homicide. *Mason's case, 1 East, P. C. c.* 5. § 23.

It were endless to go through all the cases of homicide, which have been adjudged, either expressly or impliedly, malicious; the above therefore may suffice as a pretty ample specimen. We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where, 1. Justified by the command or permission of the law; 2. Excused on the account of accident or self-preservation; or 3. Alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and

jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence. *Fost.* 255.

VI. *Where in the Prosecution of some Unlawful Act.*—If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot be attended with the danger of personal hurt to some one or other, he shall be adjudged guilty of murder. 1 *Hawk. P. C. c.* 29. § 10: *H. P. C.* 52. 57: *Kelynge*, 117.

As to the cases where such killing shall be adjudged murder, which happen in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain, they are as follow; and first, such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony; it seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at game fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with, one man, with a design to murder him, misses him and kills another. 1 *Hawk. P. C. c.* 31. § 40, 41: *Kelynge*, 117: *H. P. C.* 46. 50: *Dall. cap.* 98: *Moore*, 87.

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband who gave a poisoned apple to his wife, who ate not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof; such also was the case of the wife who mixed ratsbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as such a murderous intention, which of itself perhaps, in strictness,

might justly be made punishable with death; proves now, in the event, the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power. 1 *Hawk. P. C. c. 31. § 42: Plow. Com. 474: 9 Co. 91.*

But if one happened to be poisoned by ratsbane laid in order to destroy vermin, the person by whom he is so killed is guilty of homicide *per infortunium* only, because his intentions were wholly innocent. 1 *Hawk. P. C. c. 81. § 13.*

Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only; but it hath been adjudged, that if a justice of peace, constable, or watchman, or even a private person, be killed in the endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and that he cannot excuse himself by alledging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shows such an obstinate contempt of the law, that he is no more to be favoured than if he acted in cool blood. 1 *Hawk. P. C. c. 31. § 44: H. P. C. 45. 50: 3 Inst. 52: Dalt. cap. 93. Savil, 67: Kelynge, 66: 22 Ass. 71: 4 Co. 40. b: 9 Co. 68: Crom. 25. a. b.*

Yet it hath been resolved, that if the third person slain in such a sudden affray, do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly showing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. 1 *Hawk. P. C. c. 31. § 45: Kelynge, 66.* If the officer be within his proper district, and known, or but generally acknowledged to have the office he assumeth, the law will presume that the party killed had due notice of his intent, especially if it be in the day-time. *Fost. 135. 311.*

But where a gamekeeper was shot by a gang of poachers, one of whom had separated himself from the rest at the time the shot was fired, and it appeared that he did not do anything to join in the act, it was held that he was guilty neither of murder nor of manslaughter. 3 *C. & P. 390.*

As to such killing as happens in the exe-

cution of an unlawful action, whereof the principal purpose was to usurp an illegal authority: it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the Court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder; 1 *Hawk. P. C. c. 31. § 59: H. P. C. 45.*

But where persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but which happens to be defective only in some point of form, it seems that they are no way criminal. 1 *Hawk. P. C. c. 31. § 61.*

As to such killing as happens in the execution of an unlawful action, where no mischief was intended at all, it is said, that if a person happen to occasion the death of another, in doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them in a fright, he is guilty of murder. 1 *Hawk. 87.*

VII. *Where in resisting a civil or criminal Arrest.*—As to such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest, it seems to be agreed that whoever kills a sheriff, or any of his officers, in the lawful execution of civil process, as on arresting a person upon a *capias*, &c. is guilty of murder. 1 *Hawk. P. C. c. 31. § 55: Dalt. cap. 93: H. P. C. 45.*

Neither is it any excuse to such a person, that the process was erroneous (for it is not void by being so), or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court (which is not necessary when prevented by the party's resistance); or that the officer did not show his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. 9 *Co. 66. 68: Cro. Jac. 280. 486: 6 Co. 68. b. 69. a: 1 Hawk. P. C. c. 31. § 56.*

Yet the killing of an officer in some cases will be manslaughter only; as where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests J. S. a baronet, who never was knighted; by force of a warrant to arrest J. S., knight. 1 *Hawk. P. C. c. 31. § 57: Cro. Car. 372:*

1 *Jon.* 346: 12 *Co.* 49: So where a good warrant is executed in an unlawful manner: as if a bailiff be called in to break open a door or window to arrest a man; or perhaps if he arrest one on a Sunday since stat. 29 *Car.* 2. c. 7. by which all such arrests are made unlawful. *P. P. C.* 46: 4 *Hawk. P. C. c.* 31. § 58.

If bailiffs come to a house to arrest a person, and the house being locked they attempt to break in, whereupon the son, of the person intended to be arrested, shoots and kills one of them, it is not murder. *Jones*, 429: *Foster's Rep.* 135. 138. 270. 308. 312. 318. 321.

A person was arrested, and another not knowing the cause of the struggle, but seeing swords drawn, and to prevent mischief came and defended the party arrested, and in the scuffle the bailiff was killed; it was resolved to be no murder in the person doing it, but that all that were present and assisting, knowing of the arrest, were principal murderers. *Kel.* 86. Though it has been held in such a case, that the person offending is guilty of murder, whether he knew the person slain were an officer or not; for all fighting is unlawful: and he who, seeing persons engaged in it, takes part with one side, and fights in the quarrel without knowing the cause of it, shows a readiness to break through the laws on a small occasion, and must at his peril take heed what he doth. 1 *Sid.* 160: *Noy.* See *post*, VIII.

But no error or irregularity in any proceeding previous to the issuing of the process will affect it, so as to excuse the party killing the officer in the execution of it from the guilt of murder. *Fost.* 311: 1 *East. P. C.* 310. And though the cause of the arrest be not expressed with sufficient particularity in a magistrate's warrant, yet if it contain all the essential requisites of a warrant, and the magistrate had jurisdiction over the subject matter, the killing of the officer executing the warrant will be equally murder; for it is not in the power of the officer to dispute the validity of such a warrant if it be under the seal of the justice. 1 *Hale*, 459: 1 *East. P. C.* 310.

So when an officer is justified in breaking open a door, and in doing so is resisted and killed, it is murder. And where he is not justified in breaking open the door, if it is opened to him, or if it be half open, he may then force his way into the house to execute the warrant. See *R. v. Baker*, 1 *Leach*, 112.

Although parties on whom any process or warrant is executed should in other cases have due notice of the officer's business, yet where a man is found in the act of committing a felony or misdemeanor, it seems there is no necessity to inform him either of the cause of

his apprehension, or of the authority of the person apprehending him. 3 *C. & P.* 394

Where a constable took a man without a warrant upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who to prevent being retaken killed J. S., it was holden to be manslaughter only, although whilst under the charge of the constable the prisoner struck the man who gave the charge; because a blow under the provocation of the illegal arrest would not justify the constable in detaining him unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *Ry. & Moo.* 132. See further *tit. Arrest*.

VIII. *Of Aiders and Abettors.*—With respect to accessories in murders, as distinguished from aiders and abettors actually present, see this Dict. *tit. Accessory*. In the case of several persons being present at the death of a man, all of whom are principals, yet they may be guilty of different degrees of different degrees of homicide, as one of murder and another of manslaughter. If there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. 1 *East. P. C. c.* 5. § 121. And it has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present, aiding and abetting in the murder, is good; for all are principals, and it is not material who actually did the murder. *Wallis's Ca. Salk.* 334. See *Shaw's Case*, 1 *Leach*, 360: 1 *East. P. C. c.* 5. § 121. And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting only as accessories, yet it has been long settled, that all who are present aiding and assisting, are equally principals with him who gave the stroke whereof the party died; though they are called principals in the second degree. 1 *Hale*, 437: 4 *Plowd. Com.* 100. *a.* So that if A. be indicted for murder or manslaughter, and B. and C. for being present aiding and assisting, if A. appear not, but B. and C. appear, they shall be arraigned, and if convicted shall receive judgment, though A. neither appear nor be outlawed. 1 *Hale*, 437: *Plowd.* 97. 100. *Gythyn's case*. And if A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against all: for it is only a circumstantial variance, and in law it



is the stroke of all that were present aiding session of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, and manslaughter in the servant; though if because the person slain was so much in fault there be a conspiracy to kill a man, but no malice against his servant; if the servant be slain, the malice against the master shall be construed to extend to his servant; and the killing the servant is murder. *Dyer*, 128.

As to such killing as happens in the execution of an unlawful action, where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain; it seems clear that where divers persons resolve generally to resist all opposers in the commission of any such breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, &c., and in so doing happen to kill a man, they are guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. 1 *Hawk. P. C. c. 31. § 46*; *Savil*, 67; *Moore*, 86; *Palm*, 35; *Crom.* 24. *b. 25. a*; *H. P. C.* 47; 5 *Mod.* 285; *Dyer*, 128. *pl. 60*; *S. P. C.* 17. *h.*

The murder, however, must appear to have been committed strictly in prosecution of the purpose for which the party was assembled. *Prin. P. L.* 234. Therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity kills him, the rest are not concerned in the guilt of that act; *Kely*, 112; because it had no connection with the crime in contemplation. *Prin. P. L.* 235. So where two men were beating another man in the street, a stranger made some observations upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principals in the murder; yet although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act, and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that he could not be guilty either as principal or accessory; and upon the case of *Rez v. Thompson, Kely*, 66, 67. he was acquitted. 8 *Mod.* 164; 12 *Mod.* 629. Yet see 12 *Mod.* 256. *Leach's Hawk. P. C. c. 31. § 46. in n.*

Where divers rioters, having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, and because the person slain was so much in fault himself. 1 *Hawk. P. C. c. 31. § 47*; *Crom.* 28. *b*; *H. P. C.* 56.

But if in such, or any other quarrel, whether it was sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony. 1 *Hawk. P. C. c. 31. § 48*; *H. P. C.* 45; *Dalt. c. 93*; 3 *Inst.* 52; *Kely.* 66; 22 *Ass.* 71; 4 *Co.* 40. *b*; 9 *Co.* 68; *Crom.* 25. See *supra*.

If one attack another to rob him, and by the resistance of the party kills him, this is murder. 3 *Inst.* 52; *Dalt.* 334. A person stands by and encourages or commands another to murder a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact, it will be murder in them all. *Plowd.* 98; 11 *Rep.* 5. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, &c. and one of them kills a person, this is murder in all present aiding or assisting, or that were ready to aid and assist; all will be said to intend the murder. 3 *Inst.* 56; *Dalt.* 347; *H. P. C.* 31. And such persons will be judged to be present who are in the same house, though in another room, or in the same park, although half a mile off, &c. *H. P. C.* 47. *Kel.* 87. 116. 127. See *tit. Accessory*.

Several persons having conspired to enter the king's park, and to hunt and carry away deer, with design of killing any one that should oppose them; though the keeper's servants began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be murder; as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but

to have surrendered themselves. *Roll. Rep.* 20.

As to such killing as happens in the execution of an unlawful action, the principal motive whereof was to assist a third person; it seems clear, that if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. *Pl. Com.* 100, 101. *a*: *Crom.* 23: *Dalt. c.* 92: *H. P. C.* 51, 52: 1 *Hawk. P. C. c.* 31, § 19. Though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with the master, if they kill another, it is murder both in master and servant. *Dy.* 26: 9 *Rep.* 66: *Pl.* 100.

And therefore it follows *a fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his sword broken lend him another, wherewith he kills the other, he is guilty of manslaughter only. 1 *Hawk. P. C. c.* 31. § 50: *Crom.* 26. *b*: *H. P. C.* 57: *Dalt. c.* 94: 1 *Roll. Rep.* 407, 408: 3 *Bulst.* 206: *H. P. C.* 52.

Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c. in due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew the person slain were an officer or not. *Kelynge*, 67. 86, 87. But perhaps it may be objected, that in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person. To this it may be answered, that all fighting is highly unlawful, and that he who on a sudden seeing persons engaged in it, is so far from endeavouring to part them as every good subject ought, that he takes part with one side, and fights in the quarrel, without, knowing the cause of it, shows a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does; and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which doth not always signify a particular ill-will against the person killed, as appears by many of the above mentioned cases; and though such persons be favoured in respect of the suddenness of the occasion where both the quarrel and the persons are private, yet he must not expect such indulgence, where the fight,

in which he so rashly engages, was begun in opposition to the justice of the nation, and a person happens to be killed thereby who engaged in the maintenance thereof, and on that account is under its more particular care; and it may be justly challenged, that his opposers be made examples to deter others from joining in such unwarrantable quarrels. 1 *S. d.* 160: *Noy*, 50: *Plow. Com.* 100. See 1 *Hawk. P. C. c.* 31. § 51—53.

But if a man seeing another arrested and restrained from his liberty under colour of a press warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself; and the person who rescued him did not know that he was illegally arrested; for since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril. *Kelynge*, 66. 137: *Crom.* 27. *a*: *Dent's case*, 1 *Hawk. P. C. c.* 31. § 54. But the principles upon which this case was determined, are warmly controverted by Mr. Justice Foster, p. 315—318. And see *Borthwick's case*, *Doug.* 207: *Browning's case*, and *Dixon's case*, 1 *East's P. C. c.* 5. § 80.

There were two men in an inner chamber quarrelling, and together by the ears; a brother of one of them standing at the door, that could not get in, cried to his brother to make him sure, and presently after he gave the other a mortal wound; this was held manslaughter in him that stood at the door. *Shep. Abr.* 493.

If one person encourage another to drown herself, and is present abetting and counselling her to do so, such person is guilty of murder as a principal in the second degree. *R. & R.* 523.

A person may be present when a murder is committed, and yet be neither principal nor accessory, if he takes no part in it. 1 *Hule*, 439. *Fost.* 350: 1 *East. P. C.* 296. But if he does not endeavour to prevent it, or try afterwards to apprehend the murderer, he will be guilty of a high misprison.

IX. *The time within which the Death must take place.*—In order to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the contemplation of which the whole day upon which the hurt was done shall be reckoned the first. 1 *Hawk. P. C. c.* 31. § 9.

But if a person, hurt by another, die thereof of one who was at land, of a wound received within a year and a day, it is no excuse for the other, that he might have recovered if he had not neglected to take care of himself. 1 Hawk. P. C. 31. § 10: 3 Inst. 53: *Kelynge*, 26: 1 Keb. 17.

If one dies within a year and a day, through disorderly living, it shall be no excuse, the wound will be judged the principal cause of his death; but if one wounded die after that time, the law will presume he died a natural death. 3 Inst. 53: H. P. C. 55: *Kel.* 26. If a man receive a wound that is not mortal; but either for want of help, or by neglect, it turns to a fever, &c., which causes the party's death, it is murder: so it is, where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, &c. But if, by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not murder, by Hale, Hist. P. C. 428.

**X. Of the place where the Murder is committed, and where it may be tried.**—As to the place where murder is within the consuance of the law; it seems that the killing of one who was both wounded and died out of the realm, or wounded out of the realm and died here, could not be determined at common law, because it could not be tried by a jury of the neighbourhood where the fact was done. But it was agreed, that the death of one who was both wounded and died beyond sea, and it was said by some, that the death of him who died in England of a wound given him there, might be heard and determined before the constable and marshal, according to the civil law, if the king pleased to appoint a constable. And it seems also clear, that such a fact being examined by the privy council, might by force of stat. 33 H. 8. c. 23. have been tried before commissioners appointed by the king, in any county in England. 1 Hawk. P. C. c. 31. § 11: 3 Inst. 48: 2 Inst. 51: Co. Lit. 75: S. P. C. 65. a: Bro. Appeal, 153: Cro. Car. 247: 1 And. 195.

The above statute was repealed by the 9 G. 4 c. 31. under which (§ 7.) a person charged with murder abroad, and whether committed in the king's dominions or not, may be tried by a commission of Oyer and Terminer, directed into any county appointed by the Lord Chancellor. See tit. *Indictment*.

A murder at sea was anciently cognisable only by the civil law; but by force of stats. 27 H. 8. c. 4: 28 H. 8. c. 15. it might be tried and determined before the king's commissioners in any county of England, according to the course of the common law; yet the death

at sea, was neither determinable at common law, because the offence was not complete in either county, and the jury could inquire only of what happened in their own county. But it was holden by others, that if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county. And it was agreed that an appeal might be brought in either county, and the fact tried by a jury returned jointly from each.

This difficulty was provided for by the 2 and 3 Ed. 6. c. 24. § 2. which enacted that the trial should be in the county where the death happened. By the 7 G. 4. c. 32. that statute has been repealed, and several new provisions introduced with respect to felonies committed in several counties. See tit. *Indictment*.

Also by force of stat. H. 8. c. 6. a murder in Wales may be inquired of in an adjoining English county. 1 Hawk. P. C.: Cro. Car. 247: 1 Jon. 255: 1 Lev. 113: Latch. 13. 118: Wils. 320.

And by stat. 46 G. 3. c. 54. such offences may be tried in any of his Majesty's islands or colonies by virtue of a commission under the great seal to commissioners, who shall have all such powers as are given by stat. 28 H. 8. c. 15. And by stat. 57 G. 3. c. 53. murders, &c. committed in the Bay of Honduras, New Zealand, Otaheite, or any islands or places not within his Majesty's dominions, by the master or crew of any British ship, or persons having been such, may be tried in any of his Majesty's islands or colonies, under a commission issued by virtue of the act 46 G. 3. c. 54. Now, at Honduras such offences may be tried by commissioners specially appointed by virtue of a subsequent act. 59 G. 3. c. 44. See also stat. 58 G. 3. c. 98: as to offences relative to the slave-trade, tit. *Slaves*. See further tit. *Indictment*.

**XI. Of the Punishment, &c.**—The punishment of murder, and that of manslaughter,



were formerly one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. 1 *Hal. P. C.* 150. But by several statutes the benefit of clergy was taken away from murderers through malice prepense, their abettors, procurers, and counsellors.

And by the last statute passed on this subject, namely, 9 *G. 4. c.* 31. (§ 3.) persons convicted of murder or of being an accessory before the fact, shall suffer death as a felon, and every accessory after the fact shall be liable to be transported for life, or to be imprisoned with or without hard labour in the gaol or house of correction not exceeding four years.

As to the consequences attending a judgment of death in cases of murder, and the time when, and the manner in which the sentence is to be carried into effect, see tits. *Attainder, Corruption of Blood, Forfeiture, Escheat, Execution*.

It was doubted formerly whether the king could pardon the crime of murder; however, it was held that he had the power under the 13 *R. 2. st.* 2. *c.* 1. but with certain restrictions. See tit. *Pardon*.

It has been holden as a rule that no person should be convicted of murder unless the body of the deceased were found. 2 *Hale*, 290. But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of murder in many cases where the body is not actually found. See *Hindmarsh's case*, 2 *Leach*, 571.

4. PETIT TREASON.—This was held to be a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law the instances of this crime were numerous, and involved in some uncertainty. 1 *Hale, P. C.* 37. By the statute of treasons, 25 *Ed. 3. st.* 5. *c.* 2. they were reduced to the following cases: a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience.

By the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. But the English laws never treated it otherwise than as simple murder, probably under the idea of the impossibility of committing so enormous a crime.

But petit treason was nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance,

it was stigmatized as an inferior species of treason. And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and sovereign.

A servant who killed his master whom he left, upon grudge conceived against him during his service, was guilty of petit treason, for the traitorous intention was hatched while the relation subsisted between them, and this was only an execution of that intention. 1 *Hawk. P. C.* 89: 1 *Hal. P. C.* 380.

If a servant killed his mistress or the wife of his master, she was master within the letter of the statute, and it was petit treason. But if a son killed his father, this was not petit treason, except he served his father for wages, and then he should be indicted by the name of servant. 3 *Inst.* 20: *Hale, P. C.* 23: 11 *Rep.* 34.

A servant procured another to kill his master, who killed him in the servant's presence; this was held petit treason in the servant, and murder in the other; and that if the servant had been absent, the crime would have been murder, to which he was accessory. 3 *Inst.* 20: *Moor*, 91: *Dyer*, 128.

If a wife were divorced *à mensa et thoro*, still the *vinculum matrimonii* subsisted; and if she killed such divorced husband, she was a traitress. 1 *Hal. P. C.* 381. So a wife divorced *causâ adulterii vel savitæ*, was still within the law, because the bond of matrimony was not thereby dissolved, and she might again lawfully cohabit with her husband. But a divorce *causâ consanguinitatis vel pre-contractûs*, entirely dissolved the nuptial tie, and annihilated the very character of wife. Therefore a wife *de facto* only, and not *de jure*, could not commit this crime, for she had no lawful lord to whom she owed subjection and obedience. Nor a second wife married to a man whose first wife was alive. Neither could a husband be guilty of this crime by killing his wife *de jure*, for there was no reciprocity of obedience and subjection. *Leach's Hawk. P. C. i. c.* 32. § 7: 1 *Hale, P. C.* 381.

If a wife and a stranger killed the husband this was petit treason in the wife, and murder in the stranger. *Dalt.* 337. But where a wife and a servant conspired to kill the husband, and appointed time and place for it, and the murder was committed by the servant alone in the absence of the wife, this was held petit treason in both. A servant procured by the wife to kill the husband, was guilty of petit treason: and a stranger procuring a wife or servant to kill the husband or neighbour, was an accessory to petit treason. *Dy.* 125. *Crompt.* 41.

A clergyman was understood to owe canonical obedience to the bishop who ordained

him, to him in whose diocese he is benefited, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these was petit treason. 1 *Hal. P. C.* 381.

As to the rest, whatever was applicable with respect to wilful murder, was also applicable to the crime of petit treason, which was no other than murder in its most odious degree, except that the trial should be as in cases of high treason, before the improvements therein made by the statutes of William III. *Fost.* 337. But a person indicted of petit treason might be acquitted thereof, and found guilty of manslaughter or murder: *Fost.* 106: 1 *Hal. P. C.* 378: 2 *Hal. P. C.* 184: and in such case it should seem that two witnesses were not necessary, as in case of petit treason they were.

The punishment of petit treason in a man was to be drawn and hanged, and in a woman formerly to be drawn and burned, but which latter sentence was changed to hanging by the 30 *G. 3. c.* 48.

Petit treason is now abolished, it being enacted by the 9. *G. 4. c.* 31. that every offence which before the passing of that act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, fined, and punished, as principals and accessories in murder.

5. ATTEMPTS to commit murder appear to have been considered as felonies in the earlier cases of our law. *Staundford, P. C.* 17: 1 *East, P. C. c.* 8 § 5. But that doctrine did not long prevail, and such attempts became, and still remain, punishable only as high misdemeanors, except as provided against by special acts. A person was indicted for intending to murder the master of the rolls; *Mic.* 16 *Car.* 2; and for offering money to another to do it: and another person was committed for lying in wait to perform the murder: they were punished by heavy fines, imprisonment, and finding security for their good behaviour for life. 1 *Lev.* 146: 1 *Sid.* 230.

Where an indictment is preferred for an assault with intent to murder, the intent as laid must be fully established to support the indictment. Where a defendant was so charged, the judge (*Lord Kenyon*) being of opinion, upon the facts, that if death had ensued, the crime could only have been manslaughter, the defendant was acquitted. *Milton's case*, 1 *East's P. C. c.* 8. § 5.

By stat. 9 *G. 4. c.* 31. § 11. persons maliciously administering, or attempting to administer, poison, or other destructive thing, or maliciously attempting to drown, suffocate, or strangle any person, or maliciously shooting at a person, or by drawing a trigger, or by any

other means attempting to discharge loaded fire arms at any person, or maliciously stabbing, cutting, or wounding any person with intent to murder, shall be guilty of felony, and suffer death as felons: and see tit. *Murder*.

HOMINATION. *Domesday*, t. 1. Northampton *Sackmanni de Riden*. The mustering of men; also the doing of homage. *Cowel, edit.* 1727.

HOMINE CAPTO IN WITHERNAM. A writ to take him that had taken any bondman or woman, and led him or her out of the country, so that he or she could not be replevied according to law. *Reg. Orig. fol.* 79. See this Dict. tit. *Withernam*.

HOMINE ELIGENDO AD CUSTODIENDAM PECIAM SIGILLI PRO MERCATORIBUS EDIT. A writ directed to a corporation, for the choice of a man to keep one part of the seal appointed for statutes merchants when a form or is lead, according to the statute of *Acton-Burnel. Reg. Orig. fol.* 178.

HOMINE REPLEGIANDO. A writ to bail a man out of prison. *F. N. B. fol.* 6: *Reg. Orig. fol.* 77.

This writ lies where a person is in prison not by special commandment of the king, or his judges, or for any crime or cause irreplevisable, directed to the sheriff to cause him to be replevied; in the same manner that chattels taken in distress may be replevied; and if the person be conveyed out of the sheriff's jurisdiction, he may return, that the defendant hath essoined the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a *capias in withernam* to take the defendant's body, and keep him without bail or mainprize till he produces the party. 3 *Comm.* 129. *c.* 8. And if the sheriff return *non est inventus* in that writ against the body, the plaintiff shall have a *capias* against the defendant's goods, &c. *F. N. B.* 66: *New Nat. Br.* 151, 152.

Where one takes away secretly, or keeps in his custody another man against his will, upon oath made thereof, and a petition to the lord chancellor, he will grant a writ of *replegiari facias*, with an *alias* and *pluries*, upon which the sheriff returns an *elongatus*, and thereupon issues out a *capias in withernam*: and when the party is taken, the sheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a habeas corpus to the sheriff to bring him into court and bail him. 2 *Lil.* 23.

In a *homine replegiando* it hath been adjudged, that it doth not differ from a common replevin, on which the sheriff must return a *deliberari feci*, or an excuse why he doth not: that where he cannot make deliverance if he return an *elongatus*, the defendant is not concluded by that return to plead *non cepit*; and after the return of an *elongatus*, and a *capias in withernam*, if the defendant plead this plea, he shall

be bailed, for the *withernam* is no execution; and after a defendant is bailed upon the *capias* in *withernam*, there may be a new *withernam* against him. And it was held, that in a *homine replegiando* after an *elongatus* returned, if the defendant comes in gratis, and calls for a declaration, and pleads *non cepit*, he shall not be obliged to give bail; but if he come in upon the return of the *capias*, he must give bail, and shall not be admitted to it till he call for a declaration, and plead *non cepit*. 2 Salk. 381.

The sheriff returned an *elongavit* in a *homine replegiando*, and then a *capias* in *withernam* went forth; afterwards the defendant, having entered an appearance, moved for a *supersedeas* to the *withernam*, and offered to plead *non cepit*; which was opposed, unless he would give bail to deliver the person, in case the issue was found against him: though it was ruled, that if any property had been pleaded in the party, then the defendant ought to give bail to deliver him; but he says he hath not the person, and therefore *non cepit* is a proper plea, and he shall put in bail to appear *de die in diem*. In this case the defendant shall not be compelled to give deliverance; and a *supersedeas* was granted to the *withernam*. See 4 Mod. 183.

A *homine replegiando* cannot be brought either by the wife herself, or by her *prochein amy* against her husband; and the nature and proceedings in the writ show it to be so. Ch. Prec. 492.

This writ is now seldom used to deliver a person out of custody, being superseded by the more beneficial effects of the writ of *habeas corpus*, particularly as were extended by modern acts. See tit. *Habeas Corpus*.

**HOMINES.** A term applied to a sort of feudatory tenants who claimed a privilege of having their causes and persons tried only in the court of their lords; and when Gerard de Caneil, anno 5 Ric. 1. was charged with treason and other misdemeanors, he pleaded that he was *homo comitis Johannis*, &c., and would stand to the law and justice of his court. *Parv. Antiq.* 1.

**HOMIPLAGIUM**, is used in the laws of H. 1. c. 80. for the maiming a man. *Si quis in domo vel curia regis fecerit homicidium vel homiopladium*.

**HOMO.** This Latin word includes both man and woman, in a large or general understanding. 2 Inst. 45.

**HOMOLOGATION**, is when a man either expressly or impliedly ratifies a deed that formerly was null or invalid. *Scotch Dict.*

Implied homologation is admitted only from some act which clearly and expressly implies a knowledge and approbation of the deed. The effect of it on the person homologating is to give the deed the same validity against him and his heirs as if it had been a perfectly legal

deed from the first; but against third parties who do not represent the person homologating, the deed is liable to all its original objections. *Bell's Scotch Law Dict.*

**HOMSTALE.** A home-stall, or mansion-house. As in a charter granted about the 5 El. 1. *Cowel*.

**HOND-HABEND.** See *Hond Habend*. This bond also signifies the right which the lord hath of determining the offence in his court.

**HONEY.** All vessels of honey are to be marked with the name of the owner, and be of a certain content, under penalties; and if any honey sold be corrupted with any deceitful mixture, the seller shall forfeit the honey, &c. Stat. 23. Eliz. c. 8.

**HONOUR**, is, besides the general signification, used especially for the more noble sort of *seignories*, on which other inferior lordships or manors depend, by performance of some customs or services to those who are lords of them (though anciently *honor* and *baronia* signified the same thing). See *Spelman*, in v. *Honor*. The manner of creating these honours by act of parliament may in part be collected out of the statute of 33 H. 8. c. 37, 38. for erecting certain manors and possessions of the crown into honours.

In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently small manors to inferior persons to be holden of themselves, which do now therefore continue to be holden under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an honour, not a manor, especially if it has belonged to an ancient feudal baron, or hath at any time been in the hands of the crown. 2 Comm. 91. c. 6. See tit. *Tenure*.

An honour ought to consist of lands, liberties, and franchises. 1 Blust. 197: 2 Rol. 72. c. 1. And it is the most noble seignory. *Co. Lit.* 108. a. One or more manors may be parcel of an honour. 2 Rol. 72. l. 45. So a forest may be appendant to it. 2 Rol. 73. l. 3.

An honour originally shall be created by the king. *Co. Lit.* 108. a. Every honour must be holden of the king. R. 1: *Bull.* 195. And if it be assigned, or granted over to another, it shall not be holden of a subject. For it may be granted by the king to a subject. A man may claim an honour by grant, or by prescription. But the king at this day cannot make an honour by grant, without an act of parliament. R. 1: *Bul.* 195, 196: *Co. Lit.* 108. a. See *Cowel*, tit. *Honour*.

The following is a list of honours within the realm, viz. Amptill (by stat. 33 H. 8. c. 37), Aquila (formerly Pevensay), Arundel (see *post*), Abergavenny, Boloine, Berkhamstead, Beau-



lieu, Barnard's Castle, Bullingbrooke, Barstaple, Bononia, Brecknock, Brember, Bedford, Clare, Creveccure, Clun, Christchurch, Cockermouth, Cormayle, Candicut, Carisbrook, Clifford Castle, Chester, Carmarthen, and Cardigan, Donning Castle (by stat. 37 *H. 8. c. 18.*), Dudley, and Dover Castle, Eye, and Egremond.

The honour of East and West Greenwich, Glamorgan, Gloucester, Grentmesnil, Gower, Grafton (by Stat. 33. *H. 8. c. 38.*), Haganet, Hampton Court (by stat. 31 *H. 8. c. 5.*), Huntingdon (in Herefordshire), Heveningham, Hawenden Castle, Hertford, and Halton, Lancaster, Lincoln, Leicester, Lovetot, Hinckley, Kingston-upon-Hull (by stat. 37 *H. 8. c. 18.*), Kington, and Folkingham.

The honour of Montgomery, Mowbray, Middleham, and Maidstone, Nottingham, Newelha or Newelme, Oakhampton, St. Osith (by stat. 37 *H. 8. c. 18.*), Oxford.

The honour of Plinton, Peverel, Pickering, Raleigh, Richard's Castle, Skipton, Stafford, Strigul, Tickhil, Tromanton, Totnes, Theony, Tamworth.

The honour of Wigmore, Willingford, Westminster (by stat. 37 *H. 8. c. 18.*), Windsor, Woringay, Whirwelton (in Yorkshire), Werk, Whitchurch, and Warwick, Webley, and Tutbury.

The king granted to a subject a great manor, called *an honour*, and passed it by the name of *an honour*, and well. *Jenk. 277. pl. 99.*

It is illegal to purchase honour (as a dukedom) for money. *Vern. 5. Sec tit. Peers.*

The Earl of Arundel was the only peer who held his earldom by prescription. See *tit. Peers.*

**HONOUR-COURTS**, are courts held within the honours or manors last noticed, mentioned in the stat. of Henry VIII.

There is also a court of honour of the earl marshal of England, &c., which determines disputes concerning precedency and points of honour. 2 *Hawk. P. C.* This court of honour, which is also exercised to do justice to heralds, is a court by prescription, and has a prison belonging to it, called the White Lyon in Southwark. 2 *Nels. 935.* See *tit. Court of Chivalry.*

**HONOURARY FEUDS**, are titles of nobility, descendible to the eldest son in exclusion of all the rest. See *tit. Tenures.*

**HONOURARY SERVICES**, are those that are incident to the tenure of grand sergeanty, and commonly annexed to some honour. *Stat. 12 Car. 2. 29.*

**HONTFONGENETHEF**. *Cum omnibus aliis libertatibus tantummodo hontfongenethef mihi retento. Charta Wil. Comitis Mathiesialis. In Mon. Angl. 1. par. fo. 724.*

This should have been written *hontfongenethef*, and signifies a *thief*, taken with *hont-habend*, i. e. having the thing stolen in his hand. *Cowel.*—See *Buckherinul.*

**HOPCON**. Signifies a valley in *Domesday Book*; so do *hope*, *hawgh*, and *howgh*. *Cowel, edit. 1727.*

**HOP-OAST**. By 7 and 8 *G. 4. c. 30. § 2.* 8. setting fire to, and riotously demolishing, or beginning to demolish, any hop-oast, are capital felonies.

**HOPS** and **HOP-BINDS**. No bitter to be used in brewing but hops. 9 *Anne, c. 12. § 24.* The duty upon hops is a branch of the Excise, and regulated by many statutes made for the purpose. See 39 and 40 *G. 3. c. 81.* and 48 *G. 3. c. 134.* for preventing frauds and regulating the mode of packing, bagging, and weighing of hops. Also the 1 and 2 *W. 4. c. 53.*

By 7 and 8 *G. 4. c. 30. § 18.* maliciously cutting or destroying hop-binds is a felony, subjecting the offender to be transported for life or not less than seven years, or to be imprisoned not exceeding four years, and, if a male, whipped.

**HORA AURORÆ**. The morning bell, or what we now call the *four o'clock bell*, was anciently called *hora aurora*; as our eight o'clock bell, or the bell in the evening, was called *ignitegium* or *coverfeu*. *Cowel.*

**HORDERA**, from the Sax. *hord, thesaurus.*] A treasurer: and hence we have the word *hord* or *hoard*, as used for treasuring or laying up a thing. *Leg. Adelman, cap. 2.*

**HORDERIUM**. A hoard, a treasury, or repository. *L. Canuti, cap. 104.*

**HORDEUM PALMALE**. Beer-barley, which in Norfolk is called *sprat-barley*, and *battledore-barley*; and in the marches of Wales, *cymridge*, it being broader in the ear, and more like a hand than the common barley, which in old deeds is called *hordeum quadragesimale*. *Cowel.*

**HORESTI**. The people of Angus-upon-the-Tay, or Highlanders.

**HORNE-BEAM**. See *Timber.*

**HORNEGELD**, from the Saxon word *horn, cornu*, and *geld solutio*.] A tax within a forest to be paid for horned beasts. *Crompt. Jurisd. 197.* And to be free thereof is a privilege granted by the king unto such as he thinketh good. *Cowel, edit. 1727.*

**HORN WITH HORN**, or **HORN UNDER HORN**. The promiscuous feeding of bulls and cows, or all horned beasts, that are allowed to run together upon the same common. *Spekman.* To which may be added, that the commoning of cattle horn with horn was properly when the inhabitants of several parishes let their common herds run upon the same

open spacious common, that lay within the bounds of several parishes; and therefore, that there might be no dispute upon the right of tithes, the bishop ordains that the cows should pay all profit to the minister of the parish where the owner lived, &c. *Cowel.*

**HORNAGIUM.** *Hornegeld.* See that title.

**HORNERS.** No stranger was to buy any English horns gathered or growing in London, or within twenty-four miles thereof, by the 4 *Ed. 4. c. 8.* See tit. *London.*

**HORNGELD.** See *Hornegeld.*

**HORNING.** Letters of Warrants for charging persons in Scotland to pay or perform certain debts or duties; probably so termed from being originally proclaimed by the horn or trumpet.

**HORS DE SON FEE,** Fr. i. e. out of his fee.] An exception to avoid an action brought for rent or services, &c. issuing out of land, by him that pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls. *Broke.* In an avowry, a stranger may plead generally *hors de son fee*; and so may tenant for years; and such stranger to the avowry, being made a party, is at liberty to plead any matter in abatement of it. 9 *Rep.* 30: 2 *Mod.* 101. A tenant in fee-simple ought either to disclaim, or plead *hors de son fee.* 1 *Dann. Abr.* 655: vide 9 *Rep.* *Bucknel's case*, 22 *H. 6.* 2, 3: *Keilw.* 73. 14: *Ass. pl.* 13: *Co. Lit.* 1. b: 2 *Mod.* 103, 104: and 14 *Vin. Abr.* tit. *Hors de son fee.* See tit. *Pleading.*

**HORSE-BREAD.** Inn-keepers shall not make horse-bread. 13 *Ric. 2. st. 1. c. 8:* 4 *H. 4. c. 25.* Permitted to bake horse-bread. 32 *H. 8. c. 41.*

## HORSES.

Persons having lands of inheritance in parks, &c. were ordered to keep two mares apt to bear foals thirteen hands high, for the increase of the breed of horses, on pain of 40s. for every month they are wanting; and not suffer them to be leaped by stoned horses under fourteen hands, on a certain penalty by 27 *H. 8. c. 6.* And for the preservation of a strong breed of horses, stone horses above two years old are directed to be fifteen hands high, or they shall not be put into forests or commons where mares are kept, upon pain of forfeiture; and scabbed or infected horses shall not be put into common fields, under the penalty of 10s., leviable by the lord of the leet. 32 *H. 8. c. 13.* still in force.

To prevent horses being stolen and sold in private places, the 2 and 3 *P. & M. c. 7.* provides, that owners of fairs and markets shall appoint toll-takers or book-keepers, who are to

enter the names of buyers and sellers of horses, &c. And to alter the property, the horses must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the horse. And by 31 *Eliz. c. 12.* sellers of horses are to procure vouchers of the sale to them; and the names of the buyer, seller, and voucher, and price of the horse, are to be entered in the toll taker's book, and a note thereof delivered to the buyer; and if any person shall sell a horse without being known to the book-keeper, or bringing a voucher; or if any one shall vouch without knowing the seller; or the book-keeper shall make an entry without knowing either, in either of these cases the sale is void, and a forfeiture is incurred of 5*l.*; and the said statute provides that a horse stolen, though sold according to the direction of the act, may be redeemed and taken by the owner within six months, repaying the buyer what he shall swear he gave for the same. 2 *Comm.* 450: and see 2 *Stark.* 76.

By various acts duties are imposed in Great Britain and Ireland upon horses kept for drawing carriages, or for riding, or letting out to hire, race horses, &c.

By 26 *G. 3. c. 71.* (passed to put a stop to the practice of stealing horses for the sake of their hides) no person shall keep any place for slaughtering any horse or other cattle, not killed, for butcher's meat, without taking out a licence at the general quarter sessions, to be granted upon a certificate of the minister and churchwardens that the person applying is proper to be trusted with the carrying on such business. § 1.

Such licence to be signed by the justices at sessions, and a copy entered in a book to be kept for that purpose by the clerk of the peace, and all persons so licensed shall cause to be painted over their gates their name and the words "licensed for slaughtering horses pursuant to an act passed in the 26th George III." § 2.

Every occupier of such licensed slaughter-house shall, six hours previous to the slaughtering any live horse, or to the flaying any horse brought dead to the slaughtering-house, give notice in writing to the after-mentioned inspector, who is to take an exact account of the height, age, colour, and particular marks of every horse, &c., and keep the same in a book [see § 5.]: and no such horse shall be slaughtered or flayed but between eight in the morning and four in the evening, from October to March, both inclusive, and between six in the morning and eight in the evening from April to September, both inclusive. § 3.

Every person so licensed shall at the time any horse, &c. shall be brought, make an

entry in a book of the name and abode, and possession of the owner, and also of the person who shall bring the same to be slaughtered or flayed, and the reason why the same is so brought; which book shall, at all times, be open for the examination of the inspector, and produce before any justice, when required. § 4.

The parishioners in vestry shall annually or oftener appoint one or more persons to be inspectors of such slaughtering house. And in case such inspector shall upon examination of any horse, &c. intended to be slaughtered believe that such horse, &c. is free from disease, and in a sound and serviceable state, or that the same has been stolen, he shall prohibit the slaughtering such horse, &c. for not exceeding eight days; and in the mean time shall cause an advertisement to be inserted in some public newspaper twice or oftener (unless the owner of such horse shall sooner claim the same) at the expense of the occupier of such slaughtering-house; who, on refusal to pay the same, shall forfeit double the amount, to be raised by distress. § 5.

Every inspector may at all times in the day or night, but if in the night, then in the presence of a constable, enter into and inspect any place kept for slaughtering horses by licensed persons, and take an account of the horses, &c. there. § 6.

In case any person offering to sale or bringing any horse, &c. to be slaughtered or flayed shall refuse to give an account of himself, or of the means the same came into his possession, or if there be reason to suspect that such horse, &c. is stolen, such person shall be carried before a justice of peace, who shall commit him for not more than six days to be further examined, and if such justice shall be satisfied that such horse, &c. is stolen, the person bringing the same is to be committed to gaol to be dealt with according to law. § 7.

Any person keeping such slaughtering-house transgressing the rules before laid down by the act, shall be guilty of felony and punished by fine and imprisonment, and such corporal punishment by whipping, or shall be transported for not more than seven years, as the court shall direct. § 8.

Any such person destroying or defacing with lime, or burying the hide or skin of any horse, &c., or being guilty of any offence against this act for which no punishment or penalty is provided, shall be adjudged guilty of a misdemeanor, and punished by fine and imprisonment, and such corporal punishment by whipping, as the court shall direct. § 9.

Making false entries subjects the party to a forfeiture not exceeding 20*l.*, nor less than 10*l.*,

to be levied by distress; half to the informer and half to the poor; and in case the offender shall not have effects to the amount of the penalty, he may be committed to hard labour in the house of correction for not more than three months, nor less than one. § 10.

The book of the inspector shall be produced at every general quarter sessions. § 10.

If any person shall occasionally lend any barn or place for slaughtering any horse, &c. without taking out such licence, he shall forfeit not more than 20*l.*, nor less than 10*l.*, half to the informer and half to the poor; or be committed to gaol for not more than three months, nor less than one, unless the penalty is sooner paid. § 13.

This act does not extend to curriers, &c., nor to furriers, nor persons killing horses, &c. to feed their own dogs. § 11.

If any currier, tanner, &c. shall, under colour of their trades, knowingly kill any sound horse or boil the flesh thereof to sell, such tradesman becomes an offender under the act, and shall forfeit not more than 20*l.*, nor less than 10*l.* § 15.

[The forms of the several convictions are specified in the act.]

By the 7 and 8 G. 4. c. 29. § 25. stealing, or killing with intent to steal, the carcase or skin, of any horse, mare, gelding, colt, or filly, was a capital felony; but by the 2 and 3 W. 4. c. 26. transportation for life has been substituted for the punishment of death.

By 7 and 8 G. 4. c. 30. § 16. maliciously killing, maiming, or wounding any cattle, is a felony, punishable with transportation for life, or imprisonment.

**HORSE RACES**, for small sums, having encouraged idleness, and impoverished the meaner sort of people, it is enacted, that no person shall run any horse at a race unless it be his own, nor enter more than one horse for the same plate upon pain of forfeiting the horses; and no plate is to be run for under 50*l.* on the penalty of 500*l.* Also every horse race must be begun and ended in the same day, &c. 13 G. 2. c. 19.

Horses at races to be entered by the owners. 13 G. 2. c. 19. Horse-racing with horses carrying small weights, prohibited. 1*lb.* Horses may run for the value of 50*l.* with any weight and at any place. 18 G. 2. c. 34. § 11.

A plaintiff shall not be allowed to recover a wager on such a horse-race as is illegal within the statute. 4 Term Rep. 1. A match for 25*l.* a side is a match for 50*l.* See further this Dict. tit. *Gaming, Wager.*

**HORSTILERS**, Fr. *hostilliers*.] Is used for innkeepers: and in some old books the word *hostlers* is taken in the same sense. Stat. 31 Ed. 3. c. 2.



**HOSPES GENERALIS.** A great chamberlain. *Volumus, quantum ad hospitia pertinet, omnes indifferenter nostro hospiti generali obediant, &c. Du Cunge.*

**HOSPITALLERS,** *Hospitalarii.*] Were the knights of a religious order, so called because they built an hospital at Jerusalem, wherem pilgrims were received. To these Pope Clement transferred the Templars, which order, by a council held at Vienne in France, he suppressed for their many and great offences. The institution of their order was first allowed by Pope Gelasus the Second, anno 1118, and confirmed in this kingdom by parliament, and had many privileges granted them, as immunities from payment of tithes, &c. Their privileges were reserved to them by *Magna Charta*, c. 37., and the right of the king's subjects vindicated from the usurpation of their jurisdiction by the statute of *Westm.* 2. c. 43. Their chief abode for many years was in Malta, an Island given them by the Emperor Charles V. after they were driven from Rhodes by Solyman the Magnificent, Emperor of the Turks, whereupon they obtained the name of Knights of Malta. All the lands and goods of these knights here in England were given to the king by 32 H. 8. c. 34. See *Mon. Angl.* 2. par. fol. 489: *Tho. Walsingh.* in *Hist. E. II.*: *Stowe's Ann.* ib. See tit. *Knights Templars.*

## HOSPITALS

Are either *aggregate*, in which the master or warden and his brethren have the estate of inheritance; or *sole*, in which the master, &c., only has the estate in him, and the brethren or sisters, having college, and common seal in them, must consent, or the master alone has the estate, not having college, or common seal. So hospitals are *eligible*, *donative*, or *presentative*. 1 *Inst.* 342. a.

The master of the hospital, who has college and common seal, may have a writ of right; for the right and inheritance is in him. If he has no college, or common seal, he may have a *juris utrum*. *Co. Lit.* 341. b. 342. a.

Any person seised of an estate in fee simple may, by deed enrolled in Chancery, erect and found an hospital for the sustenance and relief of the poor, to continue for ever, and place such heads, &c., therein as he shall think fit; and such hospital shall be incorporated, and subject to such visitors, &c., as the founder shall nominate; also such corporation have power to take and purchase lands not exceeding 200*l.* per annum, so as the same be not holden of the king, &c., and to make leases for twenty-one years, reserving the accustomed yearly rent. But no hospital is to be erected,

unless it be upon the foundation endowed with lands or hereditaments of the clear yearly value of 10*l.* per annum. 39 *Eliz.* c. 5., made perpetual by 21 *Jac.* 1. c. 1. § 1.

It has been adjudged, upon this statute, that if lands given to an hospital be, at the time of the foundation or endowment, of the yearly value of 200*l.* or under, and afterwards they become of greater value by good husbandry, accidents, &c., they shall continue good to be enjoyed by the hospital, although they be above the yearly value of 200*l.* And goods and chattels (real or personal) may be taken of what value soever. 2 *Inst.* 722. And if one give his land then worth 10*l.* a year to maintain the poor, &c., and the land after comes to be worth 100*l.* a year, it must all of it be employed to increase their maintenance, and none of it be converted to private use. 8 *Rep.* 130.

If a devise be to the poor people maintained in the hospital of St. Lawrence in Reading, &c. (where the mayor and burgesses capable to take in mortmain, do govern the hospital), albeit the poor, not being a corporation, are not capable by that name to take; yet the devise is good; and commissioners appointed to inquire into lands given to hospitals, &c., may order him that hath the land to assure it to the mayor and burgesses, for the maintenance of the hospital. 43 *Eliz.* c. 4. See tits. *Charitable Uses*, *Mortmain*.

A gift must be to the poor, and not to the aged or impotent of such a parish, without expressing their poverty; for poverty is the principal circumstance to bring the gift within the stat. of 43 *Eliz.* c. 4. Although, at common law, a corporation may be of an hospital that is, in *potestate* of certain persons to be governors of the hospital, and not of the persons placed therein. The safest way upon the stat. 39 *Eliz.* c. 5. is first to prepare the hospital, and to place the poor therein, and to incorporate the persons therein placed; and after the incorporation, to convey the lands, tenements, &c., to the said corporation, by bargain and sale, or otherwise, between the founder of the one part, and the master and brethren, &c., of the other part, in consideration of 5*s.* in hand paid by the master of the said hospital, &c. 2 *Inst.* 724, 725. And the founder cannot erect an hospital for years, lives, or any other limited time, but it must be for ever, according to the 39 *Eliz.* c. 5. See 10 *Rep.* 17. 34.

The 43 *Eliz.* c. 4. under which commissions may be awarded to certain persons to inquire of lands or goods given to hospitals; and the lord chancellor is empowered to issue commissions to commissioners for inquiring, by a jury, of all grants, abuses, breaches of trust, &c., of lands given to charitable uses, does not extend to lands given to any college or hall in

the universities, &c., nor to any hospital over which special governors are appointed by the founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of hospitals, by virtue of the 2 *H. 5. st. 1. c. 1.* &c. See also statutes 58 *G. 3. c. 91*: and 59 *G. 3. cc. 81. 91*: and this Dict. tit. *Charitable Uses*.

The commissioners under 43 *Eliz. c. 4.* may order houses to be repaired by those who receive the rent; see that the lands be let at the utmost rent; and on any tenant's committing waste, by cutting down and sale of timber, they may decree satisfaction, and that the lease shall be void. *Hil. 11 Car.* Where money is kept back, and not paid, and paid where it should not, they have power to order the payment of it to the right use; and if money is detained in the hands of executors, &c., any great length of time, they may decree the money to be paid, with damages for detaining it. *Duke Read. 123.* See 4 *Rep. 104.*

The Hospital of St. Cross, near Winchester, and several other large hospitals were anciently founded by particular statutes or acts of parliament. King Charles I. granted to the mayor and commonalty of London the keeping of Bethlehem Hospital, and the manors and lands belonging to it. The hospital in London for founding children, under the care of governors and guardians, who may purchase lands or tenements to the value of 1000*l.* a year; and they are to receive as many such children as they think fit, which may be brought to the hospital, and shall there be bred up and employed, or placed apprentice to any trade, or the sea service, the males till the age of twenty-four, and the females till twenty-one. They may likewise be let out or hired, &c. See 13 *G. 2. c. 29*: 29 *G. 2. c. 29. § 13*: 30 *G. 2. c. 26. § 14.* See also 13 *G. 3. c. 82.* regulating lying-in hospitals, and ordering them to be licensed. As to hospitals or asylums for lunatics in England, see tit. *Idiots and Lunatics*. As to county hospitals and infirmaries in Ireland, see 5 *G. 3. c. 20*: 25 *G. 3. c. 33*: acts of the Irish parliament, and the acts 45 *G. 3. c. 111*: 46 *G. 3. c. 95*: 47 *G. 3. st. 1. c. 14* and *st. 2. c. 50*: 48 *G. 3. c. 113*: 49 *G. 3. c. 36*: 54 *G. 3. c. 62*: 58 *G. 3. c. 47*: 59 *G. 3. c. 41*: 3 and 4 *W. c. 92*: passed since the Union. See further tits. *Charitable Uses, Corporation, I. IV., Mortmain*.

**HOSPITALARIA.** See *Hostilaria*.

**HOSPITIUM,** otherwise *hostagium*. Procuration, or visitation-money. *Neubrigensis, lib. 4. c. 14*: *Brompton, fol. 1193.*

**HOSTELLAGIUM.** A right to have lodging and entertainment; reserved by lords in the houses of their tenants. *Cartular, Radinges, M. S. 157.*

**HOSTELER, or HOSTLER,** *hostellarius*. From the Fr. *hosteler*, i. e. *hospes*.] An inn-keeper, see 9 *Ed. 3. st. 2. c. 11*: 31 *Ed. 3. st. 2. c. 2.*

**HOSTERIUM.** A hoe, an instrument well known. *Chart. Antq.*

**HOSTLE.** Host bread, or consecrated wafers in the Holy Eucharist; and from this word *hostia*, *Somner* derives the Sax. *husel*, used for the Lord's supper, and *hustan*, to administer the sacrament, which were kept long in our old English, under *housel*, and to *housal*. *Paroch. Antiq. 270.*

Shakspeare uses the term *unhousehold*, &c., in *Hamlet*; meaning that his father gave up the ghost without having the holy bread, or sacrament, administered to him. See *Fabin's Chron. edit. 1516. fol. 14.*

**HOSTILARIUS.** An *hospitaller*.

**HOSTILARIA, HOSPITALARIA.** A place or room in religious houses, allotted to the use of receiving guests and strangers; for the care of which there was a peculiar officer appointed, called *hostillarius*, and *hospitalarius*. *Cart, Eccl. Ely. MSS.*

**HOSTRICUS, austercus,** from the Latin *astur*.] A goshawk. *Paroch. Antiq. p. 569.*

**HOTCHPOT, in partem positio.**] A word brought from the Fr. *hotch pot*, used for a confused mingling of divers things together, and among the Dutch it signifies flesh cut into pieces, and season with herbs or roots; but, by a metaphor, it is a blending or mixing of lands given in marriage with other lands in fee falling by descent; as if a man seised of thirty acres of land in fee, hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her, and dies seised of the other twenty acres; now she that is thus married, to gain her share of the rest of the land; must put her part given in marriage into hotchpot, i. e. she must refuse to take the sole profits thereof, and cause her land to be mingled with the other, so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise the sister will have the twenty acres of which her father died seised. *Lit. 55: Co. Lit. lib. 3. c. 12.*

There is also a bringing of money into hotchpot, upon the clauses and within the intent of the statute for distribution of intestates' estates. 22 and 23 *Car. 2. c. 10.* Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this is decreed to be an advancement by the father in his life-time, within the meaning of the statute, though future and contingent; and if the daughter would have any further share of her father's personal estate,

she must bring this money into hotchpot, and shall not have both the one and the other. 1 *Eg. Abr.* 253. See 2 *Vern.* 538. and this Dict. tit. *Executor*, V. 8.

By the custom of London there is likewise a term of hotchpot, where the children of a freeman are to have an equal share of one third part of his personal estate after his death. *Preced. Chanc.* 3. See tit. *London*, and tit. *Law. Brit.* V. 9.

There is also in the civil law *collatio bonorum*, answering to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest, he must call in all that he had formerly received, and then take out an equal share with the others. *Cowell.*

See further *Britton*, c. 72: *Lit.* § 267, 268: 2 *Comm.* 190, 517: and this Dict. tit. *Partours*.

**HOT-HOUSE.** See *Gardens*.

**HOVEL**, *mandra*.] A place wherein husbandmen set their ploughs and carts out of the rain or sun. *Law. Lat. Dict.*

**HOUGHING OF CATTLE.** See tit. *Malicious Injuries*. In Scotland this is capital by the act 1606, c. 5. and in Ireland by the 9 *G.* 4. c. 56. § 17.

**HOUNSLOW-HEATH.** A large heath, containing 4293 acres of ground, and extending into several parishes; so much thereof as is in the king's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of copyhold lands; or the steward of the manor may let it for twenty-one years, &c., and the lessees may improve the same. *Stat. 37 H.* 8. c. 2.

**HOUR**, *hora*.] Is a certain space of time of sixty minutes, twenty-four of which make the natural day. It is not material at what hour of the day one is born. *Co. Lit.* 135. See tits. *Age*, *Fraction*, *Time*.

**HOUSAGE.** A fee paid for housing goods by a carrier, or at a wharf or quay, &c. *Shep. Epit.* 117.

**HOUSE**, *domus*.] A place of dwelling or habitation; also a family or household. Every man has a right to air and light in his own house; and therefore, if any thing of infectious smell be laid near the house of another, or his lights be stopped up and darkened by buildings, &c., they are nuisances punishable by our laws. 3 *Inst.* 231: 1 *Danv. Abr.* 173. But for a prospect, which is only matter of delight, no action will lie for its being stopped. 9 *Rep.* 58. See tits. *Lights*, *Nuisance*.

The dwelling-house of every man is as his castle; therefore, if thieves come to a man's house to rob or kill him, and the owner or his servant kill the thieves in defending him and his house, that is not felony, nor shall he for-

suit any thing. 2 *Inst.* 316. See tit. *Homicide*. A man ought to use his own house so as not to damnify his neighbour; and one may compel another to repair his house in several cases, by the writ *de domo reparanda*. 1 *Sak. Rep.* 360. Doors of a house may not be broken open on an arrest, unless it be for treason, or felony, &c. *H. P. C.* 137: *Plowd.* 5: 5 *Rep.* 91. See tit. *Arrest*.

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries as for his repose. 2. Upon recovery in any real action or ejectment, the sheriff may break the house and deliver seisin, &c., to the plaintiff, the writ being *habere facias seisinam* or *possessionem*; and, after judgment, it is not the house of the defendant in-right and judgment of law. 3. In all cases, where the king is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the king, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the stat. *Westm.* 1. c. 17., which is only in affirmance of the common law; and, without default in the owner, the law will not suffer a house to be broken. 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any subject, either of body or goods; but otherwise, when the door is shut, there he cannot break it to execute process at the suit of a subject. 5. Though a house is a castle for the owner himself and his family, and his own goods, &c., yet it is no protection for a stranger flying thither, or the goods of such a one, to prevent lawful execution; and therefore, in such case, after request to enter, and denial, the sheriff may break the house. 5 *Rep.* 91. a. to 93. a.

From the particular and tender regard which the law of England has to a man's house, arises in part the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries; and to this principle it must be assigned that a man may assemble people together lawfully (at least, if they do not exceed eleven), without raising a riot, rout, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 4 *Comm.* c. 19. p. 223. cities 1 *Hal. P. C.* 547.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the house of the bankrupt. 2 *Show.* 247.

The hundred was formerly liable for damages by the burning of houses, under the 9 *G.* 1. c. 22. § 7; but that statute has been repeal-



ed by the 7 and 8 G. 4. c. 31., which only extends to cases where houses are riotously demolished by tumultuous assemblages. See tit. *Hundred*. As to the cases in which officers may break open a house to execute legal process, see tits. *Arrest, Constable, Execution, Homicide, &c.*; and as to felonies in or relative to houses, see *Arson, Burglary, Felony, Larceny, Riot, Robbery, &c.*

HOUSEBOLD AND HAYBOLD. See to signify housebote and hedgebote, in *Mon. Angl.* 2 par. fol. 633: *Cowell, edit.* 1727.

HOUSEBOTE. A compound of *house* and *bote*, i. e. *compensatio*; signifies *estovers*, or an allowance of necessary timber out of the lord's woods, for the repairing and support of a house or tenement. And this belongs of common right to any lessee for years or for life; but if he take more than is needful, he may be punished by an action of waste. "Housebote (says *Co. on Lit.* fol. 41.) is two-fold, viz. *Estoverium ædificandi et ardendi*. *Cowell.*" See tits. *Bote, Estovers, Common of Estover*.

HOUSE-BREAKING, or HOUSE-ROB-BING. See tits. *Burglary, Dwelling-house, Larceny, Robbery*

HOUSE-BURNING. See *Arson, Burning*.

HOUSE OF CORRECTION. The house of correction is chiefly for the punishing of idle and disorderly persons, parents of bastard children, beggars, servants running away, trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour; and any person who lives extravagantly, having no visible estate to support him, may be sent to the house of correction, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living; but not to be whipped. A person ought to be convicted of vagrancy, &c., before he is ordered to be whipped. 2 *Bulst.* 351: *Sid.* 281. Bridewell is a prison for correction in London, and one may be sent thither. *Style*, 57.

By 4 G. 4. c. 64. the former statutes relating to goals and houses of correction are repealed, and new provisions made for their regulation. See tit. *Goal*.

HOUSE DOVE. See tit. *Pigeon*.

HOUSEL. See tit. *Hostia*.

HOUSEHOLDER, *pater-familias*.] The occupier of a house, a house-keeper, or master of a family.

Under the Reform Act, persons inhabiting houses of the value of 10*l.* per annum, and properly registered, are now entitled to vote in the election of members of parliament for boroughs. See tit. *Parliament*.

HREDIGE. Readily, or quickly. *Leg. Adelman.* c. 16. From the Sax. *hredinge*, i. e. *brevi*, in a short time. *Cowell*.

HUDEGELD. See *Hidgeld*.

HUDSON'S BAY COMPANY. An exclusive trade to a part of America was granted in 1610, by Charles II. to the Governor and Company of Adventurers of England trading to Hudson's Bay. They were to have the sole trade and commerce of and to all the seas, bays, straits, creeks, lakes, rivers, and sounds, in whatsoever latitude, that lie within the entrance of the strait commonly called *Hudson's Straits*; together with all the lands, countries, and territories upon the coasts of such seas, bays, and straits, which were then possessed by any English subject, or the subjects of any other christian state; together with the fishing of all sorts of fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction. *Reeve's Law of Shipping*. See this Dict. tit. *Navigation Act*.

## HUE AND CRY.

HUTESIUM ET CLAMOR; from two French words *huer* and *crier*, both signifying to shout or cry aloud.] *Manwood*, in his *Forest Law*, cap. 19. num. 11. saith, that *hue* in Latin, *est vox delentis*, as signifying the complaint of the party, and *cry* is the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the constable of the next town, and desire him to raise the hue and cry, that is, make the complaint known, and follow the pursuit after the offender, describing the party, and showing as near as he can which way he went; the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he be not found there, then to give the next constable notice, and the next, until the offender be apprehended, or at least until he be thus pursued unto the sea side. Of this see *Bracton*, lib. 3. tract. 2. cap. 5: *Smith de Rep. Anglor.* lib. 2. cap. 20. and the *stat. of Winchester*, 13 Ed. 1: 28 Ed. 3. 11: 27 Eliz. 13.

The normans had such pursuit with a cry after offenders, which they called *clamar de haro*. See *Grand Customary*, cap. 54. And it may probably be derived from *harrior*, *flagitare*. Hue is used alone in *stat.* 4 Ed. 1. st. 2. In the ancient records this is called *hutesium et clamor*. See 2 *Inst.* fol. 172.

But the *clamar de haro* was not a pursuit after offenders, but a challenge of any thing to be his own after this manner, viz. He who demanded the thing did with a loud voice, before many witnesses, affirm it to be his proper goods, and demanded restitution. This the Scotch call *hutesium*: and *Skene* saith it is reduced from the French, *oyer*, i. e. *audire* (or

rather *oyez*), being a cry used before a proclamation. The manner of their hue and cry he thus described; if a robbery be done, a horn is blown, and an *out-cry* made, after which, if the party flee away, and doth not yield himself to the king's bailiff, he may lawfully be slain, and hanged upon the next gallows. See *Skene in v. Hutesium*.

In *Rel. Claus. 30 H. 3. m. 5.* we find a command to the king's treasurer to take the city of London into the king's hands, because the citizens did not, *secundum legem et consuetudinem Regni*, raise the hue and cry for the death of *Guino de Aretto* and others who were slain. *Cowell*.

Hue and cry is also defined the pursuit of an offender from town to town, till he be taken; which all that are present when a felony is committed, or a dangerous wound given, are by the common law, as well by the statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 *Inst.* 116, 117: 2 *Inst.* 172: *Dalt. Justice*, cap. 28. 109: *Fitz. Coron.* 395: *Cro. Eliz.* 654.

The raising of the hue and cry is enjoined by the common law, which may be called a raising of it at the suit of the king, as well by several acts of parliament, which may be called a raising of it at the suit of a private person. 3 *New Ab.* 61.

Hue and cry, says *Blackstone*, is the old common law process, of punishing, with horn and with voice, all felons and such as have dangerously wounded another. *Bract. l. 3. tr. 2. b. 1. § 1*: *Mirr. c. 2. § 6*.

The levying of hue and cry is enjoined by several acts of parliament; and to this purpose it is enacted by stat. *Westm. 1. 3 Ed. c. 9.* "that all be ready and apperelled at the summons of the sheriff, to pursue and arrest felons."

Though some imagined that the hue and cry was grounded on this statute; yet *Lord Coke* says, that it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. 2 *Inst.* 171.

By the statute of 4 *Ed. 1. De officio coronatoris*, hue and cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as elsewhere is used in England; and all shall follow the hue and steps as near as they can.

The statute of *Winchester, 13 E. 1. cc. 1. 4.* directed "that every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town,

and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff." And that such hue and cry might more effectually be made, the hundred was bound by the same statute, c. 3. to answer for all robberies therein committed, unless they took the felon; and this was the foundation of an action against the hundred in case of any loss by robbery.

This statute of *Winton*, as to the mode of enforcing the remedy against the hundred, and the manner in which the hue and cry was to be made, was amended by several acts, viz. 23 *Ed. 3. c. 11*: 27 *Eliz. c. 13*: 8 *G. 2. c. 16*: 22 *G. 2. c. 24*; c. 46. § 34; all of which together with that statute, were repealed by the 7 and 8 *G. 4. c. 27*.

By the 7 and 8 *G. 4. c. 31.* "for consolidating and amending the laws in England relating to remedies against the hundred," compensation may be recovered from the hundred in cases of the destruction or damage of churches, chapels, houses, ware-houses, &c. "by persons riotously and tumultuously assembled together," but no remedy whatever is given in case of robbery; neither does it contain any enactment with respect to hue and cry, which is, therefore, left to depend on the regulations of the common law. See tit. *Hundred*.

The whole vill or district is still in strictness liable to be amerced, according to the law of *Alfred*, if any felony be committed therein and the felon escapes. Hue and cry may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man that knows of a felony. 2 *Hal. P. C.* 100. 104. But if a man wantonly or maliciously raises an hue and cry, without cause, he shall be severely punished as a disturber of the peace. 1 *Hawk. P. C. c. 12. § 5*.

As to hue and cry at common law, it seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy hue and cry, but is also bound to do it under pain of fine and imprisonment. 2 *Inst.* 172: 3 *Inst.* 116: 1 *Hal. Hist. P. C.* 464.

From hence it follows, that although it is a good course, as *Lord Hale* says, to have precept or a warrant from a justice of peace for raising hue and cry, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found; also hue and cry was part of the law before the stat. 1 *Ed. 3. cap. 16.* which first instituted justices of the peace. 2 *Hale, H. P. C.* 99.

It is incumbent upon constables to pursue hue and cry when called upon, and they are severely punishable if they neglect it; and it prevents many inconveniencies if they be there;

for it gives a greater authority to their pursuit, and enables the pursuant, in his assistance, to plead the general issue upon the stats. 7 *Jac. 1. cap. 5*: 21 *Jac. 1. cap. 12.* without being driven to special pleading; therefore, to prevent inconveniencies which may happen by unruliness, it is most advisable that the constable be called; yet upon a robbery, or other felony committed, hue and cry may be raised by the country in the absence of the constable; and in this there is no inconveniency, for if hue and cry be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Hal. Hist. P. C.* 99, 100.

The regular method of levying hue and cry is for the party to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition, to the constables of all the neighboring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found. 3 *Inst.* 116: *Dalt. Justice, cap. 28*: *Crompt. 178*: 2 *Hawk. P. C.* 75.

The constable is not only to make search in his own vill, but also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen (but pursuit with horsemen seems to have been first enjoined by the 27 *Eliz. c.* 13. § 10. and not to be requisite at common law), until the offender be taken. 2 *Hal. Hist. P. C.* 101. In case of hue and cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed, yet those who pursue hue and cry may arrest and proceed as if a felony had already been committed. 2 *Hal. Hist. P. C.* 101: 5 *H. 5. a*: 21 *H. 7. 28. a. per Rede*: 2 *Ed. 4.* 8, 9: 29 *Ed. 3.* 39: 2 *Inst.* 173: 2 *Hal. Hist. P. C.* 102.

If hue and cry be raised a person certain for felony, though possibly he is innocent, yet the constables, and those who follow the hue and cry, may arrest and imprison him in the common goal, or carry him to a justice of the pence. 2 *Hal. Hist. P. C.* 102.

If the person pursued by hue and cry be in a louse, and the doors are shut, and refused to be opened by command of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only on suspicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and hue

and cry levied upon the offender. 7 *Ed. 3.* 16. b: 2 *Hal. Hist. P. C.* 102. See tit. *Constable*.

It seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 1 *Hal. Hist. P. C.* 102. See tit. *Homicide*.

Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. *Dalt. cap. 28*: 2 *Ed. 4.* 8. b: *Crompt. de Pace*, 178: 3 *Hal. Hist. P. C.* 103. See tit. *Constable*.

But though he may search suspected places or houses, yet his entry must be by *open doors*, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore, in case of such a search, the breaking open the door is at his peril, viz. justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them *within*, of his business, and a demand of entrance, and a refusal, before doors can be broken. 2 *Hal. Hist. P. C.* 103. See tit. *Constable*.

If the hue and cry be not against a person certain, but by the description of his stature, person, clothes, horse, &c., the hue and cry doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows (not usual in other cases), viz. to arrest a person by description. 2 *Hal. Hist. P. C.* 103.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor described by person, clothes, or the like; yet such a hue and cry is good as hath been said, and must be pursued, though no person certain be named or described. 2 *Hal. Hist. P. C.* 103.

And therefore in this case all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. 2 *Ed. 4.* 8. b: 2 *Hal. Hist. P. C.* 103.

There can be no doubt but that by the common law (as also by the several statutes which enjoin it), they who neglect to levy hue and cry (whether officers of justice or others), or



who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect. 2 *Hal. Hist. P. C.* 104.

HUERS. See *Conders*.

HUISSERIUM. A ship used to transport horses; derived, as some will have it, from the Fr. *huis*, i. e. a door; because, when the horses are put on shipboard, the doors or hatches are shut upon them, to keep out the water. *Brompton*, Anno 1190. These ships have been termed *Ufers*.

HUISSIER. An usher of a court, or in the king's palace, &c. See *Usher*.

HULKA. A hulk or small vessel. *Wals-ing*, 394.

HULKS. For felons. See tit. *Transportation*.

HULL. A restraint of exactions taken there. *Stat.* 27 *H. 8. c. 3.* Their duties on salt fish and herrings restored. *Stat.* 33 *H. 8. c. 33* : 5 *Eliz. c. 5. § 3.* The customer of Hull to have a deputy resident at York. *Stat.* 1 *Eliz. c. 11. § 8.* For erecting workhouses and maintaining the poor at Hull, see stats. 15 *G. 1. c. 10* : 28 *G. 2. c. 27.* See this Dict. tit. *Fish, Navigation Acts*.

HULLUS. A hill.—In *hullis et holmis*, i. e. in hills and dales. *Mon. Angl. tom. 2. p.* 292.

HUMAGIUM. A moist place. *Mon. Angl. 1 par. f.* 628. a.

HUMBER, (river) in Yorkshire, fish-guards and piles, &c. to be removed. *Stat.* 23. *H. 8. c. 18.* See tit. *Fish*.

## HUNDRED.

HUNDREDUM, *centuria*.] A part or division of a shire; so called, either because of old each hundred found 100 fidejussors of the king's peace, or a hundred able men for his wars. But more probably it is so called, because it was composed of a hundred families. It is true, *Brompton* tells us, that a hundred contains *centum villus*; and *Giraldus Cambrensis* writes, that the Isle of Man had 343 *villas*. But in these places the word *villa* must be taken for a country family; for it cannot mean a village, because there are not above forty villages in that island. So where *Lambard* says, that a hundred is so called, *à numero centum hominum*, it must be understood of a hundred men who are heads of so many families.

The word *hundredum* is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. *Cowell*.

Hundreds were first ordained by King Alfred, King of the West Saxons: *Lambard*

*verbo Centuria*. This dividing counties into hundreds, for better government, King Alfred brought from Germany: for there *centa* or *centena*, is a jurisdiction over a hundred towns. See 1 *Comm.* 115. *Introd. § 4.*

In ancient times, it was ordained for the more sure keeping of the peace, that all free-born men should cast themselves into several companies by ten in each company; and that every of these ten men should be surety and pledge for the forthcoming of his fellows. For which cause these companies in some places were called *tithings*; and as ten times ten makes a hundred, so because it was also appointed that ten of these tithings should at certain times meet together for matters of greater weight, therefore that general assembly was called a hundred. *Lamb. Const.*

The hundred is governed by a high constable or bailiff; and formerly there was regularly held in it the hundred court for the trial of causes, through now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes. 1 *Comm. Introd. § 4 p.* 115: and see 4 *Comm. c. 33.*

This is the original of hundreds, which still retain the name, but the jurisdiction is devolved to the county court, some few excepted, which have been by privilege annexed to the crown, or granted to some great subject, and so remain still in the nature of a franchise. This has been ever since the 14 *Ed. 3. st. 1. c. 9.* whereby these hundred courts, formerly farmed out by the sheriff to other men, were all, or the most part, reduced to the county-court, and so remain at present.

But now, by hundred-courts we understand several franchises, wherein the sheriff has nothing to do by his ordinary authority, except they of the hundred refuse to do their office. See *West, part 1: Symbol. lib. 2. § 228.* *Ad hundredum post Pascha, et ad proximum hundredum post festum St. Mich.:* *Mon. Angl. 2 par. f.* 293. a.

A hundred is to have jurisdiction or power to administer justice in 100 villis, or of 100 men, or of 100 parishes. *Br. Court Baron, pl. 8.* cites 8 *H. 7. 3. par. Rede*.

Every ward in London is a hundred in a county, and every parish in London is a vill in a hundred. 9 *Rep.* 66. b.

Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, viz. those hundreds which were anciently parcel of the farm of the sheriffs, that the statute 2 *Ed. 3. c. 12.* speaks of; or else they were such as were granted out, which the lord of the hundreds sold to be held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. *Vent.* 495.

In the time of King Alfred the kingdom was gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the king's relations had the government of them, and therefore they were called *consanguinei* (cousins); and so are the earls (*comites*) lord lieutenants styled at this day; but when the office became troublesome, there were ordained *vicecomites* (sheriffs), which name remains to this day, and the others continue to be called *consanguinei*, but have no power in the county, having only the honorary name of earls or *comites* of such or such a county, &c. For the better government of these counties, the *vicecomites* had two courts; but out of those the king granted petty leets and courts baron; but the tourn of the sheriff had yet a superintendant power, they being derived out of the sheriff's tourn. See *Dyer*, 13.

The king afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the king utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of *Linc. 9 Ed. 2. st. 2.* that sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the king and county, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of *2 Ed. 3. cc. 4. 5* that sheriffs should continue but for one year. But this took away the whole inconvenience: for the crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made them endeavour to make up their money by unlawful means; and therefore came the statutes *2 Ed. 3. c. 12: 14 Ed. 3. c. 9.* By the first it was enacted, that all hundreds and wapentakes granted by the king shall be annexed to the county, and not severed. And by the statute, that all should be annexed, and the sheriff should have power to put the bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the king granted away hundreds, and abated not the sheriff's farm. *2 Show. 20, 22.*

Under the old statutes the hundred was liable to make compensation not only in cases of robbery, but of maiming cattle, burning stacks, destroying trees, &c. These acts, however, have all been repealed by the *7 and 8 G. 4. c. 31.* and the responsibility of the hundred is now restricted to damage occasioned to the property specified in the second section by riotous and tumultuous assemblages.

By § 2. if any church or chapel, or any dissenting chapel, duly registered or recorded, or any house, stable, coach-house, outhouse, ware-house, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagonway, or trunk for conveying minerals from any mine, shall be feloniously demolished or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, in which any of the said offences shall be committed, shall yield full compensation to the persons damnified, not only for the damage done to any of the subjects before enumerated, but also for any damage at the same time done to any fixture, furniture, or goods, in such buildings or erections.

Where the owners of certain stacks of hay and corn maliciously set on fire received the amount of his loss from an insurance office, it was held, that he might nevertheless maintain an action against the hundred, under the repealed statute of the *9 G. 1. c. 22. 2 B. & C. 254.*

And it was determined that the owner of a building intended for a dwelling, but unfinished, could not recover against the hundred under that statute, because such a building was neither "a house, barn, or outhouse," within the meaning of the act. *8 B. & C. 461.*

It was also decided that a reversioner might sustain an action against the hundred under the same statute, which gave a remedy to "all and every person or persons for the damages they shall have sustained." *9 B. & C. 134.*

§ 3. No action or summary proceeding shall be maintainable by virtue of the act, unless the persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall within seven days after the commission of the offence go before some justice of the peace residing near, and having jurisdiction over the place where the offence shall have been committed, and state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended: and no person shall bring any such action unless

he commence the same within three calendar months after the commission of the offence. In the case aforesaid, the party damnified may sue him for damage sustained in an action on the case, together with costs.

The servants mentioned in the above section do not mean all the servants who have the care of particular portions of the property in a house or manufactory, but only those who represent the master in his absence, and have the general care and superintendence of his property. A swearing to a deposition previously drawn up is a sufficient submitting to examination. 3 B. & Ad. 550.

§ 4. The process in the action against the hundred is to be served on the high constable, who shall within seven days give notice thereof to two justices residing in or acting for the hundred, and may defend, or let judgment go by default, as advised.

§ 5. Renders inhabitants of the hundred competent witnesses.

§ 6. If plaintiff recovers, the sheriff, on receipt of the execution, shall make out a warrant directing the treasurer of the county to pay the amount; who is also, by § 7. to reimburse the high constable for his expenses in defending the action, &c. And for this purpose the justices at the next quarter sessions may direct the money so paid to be raised in the hundred over and above the general county rate.

§ 8. No person shall commence any action against the hundred where the damage shall not exceed 30*l*. but the party damnified shall, within seven days, give a notice in writing for his claim for compensation, according to the form in the schedule annexed to the act, to the high constable, who shall, within seven days after the receipt of the notice, exhibit the same to some two justices residing in or acting for such hundred, and they shall appoint a special petty session of all the justices acting for such hundred, to be holden within not less than twenty, nor more than thirty, days next after the exhibition of such notice, for the purpose of determining the claim. The high constable shall, within three days after such appointment, give notice in writing to the claimant, of the day and hour and place appointed for holding such petty session, and within ten days give the like notice to all the justices. The claimant is also required to cause a notice in writing, in the form in the schedule annexed to the act, to be placed on the church or chapel door, or other conspicuous part of the parish or place in which such damage shall have been sustained, on two Sundays preceeding the day of holding such petty session.

By § 9. such cases to be settled by the justice at a special petty sessions, who may make an order for the amount of the compensation and costs on the county treasurer.

§ 10. If any high constable shall refuse or

neglect to give such notice as is required in the case aforesaid, the party damnified may sue him for damage sustained in an action on the case, together with costs.

§ 11. Every action or summary claim to recover compensation for damage caused to any church or chapel, shall be brought in the name of the rector, vicar, or curate of such church or chapel, or if none, in the names of the church or chapelwardens, if there be any such, and if not, in the name or names of any one or more of the persons in whom the property of such chapel may be vested; and the amount recovered in any such case shall be applied in the rebuilding or repairing such church or chapel; and in case of damage to property belonging to a corporation, such body may recover compensation against the hundred in the same manner as any person damnified; and the conditions required to be performed by any person damnified may, in the case of a body corporate, be performed by any officer of such body.

§ 12. Where the damage is committed in any county of a city, &c., or in any liberty, &c. which is not within any hundred, or does not contribute to the county rate, such county, liberty, &c. shall be liable like the hundred. See *Threshing Machines*.

**HUNDRED-COURT.** Is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor — The free suitors are here the judges, and the steward the register, as in the case of a court-baron. It is not a court of record, and it resembles a court-baron in all points, except that in point of territory it is of a greater jurisdiction.

According to *Blackstone*, its institution was probable coeval with that of hundreds themselves, introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. See 1 *Comm. Introd.* § 4. and this *Dict. tit. County Court, Court Baron, Court Leet, Constable, Hundred, &c.*

**HUNDRED LAG-IL** from the Sax. *laga*, lex ] Is in Saxon the hundred court. *Manwood*, par. 1. pag. 1.

**HUNDREDORS**, *hundredarii*.] Persons serving on juries, or fit to be impanelled thereon for trials, dwelling within the hundred where the land in question lies. 35 H 8. c. 6. (repealed.) And default of hundredors was a challenge or exception to panels of jurors for default of hundredors, &c. Writs of *venire facias* for trial of any action in the courts at Westminster, shall be awarded of the body of the proper county where the issue is triable. See *tit. Jury*, I. II.

Hundredor also signifies him that hath the jurisdiction of the hundred, and is in some



places applied to the bailiff of a hundred. See 13 *Ed. 1. c. 38*: 9 *Ed. 3*: *Horn's Mirror*, lib. 1.

**HUNDRED-PENNY.** Was collected by the sheriff or lord of the hundred, in *oneris sui subsidium*. *Cambd.* and see *Spelm. Gloss.* Pence of the hundred is mentioned in *Domesday*. And it is elsewhere called *hundredfel* *Chart. K. Joh. Egidio Episc. Heref.*

**HUNDRED-SETENA.** Dwellers or inhabitants of a hundred. *Charta Edgar Reg.*: *Mon. Angl. tom. 1. p. 16.*

**HUNGER.** According to the present doctrine, hunger will not justify stealing food, to relieve a present necessity; 1 *Hal. P. C. 54*; and the doctrine seems just, as (on conviction) a judge may respite and a king pardon, an advantage which is wanting in many states; particularly those which are democratical. The ancient doctrine, (that it would justify,) if now in force, might open a door to many villanies. And, in this commercial state, those who can labour need not fear starving. Those that cannot, and who are poor, the laws have made provision for. See 4 *Comm. 31.*

**HUNTING.** See *tit. Deer-Stealers, Game.*

In Scotland, by the common law, all men have a right and privilege of the game on their own estate or property—the only existing act, by which any limitation of that right can now be enforced, is 1621, c. 31., which requires the qualification of a plough land (96 acres, or less if distinguished as a ploughgate) in heritage or property. The regulations of certificates of such qualification is, however, extended to Scotland (and Ireland). The person possessed of such qualification may hunt on his own lands, or (by permission) on those of his neighbours. But the practice in sheep countries, of farmers and their servants entering in hunting foxes, is considered as an act of necessary trespass, which the law regards with favour. The time of killing game is regulated in Scotland by statute. By 13 *G. 3. c. 54.* ptarmigan are prohibited from Dec. 10 to August 12; heath-fowl from Dec. 10 to Aug. 20. By 39 *G. 3. c. 34.* partridges are prohibited from Feb. 1 to Sept. 1. Hares, rabbits, and deer, cannot be destroyed in time of snow by several ancient acts: and there are several also which prohibit stalkers, slaying deer, &c. The burning of heath, or muir, is prohibited as prejudicial to the game, from April 11 to Nov. 1 by stat. 13 *G. 3. c. 54*; § 3. of which act punishes unqualified persons having game in their possession, without the licence of a qualified person, by penalties of 20s. &c. And see the 2 and 3 *W. 4. c. 68.* for the more effectual prevention of trespasses upon property in Scotland by persons in pursuit of game.

**HURDLE.** A sledge or hurdle used to draw traitors to execution. See *tit. Treason.*

**HURDEREFERST.** A domestic, or one of the family, from the Sax. *hyred, familia*, and *faest, firmus*. *Leg. H. c. 8.*

**HURRERS.** The cappers and hat makers of London were formerly one division of the haberdashers, called by this name. *Stow's Surv. Lond. 312.*

**HURST, HYRST, HERST,** from the Sax. *Hyrst, i. e.* a wood or grove of trees.] There are many places in Kent, Sussex, and Hampshire, which begin and end with this syllable; and the reason may be, because the great wood called Anderswood extended through those counties. *Cowell.*

*Hurst Castle* is so called because situated near the woods. *Hurslega* is a woody place; and probably from thence is derived *Hursley*, now *Hurley*, a village in Berkshire. *Cowell.*

**HURTARDUS, HURTUS.** A ram or wether, a sheep. *Mon. Angl. tom. 2. p. 666.*

**HUS AND HANT.** Words used in ancient pleadings. *Hucus P. captus per querimoniam mercatorum Flandriae et imprisonatus, offert Domino Regi Hus et Hant in plegio ad standum recto, et ad respondendum predictis mercatoribus et omnibus aliis, qui versus eum loqui voluerint: et diversi veniunt qui mancipiunt quod dictus Hen. P. per Hus et Hant veniet ad summonitionem Regis vel Concilii sui in Curia Regis apud Shephay, et quod stabit ibi recto, &c. Placit. coram Concilio Dom. Reg. Anno 27 H. 3: Rot. 9. See commune Plegium, sicut Johannes Doe et Richardus Roe. 4 Inst. 72.*

**HUSBAND AND WIFE.** See *tit. Baron and Feme.*

**HUSBANDRY AND HUSBANDMAN.**

There having been great decay of husbandry and hospitality, it was enacted by 39 *Eliz. c. 1.*, now obsolete, that one half of the houses decayed should be erected, and forty acres of arable land laid to them, by the person, his heir, executor, &c., who suffered the decay: and they were to keep the houses and lands in repair.

The decaying of houses of husbandry prohibited. 4 *H. 7. c. 19*: 6 *H. 8. c. 5*: 7 *H. 8. c. 1*: 27 *H. 8. c. 22*: 2 and 3 *Ph. & Ma. c. 1*, 2: 39 *El. c. 1.* Wood not to be turned to tillage or pasture. 35 *H. 8. c. 17*. § 2.—(Repealed by the 7 and 8 *G. 4. c. 27.*) Land to be re-converted to tillage. 5 and 6 *Ed. 6. c. 5*: 5 *El. c. 2*.—(Repealed by stat. 35 *El. c. 7*. § 20.) Who may be compelled to serve in husbandry. 5 *El. c. 4*. § 7. How husbandmen shall take apprentices. 5 *El. c. 4*. § 25. See *tit. Labourers, Apprentices.* Arable land not to be converted to pasture (39 *El. c. 2.*),

but not to extend to Northumberland. 43 *Ed. c.* 9. § 32.

Such of the above statutes as are still unrepealed have long been obsolete.

**HUSBRECE**, from Sax. *hus*, a house, and *brice*, a breaking.) Was that offence formerly which we now call *burglary*. *Blount*. See tit. *Burglary*.

**HUSCARLE**. A menial servant. It signifies properly a stout man, or a domestic; and the domestical gatherers of the Danes' tributes were anciently called *huscarles*. The word is often found in *Domesday*, where it is said the town of Dorchester paid to the use of *huscarles* or *housecarles*, one mark of silver. *Domesday*.

**HUSCANS**, Fr. *hauseau*.] A sort of boot or buskin made of coarse cloth, and worn over the stockings, mentioned in the ancient stat. 4 *Ed.* 4. c. 7.

**HUSFASTNE**, Sax. *hus*, i. e. *domus et faest*, *fixus*.] He that holdeth house and land. *Bract.* lib. 3. tract. 2. cap. 10. See *Heordfeste*.

**HUSGABLE**, *husgabluu*.] House-rent, or some tax or tribute laid upon houses. *Mon. Angl. tom.* 3. p. 254.

**HUSSELING-PEOPLE**. Communicants; from the Sax. *housel* or *hussel*, which signifies the holy sacrament. See tit. *Hostiæ*.

**HUSTINGS**, *hustingum*, from the Sax. *hustinge*, i. e. *concilium* or *curia*.] A court held before the lord mayor and aldermen of London, and the principal and supreme court of the City. Of the great antiquity of this court, we find honourable mention made in the laws of king Edward the Confessor: *Debet etiam in London, quæ est caput Regni et Legum, semper Curia Domini Regis singulis septimanis die Junæ hustings sedere et teneri; fundata enim erat olim et edificata ad instar, et ad modum et in memoriam veteris Magnæ Trojæ, et usque in hodiernum diem leges et jura et dignitates, et libertates regiasque consuetudines antiquæ magnæ Trojæ, in se continet: et consuetudines suas una semper inviolabilitate conservatur, &c.*

Other cities and towns have also had a court of the same name; as Winchester, York, Lin-

coln, &c. *Fleta*, lib. 2. c. 55: 4 *Inst.* 217: stat. 10 *Ed.* 2. c. 1. See this Dict. tit. *Court of Hustings, London*.

**HUTESIUM ET CLAMOR; HUE AND CRY**. See that tit.

**HUTILAN**, Taxes. *Mon. Angl. tom.* 2. p. 586.

**HYBERNAGIUM**. The season for sowing winter corn between Michaelmas and Christmas; as *Tremagium* is the season for sowing the summer corn in the spring of the year. These words were taken sometimes for the different seasons; other times for the different lands on which the several kinds of grain were sowed; and sometimes for the different corn: as *hybernagium* was applied to wheat and rye, which we still call *winter corn*; and *tremagium* to barley, oats, &c. which we term *summer corn*: these words are likewise written *ibernagium* and *thornagium*. *Fleta*, lib. 2. cap. 73. § 18.

**HYDAGE**. See *Hidage*.

**HYDE OF LAND, AND HYDEGILD**. See *Hide*.

**HYPOTHECA**. In the civil law, was where the possession of the thing pledged remained with the debtor. *Inst. l.* 4. c. 6. § 7. See *East*, 2 *Comm.* 159. See tit. *Bailment*. In the Scotch law it is synonymous with *Lien*. See that tit.

To *hypothecate* a ship, from the Lat. *hypotheca*, a pledge, is to pawn the same for necessities; and a master may hypothecate either ship or goods for relief when in distress at sea; for he represents the traders as well as owners; and in whose hands soever a ship or goods hypothecated come, they are liable. 1 *Salk.* 34: 2 *Lil. Abr.* 195. See tits. *Factor, Insurance, IV., Merchant, Mortgage, Ship, &c.*

**HYTH**. A port or little haven to lade or unlade wares at, as Queen-hyth, Lamb-hyth, &c. *New Book of Entries*, fol. 3. *De tota medietate hythæ suæ in, &c. cum libero introitu et exitu, &c.* *Mon. Angl. par.* fol. 142. Also a wharf, &c.

## I.

## IDIOTS AND LUNATICS.

**I**BERNAGIUM, *hibernagium, ybernagium.*] Season for sowing winter corn. *Cart. Antig. MSS.*

**ICENI.** The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, and Huntingdonshire.

**ICH DIEN,** from the German.] The motto belonging to the arms of the Prince of Wales, signifying *I serve*. It was formerly the motto of John, king of Bohemia, slain in the battle of Cressy, by Edward the Black Prince; and taken up by him to show his subjection to his father King Edward III.

**ICONA, iconia.**] A figure or representation of a thing. *Mat. Paris, 146: Hoveden, 670.*

**ICTUS ORBUS.** A maim, bruise, or swelling; any hurt without cutting the skin and shedding of blood, which was called *plaga*: it is mentioned in *Bracton, lib. 2. tract. 2. cap. 5 and 24*; and in the laws of *H. 1. c. 34.*

**IDENTITATE NOMINIS.** An ancient, and now obsolete writ, that lay for one taken and arrested in any personal action, and committed to prison for another man of the same name; which writ was in nature of a commission to inquire whether he were the same person against whom the action was brought; and if not, then to discharge him. *Reg. Orig. 194: F. N. B. 267.*

By 37 *Ed. 3. c. 2.* this writ is given for wrongfully seizing lands or goods of a person outlawed, for want of a good declaration of his surname; and officers shall take security, to answer the value of what is seised, if the party cannot discharge it, on pain of double damages. And this writ shall be maintainable by executors, &c. by 9 *H. 6. c. 4.* Vide 3 *Com. Dig: 14 Vin. Abr. tit. Identitate Nominis.*

Where one person is by mistake arrested for another, the person so arrested may maintain an action for false imprisonment, against the officer to recover damages, though he sue this writ for immediate relief from the imprisonment. See *tits. Arrest, False Imprisonment.*

**IDENTITY or PERSON.** Where a person convicted of, or outlawed for a criminal offence, being asked what he hath to allege why execution should not be awarded against him, pleads diversity of person, a jury shall be impanelled to try this collateral issue, *viz.* the identity of the person. See 4 *Comm. 396*: and this *Dict. tits. Execution and Reprieve.*

**IDES, idus.]** With the ancient Romans were eight days in every month, so called; being the eight days immediately after the *Nones*. In the months of March, May, July, and October, these eight days begin at the eighth day of the month, and continue to the fifteenth day: in other months they begin at the sixth day, and last to the thirteenth. But it is observable, that only the last day is called *Ides*, the first of these days is the eighth *Ides*, the second day the seventh, the third the sixth, *i. e.* the eighth, seventh, or sixth day before the *Ides*, and so it is of the rest of the days: wherefore when we speak of the *Ides* of any month in general, it is to be taken for the fifteenth or thirteenth of the month mentioned. See *tit. Calends.*

## IDIOTS AND LUNATICS.

The law relating to persons labouring under the infirmities of idiocy and lunacy, being in many respects the same, and in all cases depending on similar reasoning, is here reduced to one head: under which we may consider—

- I. *Of the Prerogative of the Crown, and the Jurisdiction of the Court of Chancery.*
- II. *Of the Distinction between Idiots and Lunatics.*
- III. *In what Manner Persons are found to be Idiots or Lunatics.*
- IV. *Of appointing Committees; their Power and Duties.*
- V. *Of the Civil Rights and Acts of Persons of Unsound Mind.*
- VI. *Of their Responsibility for Crimes.*
- VII. *Of the Treatment of Insane Persons.*

**I. 1. Of the Prerogative of the Crown.—**As the king, being *parens patriæ*, hath the protection of all his subjects, so is he in a more peculiar manner to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves; this, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the king owes to his subjects in return for their subjection and allegiance to him. *Staund. Prærog. cap. 9. fol. 33: 2 Inst. 14: 4 Co. 126. a.: Dyer, 25.*



The custody of an idiot and his lands was formerly vested in the lord of the fee. *Flet. L. 1. c. 11. § 10.* And therefore still, by special custom in some manors, the lord shall have the ordering of idiot and lunatic copyholders. *Dy. 302: Huit. 17: Noy, 27.* But by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king as the general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. *F. N. B. 232.* This fiscal prerogative of the king is declared in parliament by the 17 *Ed. 2. c. 9.* which directs, in affirmance of the common law, that the king shall have ward of the lands of *natural fools*, taking the profits without waste or destruction, and shall find them necessities; and after the death of such idiots, he shall render the estate to the heirs; in order to prevent such idiots from aliening their lands, and their heirs from being disinherited. 4 *Rep. 126.*

Lord Coke in 4 *Co. Beverley's* case, says, that this prerogative was by the common law, and that the statute *de prerogativa Regis*, 17 *Ed. 2. c. 9.* above mentioned, is only declarative thereof. 2 *Inst. 14: 4 Co. 126.*

The king, after a person has been found an idiot, by office is entitled to the custody of the body of such idiot, and of his lands and goods during his life, and as well of those lands and other hereditaments which he takes by purchase as by descent; but the freehold of them remains in the idiot, notwithstanding the right of the crown to their custody. 4 *Rep. 126: Staundf. 34. 36.* For although the statutes respecting idiots and lunatics (17 *Ed. 2. c. 9, 10.*), refer only to the lands of the idiot or lunatic, yet it seems that the prerogative extends to the custody of his person, goods, and chattels. 4 *Rep. 126: F. N. B. 232.* But if an idiot has not the possession of lands or goods, but only a title of entry, or right of action, the king cannot enter or have the custody of them. *Staundf. 35: Vin. Abr. tit. Lunacy (B. 2.), p. 1.* The king may take the profits of an idiot's estate to his own use, allowing necessities to him and his family, and making reparations, and may also demise the lands of an idiot rendering rent. *Staundf. 35: Moore, 4: Dyer, 26. a.* Though the king may, by *scire facias*, or by information, avoid all acts of an idiot done during his incapacity, yet his right to the meane profits shall have relation only to the time of the office. 8 *Rep. 170. a.*

So the king may grant the custody of an idiot, his lands, and goods, to another; *F. N. B. 232: 2 Ch. Cas. 70; And. 23;* and such grant may be made without security to account; 3 *Mod. 23;* and it seems may extend

to the grantee's representatives. 2 *Ch. Cas. 70: 1 Vern. 9. 137.* The doubt, whether the king could grant the custody of an idiot to one, and his executors proceeded on the possibility of the executorship devolving on an infant, who, being held incapable of managing his own estate, could scarcely be thought a proper person to be intrusted with the charge and person of another. The Court of King's Bench, however, did, upon an issue directed, adjudge the grant to be good, holding it to be a trust coupled with an interest of which an infant is capable. 3 *Mod. 43: Skin. 177.* See 1 *Vern. 9.* Neither are the executors of an idiot entitled to an account against the grantee for the profits accruing during the grant from the crown. 3 *Atk. 312.*

This branch of the royal revenue was long considered as a hardship upon private families; and so far back as 8 *Jac. 1.* it was under the consideration of parliament to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the feudal tenures which have been since abolished. 4 *Inst. 203: Com. Journ. 610.* Yet few instances can be given of the oppressive exertion of it, since it seldom happened that a jury found a man an idiot *à nativitate*, but only *non compos mentis* from some particular time; which had an operation very different in point of law. 1 *Comm. 304.* And since the Revolution, the crown has always granted the surplus profits of the estate of an idiot to some of his family. 1 *Ridg. P. C. 519: App. n. 1.*

With respect to lunatics, it is enacted by the statute *de prerogativa* (17 *Ed. 5. st. 2. c. 10.*), that the king shall provide where any (that beforetime hath had his wit and memory) happen to fail of his wit, as there are many having lucid intervals, that their lands and tenements shall be safely kept, without waste and destruction, and that they and their household shall live and be maintained competently from the profits of the same; and the residue beyond their reasonable sustentation shall be kept to their use, to be delivered unto them when they recover their right mind; so that such lands and tenements shall in nowise within the time aforesaid be aliened; nor shall the king take any thing to his own use. And if the party die in such state, the residue shall be distributed for his soul, by the advice of the ordinary; and of course, by the subsequent amendments of the law of administration, shall now go to his executors or administrators. 1 *Comm. 304.*

It will be seen, therefore, that the words of the above statute differ as to the provisions for the care of the property of an idiot or lunatic.

In the case of a lunatic the king is a mere trustee, acting only as *parens patriæ*; in that of an idiot he has, or is entitled to have, a beneficial interest.

The prerogative of the crown does not prevent a relation or friend from confining a lunatic; 2 *Roll. Abr.* 546: 4 *Comm.* 25; under the regulations introduced by statute. See *post*. VII.

The right of the crown to control and manage lunatics and their estates commences with the finding of the inquisition. 8 *Rep.* 170. b.

2. *Of the Jurisdiction of the Court of Chancery.*—As to the manner in which this branch of the prerogative court is vested in the chancellor, before the Court of Wards was erected, the jurisdiction, both as to idiots and lunatics, was in Chancery, and therefore all such commissions were taken out and returned in Chancery; and after the Court of Wards was abolished by act of parliament, it reverted back to the Court of Chancery. 2 *Atk.* 553. When a person is found an idiot or a lunatic, the king alone has power to grant the custody of the idiot or lunatic and his estates by sign manual; and therefore, to save repeated application to the crown, it has been the practice to entrust such power by warrant under the sign-manual, countersigned by the two secretaries of state, to the lord chancellor on his coming into office; by virtue of which warrant, and not as chancellor, he has the ordering and disposition of the persons and estates of idiots and lunatics; and such warrant confers no jurisdiction, but only a power of administration. This authority is given to him (as stated in the warrant) in consideration of its being his duty, as chancellor, to issue the commission on which the inquiry as to the fact of idiocy or lunacy is to be made.

This branch of the prerogative may be exercised by any officer the crown thinks fit; it is ordinarily delivered to a great officer of state, but not necessarily to the keeper of the great seal. 4 *Bro. C. C.* 233: 2 *Shaw. & W.* 525. An instance is mentioned of the lord high treasurer having the warrant; 2 *Dick.* 553; but if it were granted to any other officer of state than the chancellor, it would not enable such officer to act after the grant made to the committees, but merely to direct such grant.

The warrant confers the right of making grants of the custody of the persons and estates of idiots and lunatics, and empowers the lord chancellor, or other person to whom it is given, to prepare and pass such grants without any further special warrant from the crown. See 3 *P. W.* 107. n. (a.)

After the custody is granted, the chancellor acts in matters relative to the lunatic, not under

the sign-manual, but by virtue of his general power as keeper of the king's conscience; and the orders of the Court of Chancery in matters of lunacy are enforced by attachment, not as being warranted by the sign-manual, but by the general power of the court. 2 *Amb.* 707. See 2 *Sch. & L.* 438: 6 *Ves.* 783.

Neither the master of the rolls, nor the vice-chancellor can sit for the lord chancellor in matters of lunacy. *Shelford's Law of Lunacy*, 15. 18. And as his power is derived under the sign-manual, in virtue of the prerogative of the crown, he is responsible to the crown alone for the right exercise of it; and therefore an appeal will not lie to the House of Lords from an order made in lunacy, but must be made to the king in council. 3 *P. Wms.* 107: 6 *Bro. P. C.* 329.

Though in strictness the guardianship of the king may be said to be determined by the death of the lunatic, yet it has been held, that the chancellor may make an order in a lunatic's affairs, after his death. *Amb.* 706. See also 3 *Bro. C. R.* 238.

The Court of Chancery will not interfere touching the property of a person of unsound mind, where no commission of lunacy has issued. 5 *Rus.* 152.

As to the powers given to the chancellor or other person entrusted with the sign-manual by statute, see *post*, IV.

II. *Of the Distinction between Idiots and Lunatics.*—An idiot (derived originally from the Greek *Idiotês*, a private individual), or *natural fool*, is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any.

A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents his age, or the like common matters. *F. N. B.* 233.

Fitzherbert also defines an idiot from birth to be a person who cannot count or number twenty pence, or tell who was his father or mother, or how old he is, &c., so as it may appear that he hath no understanding of reason what shall be for his profit or what shall be for his loss: but if he have sufficient understanding to know and understand his letters, and to read by teaching or information of another man, he is not an idiot. *F. N. B.* 583.

In a case in the House of Lords, however, Lord Tenterden is reported to have said that the above definition was contrary to common sense, for, as to repeating the letters of the alphabet, or reading what is set before him, a child of three years old may do that. 1 *Don. P. C. (New Series)* 392: *S. C.* 3 *Bligh, (New Series.)*

Although a person has a weak mind, yet, if

he appears by conversation and instruction capable of acquiring a competent share of understanding to enable him to govern himself or his estate, and a memory sufficient to retain the knowledge so acquired, he is not considered in law an idiot, or of unsound mind. 1 *Ridg. P. C.* 522.

But if it appear he has the use of understanding, which many of that condition discover by signs to a very great measure, he may be tried and suffer judgment and execution, though great caution is to be used therein. 1 *Hale P. C.* 34.

A person born deaf and dumb, on attaining 21, applied to the Court of Chancery to have possession of her real, and an assignment of her chattel, estate, and the chancellor having put questions to her in writing, to which she returned sensible answers in writing, the application was granted. 1 *Dick.* 268.

And there can be no doubt, whatever was the case formerly, that now, owing to the judicious and humane means used, deaf and dumb persons are capable of being taught many pursuits, and may receive moral instruction, fully sufficient to raise them to the station and to the respectability of rational agents.

A man who is born deaf, dumb, and blind, is looked upon as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. *Co. Lit.* 42: *Fleta*, l. 6. c. 40.

A lunatic, or person *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is, indeed, properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not; and the word is derived from the Latin *luna*, in consequence of a belief which formerly prevailed that the moon has an influence over mental disorders.

Under the general name of *non compos mentis*, and which is the most legal term, are comprised not only lunatics, but persons under phrenzies, or who loose their intellects by disease; those that grow deaf, dumb, and blind, not being born so, or such, in short, as are judged by the Court of Chancery incapable of conducting their affairs. See *post*, III.

The more general description of a person, who, from his want of reason and understanding, comes within the protection of the law, is that of *non compos mentis*. *Co. Lit.* 246: 4 *Co.* 124: *Skin.* 177.

There are, says *Coke*, four kinds of men who may be said to be *non compos*:—1. An idiot, who is *non compos* from his nativity. 2.

*alquando gaudet lucidis intervallis*; who is *non compos* only for the time that he wants understanding. 4. One that is drunk; which last is so far from coming within the protection of the law, that his drunkenness is an aggravation of whatever he does amiss. *Co. Lit.* 247: 4 *Co.* 124. See 1 *Hale Hist. P. C.* 30. 37: 3 *P. Wins.* 130: and this *Dict. tit. Drunkenness*.

1. An idiot is a fool or a madman from his nativity, and one who never has any lucid intervals; therefore the king has the protection of him and his estate during life, without rendering any account; because it cannot be presumed that he will ever be capable of taking care of himself or his affairs: and such a one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c. But these are mentioned as instances only; for idiot, or not, being a question of fact must be tried by jury, or inspection. *Dyer*, 25: *Moor*, 4. pl. 11: *Bro. Idiots*: *F. N. B.* 233.

But though an idiot must be so *à nativitate*, yet, if by inquisition it be found, that A. is an idiot not having any lucid intervals *per spatium octo annorum*, this is a sufficient finding; for the inquisition having found the party an idiot, the adding *spatium octo annorum* is surplusage, and shall be rejected. 3 *Mod.* 43, 44: 2 *Show.* 171: *Skin.* 5. 177: *S. C. Prodgers* and *Lady Frazier*.

2. One made such by sickness, which *Lord Hale* calls *dementia accidentalias vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party also in every thing else be entitled to the same protection with an idiot, and though his disorder seems permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but what he may be restored to them again, it makes the king only a trustee for the benefit of such a one, without giving him any profit or interest in his estate. 1 *Hale's Hist. P. C.* 30.

3. A lunatic; this is also *dementia accidentalias vel adventitia*; and though such a one hath intervals of reason, yet during his phrenzy he is entitled to the same indulgence as to his acts, and stands in the same degree, with one whose disorder is fixed and permanent. 4 *Co.* 125: *Co. Lit.* 247: 1 *Hale's Hist. P. B.* 31.

4. One made mad by drunkenness, which is called *dementia effectata*; and though, as has been said, such a person be not entitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth phrenzy, this puts him in the same



condition with any other phrenzy, and equally excuseth him; also if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man in the same condition as if the same was contracted involuntarily at first. *Plowd.* 19. a.: *Co. Lit.* 247: 1 *Hale's Hist. P. C.* 23.

But though this subject of madness may be branched into several kinds and degrees, yet it appears that the prevailing distinction in law is between idiocy and lunacy: the first a *fatuitas à natiuitate, vel dementia naturalis*: the other accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the general name of lunacy. 4 *Co.* 125. a.

But a commission of lunacy is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause; as disease, age, or habitual intoxication. 8 *Ves.* 65. See *post.* III.

As to what constitutes imbecility of mind, see the remarks of *Sir John Nicholl*, in 1 *Hagg. Eccl. R.* 401.

III. *In what manner Persons are found to be Idiots or Lunatics.*—Every person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil as criminal cases. 1 *Hale's Hist. P. C.* 33.

By the old common law there is a writ *de idiotâ inquirendo*, to inquire whether a man be an idiot or not; which must be tried by a jury of twelve men; and if they find him *merus idiota*, the profits of his lands, and the custody of his person, may be granted by the king to some subject who has interest enough to obtain them. *F. N. B.* 232.

If a man be found by jury and idiot *à natiuitate*, he may come in person into the Chancery before the chancellor, or be brought there, by his friends, to be inspected and examined whether idiot or not; and if upon such view and inquiry it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void, and instantly of no effect. 9 *Rep.* 30: 4 *Co.* 126.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is, as we have seen, generally intrusted, upon petition or information, grants a commission in nature of the writ *de idiotâ inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, the chancellor usually commits the care of his person, with a suitable allowance for his main-

tenance, to some friend, who is then called his committee. See *post.* IV.

*Of the Commission.*—When persons *non compos mentis* became distinguished into two classes of idiots and lunatics, distinct commissions, in the nature of the old writs, were framed for each of them, one *de idiotâ inquirendo*, and the other *de lunatico inquirendo*.

Commissions are made by letters patent under the great seal, and were formerly directed to five commissioners, three or more of whom were required to act. By the 3 and 4 *W. 4. c. 31.* (after reciting, that great inconvenience and expence had been experienced from the practice of addressing commissions in the nature of writs *de lunatico inquirendo*, to three or more persons therein named as commissioners, and doubts had arisen whether such commissioners could be addressed to one commissioner only) it is enacted, that the lord chancellor, or the lord keeper, or commissioners of the great seal, or other the persons instructed, by virtue of the king's sign manual, with the care and commitment of the persons and estates of persons found idiot, lunatic, or of unsound mind, may (if thought advisable) cause such commissions to be directed to one or more persons, who shall make inquisition thereon, and return the same into Chancery; and for that purpose shall have the same power to issue precepts to the sheriff to summon a jury, and to compel the attendance of witnesses, and the production and attendance of the alleged lunatic, idiot or person of unsound mind, and all other the powers hitherto possessed by the three or more commissioners in such commissions named.

*When granted.*—The rules of judging upon the point of insanity being the same at law and in equity, the Court of Chancery cannot assume any kind of discretion upon the subject; and therefore, the return of an inquest, stating that *W. B.* was, at the time of taking the inquisition, from the weakness of his mind, incapable of governing himself and his lands and tenements, was held illegal and void; and many adjudged cases being cited to the same effect, *Lord Hardwicke* congratulated himself that, upon search of precedents, the court had not gone further, in departing from the legal definition of a lunatic, than in allowing returns of *non compos mentis* or *insane mentis*, or since the proceedings had been in English, of *unsound mind*, which amounts to the same thing. And in *Lord Donegal's* case, upon the same principle, a commission of lunacy was refused, though it was admitted that the weakness of *Lord Donegal's* understanding was extreme. See 3 *P. Wms.* 130: 2 *Atk.* 327: 2 *Atk.* 168: 2 *Ves.* 407.

But though a court of equity, in judging

upon the point of insanity, is governed by the rules of law, yet, if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders him unequal to the management of his affairs, if the court will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such other acts as his interest, or the rights of others, may require. 3 *P. Wms.* 111. *n. B.* Upon petition, praying a reference to the master as to the state of the plaintiff and her fortune, and directions for her maintenance, the property being too small to bear a commission of lunacy, an order was made upon affidavits, without a reference, for payment of the dividends for two ensuing quarters. 4 *Ves.* 795. As to the general rules of determining what shall be considered a lucid interval, where previous lunacy has been proved or admitted, see 3 *Bro. Ch. R.* 441.

Of late years, the question has not been in many cases whether the party is absolutely insane; but the court has issued a commission, provided it has been made out that the party is unable to act with any proper and provident management; is liable to be robbed by any one; and, in short, labours under that imbecility of mind which requires as much protection as actual insanity. 8 *Ves.* 65.

Though it was formerly doubted, it now seems to be settled that a commission may be sued out against a lunatic resident abroad, and may be executed where his mansion house was: *ex parte Southcote, Amb.* 109.

*Upon whose Application.*—It has been said, that as the crown has an interest in respect of persons *non compos mentis*, a commission may issue upon information by the attorney-general. 1 *Coll. on Lun.* 125.

However, commissions are usually directed upon petitions preferred by the near relations of the supposed lunatics, accompanied by affidavits, setting forth instances of the weak or incoherent behaviour of the parties.

A husband may prefer a petition for a commission against his wife, and *vice versa*. A father or mother against a child, and *vice versa*. Brothers, sisters, uncles, aunts, nephews, uncles, cousins, against each other. An executor under a will against a legatee. A trustee under a deed against his *cestui que trust*. And creditors against their debtor. 1 *Coll. on Lun.* 377.

The nearest relations of the alleged lunatic will be allowed the carriage of a commission, unless there be some specific ground of objection. 1 *Ves. & B.* 59.

*Of the Execution of the Commission.*—The common order of the chancellor directs the commission to be executed in or near the residence of the supposed lunatic, and a jury of the

county and neighbourhood to be returned, to inquire of the lunacy. And a satisfactory ground must be made out to establish an exception to this rule.

As to the authority of the court to enforce the production of persons suspected to be idiots or lunatics, it seems clearly established, that upon the commission being sued out, the person having the lunatic must, when required, produce him. 1 *P. Wms.* 701: 2 *P. Wms.* 638.

The commissioners and jury have a right to inspect and examine the lunatic; and the latter generally exercise their privilege. And the lunatic himself has a right to be present at the execution of the commission. 12 *Ves.* 155.

Notice of the execution of the commission is not generally given to the party affected by it; but if a sufficient reason for such notice is made out, the court will, on application, order it to be given to the party requiring it. 1 *Ves.* 269.

The commissioners are bound, under a penalty of 40*l.*, to suffer witnesses to give evidence openly in their presence. And when the jury are ready to return their verdict, they must receive it, or incur a penalty of 100*l.* 1 *H. S. c.* 8.

*Of the Inquisition.*—The inquisition, by 36 *Ed. 3. c.* 13. must be by indenture, and one not indented was held void. *Dyer*, 170. *a.* It must also be under the seal of twelve jurymen, otherwise the officer by whom it is taken will be liable to the penalty of 100*l.* 1 *H. S. c.* 8. In inquiries under commissions, the jury have not been strictly limited to the question whether lunatic or not; for it has been held sufficient if they find that the party is of unsound mind.

The proper return to a commission of idiocy or lunacy, where the party is not found an idiot or lunatic, but is considered by the jury as an object fit to be under the superintendence of the Court of Chancery, is, that he is of unsound mind, so that he is not sufficient for the government of himself, his lands, and tenements; and, therefore, where the return was "that the party was so far debilitated in mind, as to be incapable of the general management of his affairs, and had been in the same state of mind for six months last past," the inquisition was quashed, and a new commission issued. 12 *Ves.* 445. And see 4 *Russ.* 182.

The chancellor inclined to quash the inquisition, the commission not having been executed near the place of abode; and an order, that the lunatic should have due notice, having been disobeyed. 7 *Ves.* 261.

By the 1 *W. 4. c.* 65. § 41. inquisitions of

lunacy on commissions in Great Britain, and writs of *supersedeas* thereon, may be transmitted to Ireland, and entered on record in the Chancery there, and acted on in Ireland; and so, *vice versa*, inquisitions in Ireland may be transmitted, &c., to England.

*Of traversing the Inquisition.*—A traverse is a summary proceeding, setting out the inquisition, and traversing or denying the facts thereby found, whereupon issue is joined for the crown by the attorney-general; and a *venire facias juratores* will be awarded into the Court of King's Bench. 4 *Inst.* 80: 2 *Saund.* 6. 23: 5. *Ves.*

If by inquisition a person be found a lunatic, and the custody granted to J. S., and the party thus found bring a *scire facias* to set aside the inquisition, the committee of the lunatic cannot plead nor join issue in such *scire facias*; for he can have no interest in the estate of the lunatic, being only in the nature of a bailiff to the king, and therefore, his duty is to inform the king's attorney-general of the nature of the affair, who is the proper person to contest the matter in behalf of the king. 2 *Sid.* 124.

The 2 *Ed.* 6. c. 8. § 6. provides, that "if any be, or shall be, untruly found lunatic, &c., that every person or persons grieved, or to be grieved, by any such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden." It has been doubted, however, whether the party aggrieved by the inquisition must not apply to Chancery, notwithstanding this provision of the statute. *Ley*, 26, 27. Certain it is, that he must apply in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest; though, according to stat. 18 *H.* 6. c. 6., the custody of the land ought not to be granted till a month after, in order that the parties affected by it may have time to traverse it. *Ex parte Roberts*, 3 *Atk.* 5. For the doctrine of traversing an inquisition, see the cases referred to in *ex parte Roberts*, 3 *Atk.* 7. 311. The 2 *Ed.* 6. gives the right of traverse to all persons aggrieved by the inquisition; yet the heir may traverse it, but is bound upon the traverse by the lunatic, or his alienage, who may traverse it. *Ex parte Roberts*, 3 *Atk.* 308: 1 *Ch. Ca.* 113.

By the 6 *G.* 4 c. 53. § 1. petitions to traverse inquisitions returned into Chancery may, within three calendar months after the return, be presented to the lord chancellor, who may make order for trying such traverse within six months, and for the traverse (not being the party found lunatic) to give security for all

proper parties proceeding to trial. Persons not petitioning or proceeding within the times limited, or neglecting to give security, shall be barr'd. 2. Chancellor, if dissatisfied with any verdict, may direct a new trial (§ 3.), and make orders for management of the person and estate of the lunatic, notwithstanding any petition or order for traverse may be depending. Committees, &c., acting under such orders, are indemnified. § 4.

Any individuals who suppose their interests affected by the acts which the lunatic has done, have a right to apply to the great seal, for leave to traverse the inquisition, which is never refused in any proper case. *Per Lord Eldon*, 2 *Wils. & S.* 520.

A traverse may be ordered to be tried by a special jury at the next assizes to be held for the county where the party has her residence. 5 *Ves.* 832. And such trial may be postponed in the absence of material witnesses, and on the ground of want of time to prepare for trial. *Sir G. O. P. Turner's case*, 1826.

*Of superseding the Commission.*—In case of the lunatic's recovery, he must petition the chancellor to supersede the commission; upon the hearing of which, the lunatic must attend in person, that he may be inspected by the chancellor: it is also usual for the physician to attend, and to make an affidavit that the lunatic is perfectly recovered. *Fonblanque Treat.* *Eq. c.* 2. § 3. in note.

And without strong evidence of his sanity given by medical men, or other persons competent to form an opinion, the chancellor will not supersede a commission. 1 *Coll. on Lun.* 324.

After the chancellor has made an order for superseding a commission of lunacy, the party must be restored to the government of himself and his property by a grant under the great seal.

A commission may also be superseded if the party has been irregularly found a lunatic. 3 *Atk.* 6: and see 1 *Mer.* 269.

IV. 1. *Of appointing Committees.* The custody of lunatics being a branch of the prerogative, the appointment of the committees must necessarily be in the discretion of the person to whom that branch of the prerogative is intrusted; but in the exercise of this discretion, certain rules have been regarded, as best calculated to protect the person and interests of the unfortunate lunatic.

To prevent sinister practices, the next heir is seldom permitted to be the committee of the person of a lunatic, because it is his interest that the party should die; but it has been said there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in



order to increase the personal estate, by savings (out of the rents and profits of the real), which he or his family may hereafter be entitled to enjoy. 2 P. Wms. 638. The heir is generally made the manager or committee of the estate, it being clearly his interest, by good management, to keep it in condition; accountable, however, to the Court of Chancery, and to the *non compos* himself if he recovers, or otherwise to his administrators. 1 Comm. 305.

This distinction was, however, very soon reprobated by Lord Chancellor Macclesfield, in *Justice Damer's case*, 2 P. Wms. 638. It prevailed in barbarous times, before the nation was civilized; but it may be observed, in defence of it, that it gives the custody of the person to those, who, in point of nearness of blood, have equal pretensions to the charge, without the same temptation, in point of interest, to abuse it. Lord Chancellor Finch, in *Lady Mary Cope's case*, 2 Ch. Ca. 239. appears, indeed, to have strained the rule beyond its original extent, in deciding that a half-sister should not be committee of the person of the lunatic, because concerned to outlive her. A reason which, in fact, does not apply; for indeed, the personal estate may increase, and probably will, by good management, during the life of the lunatic; thus, the longer the lunatic lives, it will be the better for the next of kin. 2 P. Wms. 638. 541.

The old rule, however, has not been adhered to for a great length of time; see 7 Ves. 790. where Lord Eldon appointed a brother of the half blood, and who was entitled in remainder to his estate, committee of the person of the lunatic. The usual course is for the chancellor on petition to refer it to one of the masters, to inquire and certify the most fit and proper individuals to be appointed committees of the person and estate of the lunatic. But where the property is small, the court will, on application supported by satisfactory evidence, appoint committees without reference to the master. 1 Russ & Mylne, 112.

Though no committee should get any thing by his appointment, yet the allowance for the support of a lunatic should be liberal and honourable; and, if necessary, the court will allow the yearly value of the lunatic's estate. See 2 C. C. 239: *Amb.* 78: 2 P. Wms. 262: 3 P. Wms. 110.

So strictly does the court consider the committee's authority without any interest, that where the custody of the lunatic's estate was granted to husband and wife, the wife being next of kin to the lunatic, Lord Talbot held, that the husband's right was determined by the death of the wife, the grant being joint. *Forester*, 143. It must not, however, be inferred from this case, that the hus-

band was necessarily joined in the grant; Lord Parker having held (*ex parte Kingsmill*, *Mich. T. 1729*), that the custody of a lunatic may be granted to a feme covert, though not *sui juris*; and, indeed, the court will seldom grant the custody to two, and in its choice is influenced by the sex of the parties applying, as well as by other circumstances. Therefore, where two persons equally a-kin to the feme lunatic, the one a man, the other a woman, applied for the custody, the woman was preferred, as being of the same sex, and better knowing how to take care of her. 2 P. Wms. 635.

Committees of the estate must enter into recognizances, together with two sureties, in double the amount of the rents and profits of the estates, and of the outstanding property, for duly accounting for them once in every year, or oftener if required.

2. *Their Power and Duties.*—The committee of the estate is considered as a mere bailiff appointed by the crown, and under its control, to take care of the property, and to act according to the duty imposed on the crown, and he is liable to account, to censure, to punishment, and to removal, if he misconduct himself. 2 Sch. & L. 436.

The committee of a lunatic's estate has, under the authority of the chancellor, the management of his property, but he cannot enter into any contract which shall be regarded as binding upon the person intrusted to his care, unless the same is warranted by some act of parliament; and, even in such cases, the previous directions of the chancellor is generally required. See *post*.

Provisions have been made from time to time by various statutes, authorising committees of lunatics, generally by the direction of the chancellor, to do certain acts for the benefit of the real and personal estates of such lunatics.

By the general inclosure act (41 G. 3. c. 109. § 18.), and in most acts of inclosure, committees of lunatics are enabled to perform certain acts on their behalf, such as accepting of allotments of land, &c. And by the act consolidating the statutes for redeeming the land-tax (42 G. 3. c. 116. § 14.) committees may contract for the redemption of the land-tax payable out of the estates of lunatics.

By the 1 W. 4. c. 65. (whereby several former statutes are repealed), lunatics may be admitted to copyholds by their committees. § 3. Committees paying fines may reimburse themselves out of the rents of the copyholds. § 8. And no forfeiture is to be incurred by lunatics for not appearing or refusing to pay fines. § 9. Committees, by the direction of the chancellor, may surrender leases, whether for lives or years, belonging to lunatics, in order to renew them. § 10. And the fines, &c.,

attending such renewals, are to be charged on such leaseholds. § 14. Committees, by the direction of the chancellor, may, on the other hand, accept of surrenders of leases, and make new leases. § 19. The fines received for such last-mentioned renewals to be applied as directed by the chancellor, and, on the death of lunatics, to be considered as part of their real estate. § 21. And where lunatics are seized of any estate, with a power of leasing, such power may be exercised by their committees, under the direction of the chancellor § 23. And where lunatics are seized of estates in fee or in tail, or have an absolute interest in leaseholds, the chancellor may direct their committees to make leases thereof. § 24. So much of the 1 *G. l. c.* 10. § 9. for augmenting the maintenance of the poor clergy as enacted that the agreements of guardians of idiots should be effectual, is repealed. § 25. But such agreements may be made by committees of lunatics with the approbation of the chancellor. § 26. Committees, by direction of the chancellor, may convey lands in performance of contracts made by lunatics. § 27. The chancellor may order the estates of lunatics to be sold, for the payment of debts, mortgages, &c., and direct committees to execute conveyances in their names, § 28. The surplus moneys arising from such sales to be of the nature of the estates sold. § 29. Stock standing in the names of lunatics beneficially interested therein, or in the names of their committees, may be ordered by the chancellor to be transferred to new committees, or into the name of the accountant-general. § 33. And stock standing in the names of persons residing out of England, and found lunatics according to the laws of the places where they are living, may be ordered by the chancellor to be transferred to the curators appointed for the management thereof. § 34. The powers given to the Court of Chancery to extend to land and stock within all the British possessions, except Scotland, § 36; and may be exercised by the Exchequer, § 37. and by the Courts of Chancery and Exchequer in Ireland, with respect to land and stock there. § 38. The powers given to the lord chancellor to extend to all land and stock within the British dominions and colonies, except Scotland and Ireland. § 39. And such powers may be exercised by the lord chancellor of Ireland in that country. § 40. The act to be an indemnity to the Bank and other companies. § 44.

In cases where it is not thought expedient to intrust committees with the receipt of the rents of the estates of lunatics, receivers may be appointed. And a receiver will sometimes be appointed where the committee lives at a distance, or is infirm, or the management of

the property is attended with considerable trouble. *Shelf. on Lun.* 146.

An ejectment must be brought in the name of the lunatic, and not in that of his committee, for the latter has not interest in the land. 2 *Wils.* 130: 2 *Sch. & L.* And it should seem he has no further power of distraining for rent in arrear than that possessed by receivers.

With respect to the powers with which the committee of a lunatic is intrusted, they are necessarily restrained by the object of the trust; and as a discretionary power might, in some instances, endanger that object, the committee cannot make leases, nor incur the lunatic's estate, without special order of the court, though the profits be not sufficient to maintain the lunatic; therefore, where the lunatic when sane had mortgaged his estate for 50*l.* and the committee had afterwards taken up more upon it, the court refused to allow the mortgage to stand as a security for more than the 50*l.* or to charge the heir of the lunatic with the improvements made by the committee. 1 *Vern.* 262.

The court, however, will allow the committee of a real estate of a lunatic to exercise the same power over it, in regard to cutting timber for repairs, as any discreet person who was the absolute owner of it might do. 2 *Atk.* 407. Though it has been stated as a rule never departed from, not to vary or change the property of a lunatic, so as to effect any alteration as to the succession to it; it has been decreed, that incumbrances paid off in the life-time of the lunatic, out of savings of the estate, should be assigned to attend the inheritance, and not in trust for the next of kin; the ruling principle in the management of a lunatic's estate being considered to be the doing of that which is most beneficial to the lunatic. And it is upon this principle that the court will order part of the lunatic's personal estate to be laid out in repairs, or even upon improvements of his real estate, if the interest of the lunatic requires it, and the next of kin cannot show good cause against it. See *Amb.* 81. 706: 2 *Atk.* 414.

In managing the estate of a lunatic, the general principal is, to attend solely to the interest of the owner, without any regard to the succession. 2 *Ves.* 72.

And great care must be taken that nothing extraordinary is attempted; as purchasing estates, disposing of interests, engaging in adventures, &c. *Ib.* 73,

V. Of the Civil Rights and Acts of Persons of Unsound Mind.—An idiot, or person *non compos*, may inherit; because the law, in compassion to their natural infirmities, presumes them capable of property. *Co. Lit.* 2. 8.

It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange conclusion! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing; are therefore the civil law judged more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce if they happened after marriage. And modern resolutions have departed from the reason of the civil law, by determining that the marriage of a lunatic not being in strict terms, is absolutely void. 1 *Hagg.* 414; 2 *Phill.* 69. But as it might be difficult to prove the exact state of the party's mind at the celebration of the nuptials, the 15 *G. 2. c.* 30. (extended to Ireland, by the 51 *G. 3. c.* 37.) provides that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, shall be totally void.

These statutes render the marriage void, although contracted in a lucid interval, of a lunatic who has been found such. 1 *Hagg.* 417. And see *Lord Portsmouth's case*, 1 *Hagg.* 355.

If an idiot or lunatic marry, and die, his wife shall be endowed; for this works no forfeiture at all, and the law has only the custody of the inheritance in one case, and the power of providing for her and her family in the other; but in both cases the first of the inheritance is in the idiot or lunatic; and, therefore, if lands descend to an idiot or lunatic after marriage, and he or she, once found, takes those lands into his custody, or grants them over to another, as committee, in the usual manner; yet this seems no reason why the husband should not acquire by the curtesy, or the wife be endowed; since the title does not begin to any purpose till the death of the husband or wife, when the king's title is at an end. *Co. Lit.* 31. a.; 4 *Co.* 124, 125. Yet see *Phewell*, 263. b.; 1 *Vern.* 10.

A lunatic shall be tenant by the curtesy, and shall have dower, so long as a woman, being a lunatic, kill her husband, or my other, yet she shall be endowed, because this cannot be felony in her, who was deprived of her understanding by the act of God. *Perk.* 365.

A person *non compos*, being lord of a copyhold manor, may make grants of copyhold estates, for such estates do not take their perfection from any power or interest in the lord, but from the custom of the manor, a ward of the court, if the grant be made in the usual way, out of mind. 1 *Co.* 23. b.; *Co. Copyholder*, 79. 107.

Idiots and lunatics are, both by the civil law and likewise by the ecclesiastical law, incapable of being executors or administrators, for these distinctions render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding, they are incapable of determining whether they will take upon them the execution of the trust or not. *Godolph. Orph. Leg.* 86.

Therefore it hath been agreed, that if an executor become *non compos*, that the spiritual court may, in account of this natural disability, commit administration to another. 1 *Salk.* 36.

Distinction must be made between acts done by idiots and lunatics *in pais*, and in a court of record. As to those solemnly acknowledged in a court of record, as fines and recoveries, and the uses declared on them, they were good, and could neither be avoided by themselves nor their representatives; for it was presumed, that had they been under these disabilities, the judges would not have admitted them to make these acknowledgments. 4 *Co.* 121. 2 *And.* 119; *Co. Lat.* 247.

Therefore, if a person *non compos* acknowledged a fine, it should stand against him and his heirs; for though the judges ought not to have admitted of a fine from a madman under that disability, yet when it was once received, it should never be reversed, because the record is the record of the court being the highest evidence that could be, the law presumed the sanity of that time capable of contracting; and therefore the credit of it was not to be contested, nor the record avoided by any averment against the truth of it, though an officer should have an idiot *a notitate*. 4 *Co.* 124; 2 *Inst.* 484; *Bro. tit. Fines*, 75; *Co. Lat.* 247; 2 *And.* 193; 4 *Co.* 124.

The rule of law in these cases was, *fieri non debet, sed factum valet*; and *Winstield's case*, 12 *Co.* 123, furnishes a striking instance of the extreme anxiety of courts of law to protect the authority of their records; for though in that case a fine was levied by a man obviously an idiot, and by a most gross contrivance, and though *Lord Dyer* observed, that the judge who had taken it ought never to take another, yet he allowed it to prevail. As by the common law a fine might be avoided on account of fraud, or even on account of infancy, by inspection during the infancy; *Bracton*, 136. b. 137. a.; *Co. Lat.* 380. b.; it seems remarkable, that insanity or lunacy should not have been held entitled to the same effect; but *Marsdale's case* abundantly proves that the grossest imbecility of mind was not at law a ground of annulling the record. But, in equity, a poor madman was relieved against a fine levied by an idiot, even against



a purchaser. *Tolh.* 42: see also 2 *Vern.* 678. The Court of Chancery, however, in the case of fraud, did not absolutely set aside or vacate the fine; but considering those who took it under such circumstances as trustees, decreed a reconveyance of the estate to the persons prejudiced by the fraud; and though this does not distinctly appear to have been the practice, in the case of fines levied by idiots or lunatics, yet from the argument in *Day v. Hungat*, 1 *Rolle's Rep.* 115. such may be inferred to have been the rule of proceeding. See *tits. Fine of Lands, Recovery.*

If an idiot or lunatic enter into a recognition, or acknowledge a statute, neither they themselves, nor their heirs nor executors, can avoid them; for these are securities of a higher nature than specialties and obligations, which yet they themselves cannot avoid, and being matters of record, and equivalent to judgments of the superior courts, neither they themselves, their heirs, nor executors, can avoid them. 4 *Co.* 124. *a.*: 10 *Co.* 42. *b.*: 2 *Inst.* 483: *Bro. Fait. Inrol.* 14.

As to acts *in pais*, idiots and persons of nonsane memory are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not actually void. The king, indeed, on behalf of an idiot, may avoid his grants, or other acts. 1 *Inst.* 247. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity, in order to avoid such grant; for that no man shall be allowed to satisfy himself, or plead his own disability. The maxim, however, that a man shall not stultify himself, has been handed down as law from very loose authorities, which *Fitzherbert* does not scruple to reject as contrary to reason; and later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it. *F. N. B.* 202: *Litt.* § 405: *Cro. Eliz.* 398: 4 *Rep.* 123: *Jenk.* 40: *Comb.* 469: 3 *Mod.* 310, 311: 1 *Eq. Ab.* 379: See *Fonblanque's Treat. Eq. & c.* 2. § 1. and *Stra.* 1104. 2 *Vent.* 198. there cited.

Though the principles upon which courts of equity in general relieve, appear to entitle a lunatic to a remedy in such cases, there does not appear a single case in which the plea of *non compos* by the lunatic himself before inquisition has been allowed: on the contrary, in *Tolh.* 130. it is said, that Chancery will not retain a bill to examine the point of lunacy. But after the lunatic is so found by inquisition, his committee may avoid his acts from the time he is found to have been *non compos*. See 2 *Vern.* 412. 678: 1 *Aq. Ab.* 279. Courts of equity were formerly so anxious to adhere to

the rule of law, that the lunatic was not allowed to be a party to a suit, to be relieved against an act done during his lunacy; 1 *C. C.* 112; though he might be a party to a suit to enforce performance of an agreement entered in prior to his lunacy. 1 *C. C.* 153.

And clearly the next heir or other person interested may, after the death of the idiot or *non compos*, take advantage of his incapacity, and avoid his grant. *Perk.* § 21. So, too, if he purchases under this disability, and does not afterwards upon his recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option. 1 *Inst.* 2.

If parceners of nonsane memory make partition, unless it be equal, it shall only bind the parties themselves, but not their issue: and the reason it binds the parties themselves is the same that all other contracts bind them, viz. because no man is admitted to stultify himself: and the reason their issue may avoid such partition is the same likewise, for which they may avoid all other contracts made by such ancestors during their insanity, viz. because they may be admitted to show the incapacity of their ancestors, and so avoid all acts done by them during that time. *Co. Litt.* 166. *a.*

It is said by Lord Coke that, even at law, the contracts of idiots and lunatics, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one. 4 *Co.* 125.

Where, however, a tradesman supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been a lunatic before and at the time when the goods were ordered and supplied, it was held that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic. *Baxter v. Earl of Portsmouth*, 5 *Barn. & A.* 170: 7 *Dowl. & Ry.* 614: 1 *Moo. & Malk.* 105.

And a court of equity will not interfere to set aside a contract, over-reached by an inquisition in lunacy, if fair and without notice; especially where the parties cannot be reinstated. 9 *Ves.* 478.

Acts by a lunatic done during a lucid interval, are valid. 9 *Ves.* 610.

But general lunacy being established, the proof is thrown upon the party alleging a lucid interval; who must establish, beyond a mere cessation of the violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act. *Ib.* 611.

Courts of equity will not only sustain con-

tracts completed by the lunatic while sane; but, under certain circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy; for the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy: as, if the legal estate be vested in trustees, a court of equity ought to decree a performance; but, if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law. 1 Ves. 82. See now 1 W. 4. c. 65. § 27. *ante* IV.

An idiot can have no executor; for, being *non compos à nativitate*, he could at no time make a will; but a lunatic may have an executor, for lunacy is not a revocation of a will made when *compos*. 4 Co. 61. b. But equity will not entertain a suit to perpetuate the testimony of witnesses to such a will in the lifetime of the lunatic. 1 Vern. 105. In supporting the validity of the will, notwithstanding the subsequent lunacy, the rule of the common law is conformable to the civil law, which provides that "*neque testatum rectè factum, neque ullum aliud negotium rectè gestum, postea furor interveniens perimit.*" Inst. l. 2. t. 12. § 1.

*Non compos mentis* is a common disability with respect to every disposition of property, and consequently what shall be considered a sound and perfect memory at the time of devising lands, is a question determinable at common law. 6 Rep. 23. b. And a court of equity will not interfere in setting aside devises of land until they have been held invalid by a court of law. 9 Mod. 90: 18 Ves. 297.

The sanity or insanity of a testator at the time of making his will is often a very difficult question to decide, and it is impossible to give here even an outline of the numerous cases on the subject. See tit. Will.

It was formerly held that idiots, madmen, and such as were born deaf and dumb, were incapable of suing, on account of their want of reason and understanding; but actions can now be maintained in their names, and prosecuted on their behalf. Co. Lit. 135. b.

When an idiot doth sue or defend, he shall not appear by guardian, prochein amy, or attorney, but he must be ever in proper person. Co. Lit. 135. b.: F. N. B. 27. The statute of Westm. 2. c. 15. extends not to an idiot. 2 Inst. 390.

But otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney if of full age. 4 Co. 124. b.: Palm. 520: and vid. 2 Saund. 335.

If a trespass be committed in the lands of

a lunatic who is legally committed, the committee cannot bring an action of trespass; but this must be brought in the name of the lunatic. 2 Sid. 125. So also of an ejectment. 2 Wils. 130.

Although one *non compos* is not liable to the ordinary punishment for crimes (see *post*, VI.), yet if he commit a trespass against the persons, or property of others, or do them bodily injury, he is compellable to make satisfaction in damages to be recovered in a civil action; for in such cases the intention is immaterial if the act done be prejudicial. Hob. 134: 2 Roll. Abr. 547. pl. 4: 1 Hale, P. C. 16: 2 East, 104.

As to the effect of a defendant becoming insane after an arrest at law, it seems to be now settled, that such circumstance is not a reason for discharging him out of custody, on filing common bail. 2 Term. Rep. 390. Nor will a court of law interpose, though the party be insane at the time of arrest. 4 Term. Rep. 121.

Generally speaking, courts of equity will not interfere to restrain proceedings at law against lunatics, merely on the ground of their mental incapacity.

Idiots and lunatics defend suits in equity by their committees; 1 Vern. 106: 1 S. & St. 356; who are, by order of the court, appointed guardians for that purpose as a matter of course. 1 Dick. 233. Committees should in many cases obtain the direction of the chancellor before they defend suits, who, on application by petition, usually refers the consideration of the propriety of so doing to the master.

The manner in which persons of unsound mind may be discharged under the insolvent acts, is prescribed by the 7 G. 4. c. 57. § 37. continued by 2 W. 4. c. 44.

As to the transfer of estates and stock, of which lunatics are trustees and mortgagees, see tit. Trust.

Idiots and lunatics are, of course, disqualified for the performance of public duties.

#### VI. Of their Responsibility for Crimes.—

One case of a deficiency in will, which excuses from the guilt of crimes, arises from a defective, or vitiated understanding: viz. in an idiot or lunatic; for the rule of law as to the latter, which may be easily adapted also to the former, is *furiosus furore solum punitur*. In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed under these incapacities; no, not even for treason itself. 3 Inst. 6.

It is laid down as a general rule, that idiots and lunatics being, by reason of their natural disabilities, incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever. 1 Hawk. P. C. 2.

And therefore a person who loses his memory by sickness, infirmity, or accident, and kills himself, is no *felo de se*. 3 *Inst.* 54.

So if a man gives himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*; for though the death complete the homicide, the act must be that which makes the offence. But it is not every melancholy or hypochondriacal distemper that denominates a man *non compos*; for there are few who commit this offence but are under such infirmities; but it must be such an alienation of mind that renders them madmen, or frantic, or destitute of the use of reason. 1 *Hal. P. C.* 412.

And as a person *non compos* cannot be a *felo de se* by killing himself; so neither can he be guilty of homicide in killing another. 1 *Hawk. P. C.* 2.

The great difficulty in these cases is, to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which *Lord Hale* distinguishes between, and calls by the name of total and partial insanity; and though it be difficult to define the indivisible line that divides perfect and partial insanity, yet, says he, it must rest upon circumstances, duly to be weighed and considered both by the judge and jury; lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes; and the best measure he can think of is this: such a person, as labouring under melancholy distempers, hath yet ordinarily as great understanding as a child of fourteen years commonly hath, as such a person as may be guilty of treason or felony. 1 *Hale Hist. P. C.* 30.

He who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. *Keble.* 53. *Dalt. c.* 95. 1 *Hawk. P. C.* See tit. *Accessory, Homicide, III.*

And here we must observe a difference the law makes between civil suits that are terminated in *compensationem damni illati*, and criminal suits or prosecutions that are *ad penam et in vindictam criminis commissi*; and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. 2 *Roll. Abr.* 517: *Hob.* 134: *Co. Lit.* 217: 1 *Hawk. P. C.* 2: 1 *Hal. Hist. P. C.* 16, 38.

As to idioecy, lunacy, or madness (the latter

of which is defined by *Hale* to be a total alienation of the mind), which excuses in capital cases, it is not necessary that it was found by inquisition that the party was a madman, idiot, or lunatic, previous to the commitment of the fact; for if he was actually mad at the time of the fact committed, this shall excuse; and this regularly is to be tried by an inquest of office to be returned by the sheriff of the county wherein the court sits for the trial of the offence; and if it be found that he was actually mad, he shall be discharged without any other trial; but if they find that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute. 26 *Ass. pl.* 27: *Bro. Cor.* 101: 1 *And.* 107. 154: *Sav.* 50. 57: 1 *Hawk. P. C.* 2: 1 *Hal. Hist. P. C.* 35.

These defects, whether permanent or temporary, must be unequivocal and plain; not an idle frantic humour or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. 8 *S. T.* 322: 1 *Hal. P. C. c.* 4: 1 *Hawk. P. C. c.* 1. § 1. in *n.*

Also if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned; if after pleading, he shall not be tried; if after trial, he shall not receive judgment; if after judgment, execution shall be stayed. See this Dictionary, tit. *Execution and Reprieve.*

So if a person during his insanity commits a capital offence, and recovers his understanding, and being indicted and arraigned for the same, pleads not guilty, he ought to be acquitted; for, by reason of his incapacity, he cannot act *felix animo*. 1 *Hal. Hist. P. C.* 36.

If a man in a phrenzy happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is mad, the judge in discretion may discharge the jury of him, and render him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact; and this is *in favorem vita*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then, upon the same favour of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement. 1 *Hal. Hist. P. C.* 33, 36.

It seems to have been anciently holden, (in respect of that high regard which the law has for the safety of the king's person,) that a madman might be punished as a traitor for killing or offering to kill the king; but this is now contradicted by better and later opinions.



*Fitz. Coron.* 351: *Regist.* 309: 4 *Co.* 124. *b.*: all abuses incident to such private custody, has 1 *Roll. Rep.* 324. In the reign of Henry VIII. thought proper to interpose its authority. See a statute was made, 33 *H. 8. c.* 20. that if on *post.*

*compos mentis* should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death as if he were of perfect memory; but this was repealed by stat. 1 and 2 *P. & M. c.* 10. See 3 *Inst.* 6. But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury; and if he be so found, a total idocy or absolute insanity excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but if a lunatic hath brief intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. 1 *Hut. P. C.* 31.

Now by stat. 39, 40 *G. 3. c.* 94. "for the safe custody of insane persons charged with offences," it is enacted, that the jury, in cases where any person charged with treason, murder, or felony, shall be proved to be insane, shall declare whether he was acquitted by the account of insanity, and if he was, the court shall in such case order him to be kept in custody till the pleasure of the king is signified, who may direct such lunatic to be kept in safe custody. By § 2. of the act, insane persons indicted for any offence, who may be found insane by the jury impanelled on their arraignment, shall be kept in custody in like manner. By § 3. for the prevention of crimes by insane persons, such person may be committed to safe custody, and shall not be bailed, except by two justices, one thereof being the committing justice, or by the quarter sessions, or the courts at Westminster, or the lord chancellor. By § 4. insane persons endeavouring to intrude into the presence or palaces of the king, may be committed by the privy council, until his insanity is decided by the lord chancellor under a commission in the nature of a writ *de lunatico inquirendo*.

The 2d section of the above act applies to cases of misdemeanor, and is not confined, like the first, to treason, murder, or felony. *Russ. & R. Cr. Cas.* 430.

As to criminals becoming insane while under sentence of imprisonment or transportation, see *post*.

## VII. Of the Treatment of Insane Persons.—

On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody, under the direction of their nearest friends and relations; who by law may beat or use such other methods as are necessary for their cure. 2 *Ro. Ab.* 546. And the legislature, to prevent,

But when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority, as delegated to the chancellor, to warrant a lasting confinement. 1 *Comm.* 305.

In the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper controul; and in particular they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission, or other special authority from the crown. 4 *Comm.* 25.

Many acts have been passed at various times for regulating the treatment of insane persons, whether confined in public or private asylums, all of which have been repealed, and their provisions consolidated and extended by recent statutes.

By the 9 *G. 4. c.* 40. the laws for the erection and regulation of county lunatic asylums, and for providing for the maintenance of pauper and criminal lunatics, were amended.

The following is a short outline of its principal provisions.

§ 2. The justices for every county at any general quarter sessions may direct notice to be given in some newspaper circulated in such county of their intention of taking into consideration at their next quarter sessions the expediency of providing a county lunatic asylum, or of appointing a committee of justices to treat with the justices of any one or more of the adjacent counties, or with the subscribers to any lunatic asylum therefore, or intended to be, built and established, by voluntary contributions, to unite with them for such purpose.

§ 3. Justices may appoint committee to superintend the erection of a lunatic asylum.

§ 4. Justices may appoint committee to treat with adjacent counties, or with the committee of subscribers to asylums maintained by voluntary contributions.

§ 5. Subscribers to any lunatic asylum may appoint a committee to enter into agreement with committee of justices.

§ 6. Agreement to be entered into in the form set forth in the schedule to the act, where counties shall be united.

§ 7. And to be reported to quarter sessions, and not to be valid unless approved of.

§ 8. *et seq.* direct the way in which the vi-

sitors of every lunatic asylum shall be appointed, who are empowered to enter into contracts relative thereto.

§ 28. If the asylum be situate in any other county, justices of the county or counties to which it belong may act, in regulating the same.

§ 30. Visitors to make regulations and appoint officers; and to fix a weekly rate for maintenance of insane persons; not to exceed 14s. for each per week.

§ 31. If rate be found insufficient, justices in quarter sessions may increase it.

§ 32. A chaplain to be appointed for every county lunatic asylum.

§ 35. Visitors may sue and be sued in the name of their clerk, whose death or removal shall not abate actions.

§ 36. Justices at petty sessions to require overseers to make returns of insane persons yearly chargeable to their respective parishes.

§ 37. Overseers neglecting to give notice to justice of the peace of the state of insane persons, shall forfeit not exceeding 10*l*.

§ 38. When any poor person is deemed to be insane, one justice may require the overseers to bring such person before two justices, who, upon due examination, may cause him or her to be sent to the county lunatic asylum, or, if none, to some licensed house. Justices to make order for the payment of the charges of conveying and maintaining such person who is not to be removed from such licensed house without justice's order, unless cured.

§ 39. Visitors may deliver any pauper to his relatives or friends upon their undertaking that he shall be not longer chargeable.

§ 40. Medical practioners appointed by parishes may visit eight times in the year pauper patients confined in any public hospital, county asylum, or licensed house.

§ 41. Where the legal settlement of lunatics cannot be discovered, justices shall send them to the asylum, or other place of confinement for the county where found.

§ 42. If settlement has not been ascertained, two justices may inquire respecting the same, and, if satisfied, may make order for payment of the expences.

§ 43. Justices of the county in which an asylum is situate may make orders for the maintenance of pauper lunatics upon overseers of any other county jointly maintaining.

§ 44. If persons are wandering about and deemed to be insane, although not chargeable, justices may proceed as in case of persons chargeable, and make order for maintenance. If the estate of the insane person shall be sufficient, overseers may levy for their expences.

§ 45. Justice refusing to make order for

the conveyance of any insane person to an asylum shall give his reasons in writing.

§ 46. Persons aggrieved by any order may appeal to the quarter sessions.

§ 47. Justices to make return to the quarter sessions of the cases brought before them.

§ 48. Sums directed to be paid by overseers to be levied to distress if overseers shall neglect to pay.

§ 49. Bastards of lunatics to have the legal settlement of the mother.

§ 50. Lunatic asylums not to be liable to the reception of lunatics chargeable to any place which does not contribute to the expence.

§ 51. When any asylum can accommodate more lunatics, visitors may order an addition, whether paupers or not, under certain regulations.

§ 52. All insane persons committed to such county lunatic asylum shall be safely kept, and not suffered to quit it until the major part of the visitors present at a meeting duly convened under the authority of the act, not being less than three, shall order their discharge, in writing under their hands and seals, or until any two visitors shall, with the advice of the physician or apothecary attending such asylum, discharge any lunatic; and certain penalties are inflicted on persons having lunatics in their care suffering them to go at large without such order.

§ 53. Expence of removal of paupers from asylums to be borne by parishes where settled.

§ 54. Where persons charged with offences are insane, justices to inquire into their settlement, and make order for their maintenance; but an appeal may be made to the sessions by the parish.

§ 55. If any person while imprisoned, under sentence of imprisonment or transportation, shall become insane, a secretary of state may direct that he be removed to such county lunatic asylum as such secretary of state may judge proper; and every such person so removed shall remain in such county lunatic asylum until it shall be certified that he has become of sound mind; whereupon he may be removed back to the prison from whence he was taken; or if the period of his imprisonment or custody shall have expired, be discharged.

§ 56. Visitors of county asylums to prepare a report yearly of the patients confined therein, a copy of which to be sent to the home secretary of state.

§ 57. The home secretary of state may employ any person to inspect any county asylum.

§ 58. The act not to extend to Bethlehem hospital.

§ 60. Appeal given to quarter sessions by

parties aggrieved by order or judgment of justices.

By the 2 and 3 W. 4. c. 107. (repealing the 9 G. 4. c. 41. and the 10 G. 4. c. 18.) and which in its turn has been in part amended by the 3 and 4 W. 4. c. 64. a variety of provisions were enacted for the care and treatment of insane persons.

By § 3. the lord chancellor may, on the 1st day of September, in every year, or within ten days next following, appoint not less than fifteen nor more than twenty persons to be commissioners, during the space of one year, for licensing and visiting all houses for the reception of two or more insane persons, to be situate within the cities of London and Westminster, the county of Middlesex, the borough of Southwark, and also within the several parishes and places in the county of Surrey, Kent, and Essex hereinafter enumerated; and to be called "The Metropolitan Commissioners in Lunacy;" of which commissioners not less than four or more than five shall be physicians, and two barristers; and the jurisdiction of the said metropolitan commissioners shall be deemed to include any township, or extra-parochial place within the cities of London and Westminster, and within seven miles thereof, and within the county of Middlesex; and the said commissioners are thereby empowered to grant licences (if they think fit) in the manner directed by the act for persons to keep houses for the reception of two or more insane persons, of one or both sexes within the jurisdiction of the said commissioners.

§ 4. In case of death or refusal of commissioners, others to be appointed.

§ 8. The said metropolitan commissioners, or any five, two of whom at the least shall not be physicians, shall meet at such place as the said lord chancellor may direct, on the first Wednesday in the months of November, February, May, and July in every year, in order to receive applications from persons requiring houses to be licensed for the reception of two or more insane persons within their jurisdiction, and (if they shall think fit) to license the same; and in case on any such occasion five such commissioners shall not be present, the meeting shall take place on the next succeeding Wednesday, and so on weekly till such quorum of five shall be assembled; and the said commissioners so assembled at every such meeting shall have power to adjourn such meeting from time to time and to such place as they shall see fit.

§ 9. Five commissioners may assemble for general purposes at any time, notice of such meeting having been given by the clerk. At all meetings a chairman to be chosen, who shall have a casting vote.

§ 10. Justices in quarter sessions (except in the metropolitan district) may grant licences.

§ 11. The said justices shall at the Michaelmas sessions in every year appoint three or more justices of the peace, and also one or more physician, surgeon, or apothecary, to act as visitors of each house licensed for the reception of two or more insane persons within the county; and who are empowered to visit every such house in manner directed by the act.

§ 12. Commissioners or visitors not to keep any licensed house, &c.; nor medical commissioners or visitors to attend patients in any licensed house, except as therein mentioned.

§ 15. Notice of application for and plan of licensed house to be given to the clerk of the commissioners or clerk of the peace fourteen day previous to their meeting.

§ 16. Detached buildings to be considered part of the house.

§ 17. Upon alteration of house, notice and amended plan to be given to commissioners, &c.

§ 18. Licences to be made out by the clerk of the commissioners or clerks of the peace, and to be renewed yearly.

§ 19. Licences to be stamped, and to be under seal.

§ 22. It shall not be lawful for any person to keep a house for the reception of two or more insane persons, unless licensed in the manner directed by the act; and every person keeping a house for the reception of two or more insane persons, not duly licensed, shall be deemed guilty of misdemeanor: provided that no one licence shall authorize any person to keep more than one house; but all licenses therefore granted shall remain in full force until the period for which they were granted shall have expired, unless revoked as after directed; and all plans theretofore delivered shall be deemed sufficient for the purposes of the act, if the commissioners or justices shall so think fit.

§ 25. When commissioners or justices shall refuse to renew any licence, notice thereof to be given to the secretary of state for the home department.

§ 26. If at any meeting a majority of the metropolitan commissioners present, or any three visitors, shall think fit to recommend to the lord chancellor, that any licence granted should be revoked, the lord chancellor, after making such inquiries as he shall think necessary, may revoke the same by an instrument under his hand and seal, such revocation to take effect at a period not exceeding three calendar months from notice thereof given in the *London Gazette*.

§ 27. No person (not being a parish



pauper) shall be received into any house licensed for the reception of insane persons in England, without an order under the hand of the person by whose direction such insane person is sent, according to the form in the schedule annexed to the act, nor without a medical certificate of two physicians, surgeons, or apothecaries, in the manner directed by the act; and if any person shall knowingly receive any insane person to be confined in any house licensed under the act, without such order and medical certificate, and without making, within three clear days after the reception of such patient, a minute or entry in writing in a book to be kept for that purpose, according to the form in the schedule annexed to the act, of the true name of the patient, and also the christian and surname, occupation, and place of abode of the person by whom such patient shall be brought, every person so offending shall be guilty of a misdemeanor.

§ 29. No parish pauper shall be received into any house licensed for the reception of insane persons without an order according to the form in the schedule annexed to the act, under the hand and seal of one justice of the peace or an order according to the form in the schedule annexed to the act, signed by the officiating clergyman and one of the overseers of the poor of the parish to which such pauper shall belong, and also a medical certificate according to the form in the schedule annexed to the act, signed by one physician, surgeon, or apothecary, that such parish pauper is insane, and a proper person to be confined; and if any person shall knowingly receive any parish pauper into any licensed house, without such order and medical certificate, he shall be guilty of a misdemeanor.

§ 30. Notice to be given to clerk of the commissioners, &c. within two days after the admission of every patient.

§ 31. The like notice to be given on the removal or death of a patient.

§ 32. Statement of the causes of death of pauper patients to be transmitted to clerk of commissioners or clerk of visitors.

§ 33. Licensed houses containing 100 patients to have a resident medical man; containing less than 100 to be visited by medical men.

§ 34. Commissioners, &c. may alter the periodical visits of medical attendants.

§ 35. Houses to be inspected by commissioners four times a year.

§ 36. And by visitors three times a year at least.

§ 38. Plan of house to be hung up, and

copy of act kept; and at each visitation commissioners to make minutes.

§ 39. Minutes to be transcribed into a book.

§ 40. Concealing persons from inspection to be deemed a misdemeanor.

§ 41. Commissioners may set at liberty persons improperly confined; but such power of liberation shall not extend to any person found idiot, lunatic, or of unsound mind under a commission issued by the lord chancellor, nor to any insane person confined under any order of the home secretary of state.

§ 42. Commissioners, upon information of malpractices in any licensed house, may visit the same at night.

§ 43. In case of inquiry whether any particular patient is in confinement, the commissioners, &c. may give an order to the clerk, who shall furnish the information.

§ 44. Annual report of houses to be made to the lord chancellor.

§ 45. Transcript of minutes of visitors to all houses to be sent to the clerk of the commissioners by the clerk of the peace, &c.

§ 46. No person (except a guardian or relative who does not derive any profit from the charge, or a committee appointed by the lord chancellor or other the person or persons intrusted as aforesaid,) shall, under pain of being deemed guilty of misdemeanor, receive to board or lodge in any house not licensed under the act, or take the charge of any insane person, without having the like order and medical certificates as are required on the admission of an insane person (not being a parish pauper patient) into a licensed house.

§ 47. Every person (except as aforesaid) who shall receive to board in any house not licensed, or take charge of, any insane person, shall, within twelve calendar months next after, transmit to the clerk of the metropolitan commissioners a copy of such order and medical certificates, sealed, and indorsed "private return," and not to be inspected by any person except by the said clerk or other person authorised by the lord chancellor or the home secretary of state; and such person shall also (if such insane male or female person shall not have been removed) on the 1st of January in every succeeding year, or within seven clear days after, transmit to such clerk a certificate signed by two physicians or apothecaries, describing the then state of mind of such insane person, and to be indorsed "private return;" and all such orders, &c. shall be preserved by the said clerk, and be open only to the inspection of the home secretary of state, and of the lord chancellor, and of such other person as shall be authorised to inspect the same by an order

under their hands and seals; and every person (except as aforesaid) who shall receive to board, in any house not licensed, or take the charge of any insane person in any such house, and who shall omit to transmit such copies of orders and certificates, shall be guilty of a misdemeanor.

§ 48. Lord chancellor and secretary of state may order visitation of patients in care of relatives, &c.; but the said secretary of state shall have no authority to order a visitation of any patient under the care of a committee appointed by the lord chancellor.

§ 49. Lord chancellor or secretary of state may order commissioners, &c. to visit lunatic asylums and public hospitals.

§ 52. Metropolitan commissioners and visitors may summon witnesses, who shall be subject to penalty for neglect.

§ 53. Gives a power of summary conviction to two justices for offences against the act.

§ 55. In all proceedings which shall be had under his Majesty's writ of habeas corpus, and in all indictments, informations, and actions, and other proceedings preferred against any person for confining or ill-treating any of his Majesty's subjects, insane, or alleged to be insane, the parties complained of shall be obliged to justify their proceedings according to the common law, in the same manner as if the act had not been made.

§ 57. Gives an appeal to the quarter sessions by parties aggrieved.

§ 58. If an action or suit shall be brought against any person for any thing done in pursuance of the act, the same shall be commenced within six calendar months after the fact committed, and laid in the county, city, or place where the cause of action shall have arisen; and the defendant in every such action or suit shall and may at his election plead specially or the general issue not guilty, and this act and the special matter in evidence at any trial to be had thereupon; and the jury shall find a verdict for the defendant; or if the plaintiff shall be nonsuited, or discontinue his action or suit after the defendant shall have appeared, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall recover treble costs.

§ 59. Actions not to be brought except by order of the commissioners or justices.

§ 60. Clerk of the commissioners, &c. to enforce act and recover penalties.

§ 61. Prosecution to be by indictment at assizes.

§ 62. Act not to extend to Bethlehem hospital, or to county lunatic asylums erected under the 48 G. 3. c. 96. or to be thereafter erected under 9 G. 4. c. 40.

§ 63. Nothing herein to extend to public

hospitals or institutions, except as to visitations, and to the transmission of names of patients.

§ 64. The act shall commence and shall continue in force for three years, and from thence to the end of the next session of parliament.

By the 3 and 4 W. 4. c. 64. § 2. clerk of metropolitan commissioners and clerk of the peace to preserve a copy of all orders, certificates, and notices.

§ 3. Notice of deaths or removals of patients to be transmitted to clerk of metropolitan commissioners.

§ 4. All copies of orders, certificates, &c. which have been transmitted to the clerk of the metropolitan commissioners, shall be registered.

§ 5. Notices of deaths or removals, &c. since August 1832, if not already transmitted, shall be forthwith transmitted to clerk of metropolitan commissioners.

§ 6. Commissioners, being practising barristers, to be paid for the time employed in the duties of their office.

§ 7. Proprietors, &c. neglecting to comply with this act, to be deemed guilty of a misdemeanor. Prosecutions to be carried on, and penalties recovered, in the same manner as under the 2 and 3 W. 4. c. 107.

By the 3 and 4 W. 4. c. 36. § 2. the lord chancellor may appoint visitors to superintend, and report to him upon the care and treatment of idiots, lunatics, and persons of unsound mind found such by inquisition.

§ 3. Persons so found idiots, &c. to be visited at least once in each year.

§ 4. Visitors to report to the lord chancellor, &c. on care and treatment of such idiots, &c.

§ 5. In case of death, &c. of visitors, the lord chancellor may appoint others.

§ 6. Persons interested in houses licensed for the reception of insane persons not to act as visitors.

§ 7. A secretary to such visitors may be appointed.

§ 8. A fund for payment of salaries and expences to be raised by a per-centage on the income of the idiots, &c.

§ 9. Committees, &c. to pay such per-centage into the Bank upon receiving notice.

§ 10. For better estimating the amounts of the said clear annual incomes, and collecting the per-centage thereon, masters of the Court of Chancery to certify the amount of income of idiots, &c.

IDIOTA INQUIRENDO. See the preceding tit. *Idiots and Lunatics*.

IDLENESS. See tits. *Poor, Vagrants*.

IDONEUM SE FACERE; IDONEARE

SE. To purge himself by oath of a crime of which he is accused. *Leg. H. 1. c. 15.* where the word *idoneus* is taken for *innocens*. But he is said in our law to be *idoneus homo*, who hath these three things—honesty, knowledge, and ability.

**IDUMANUS FLOVIUS**, *Black Water* in Essex.

**IFUNGIA**. The finest white bread, formerly called cocket bread. *Blount*.

**IGNIS JUDICIUM**. Purgation by fire, or the old judicial fiery trial. *Blount*. See *Ordeal*.

**IGNORAMUS**. We are ignorant.] The word formerly written on a bill of indictment by the grand jury impanelled on the inquisition of criminal causes, when they rejected the evidence as too weak or defective to make good the presentment against a person so as to put him on the trial; the words now used are, *not a true bill*, or *not found*, and all proceedings are thereby stopped, and he is delivered without further answer. 3 *Inst.* 30. See tit. *Indictment*.

**IGNORANCE**, *ignorantia*.] Want of knowledge of the law, shall not excuse any man from the penalty of it. Every person is bound at his peril to take notice what the law of the realm is; and ignorance of it, though it be invincible, where a man affirms that he hath done all that in him lies to know the law, will not excuse him. *Plowd.* 343.

Though ignorance of the law excuseth not, ignorance of the fact doth: as if a person buy a horse or other thing in open market, of one that hath no property therein, and not knowing but he had right; in that case he hath good title, and the ignorance shall excuse him. *Doct. & Stud.* 309. But if the party bought the horse out of the market, or knew the seller had no right, the buying in open market would not have excused. *Ibid.* 5 *Rep.* 83. Also where a man is to enter into land or seize goods, &c., he must see that what he does be rightly done, or his ignorance shall be no excuse. *Wood's Inst.* 608.

Ignorance of fact is a defect of will, when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act; as if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family. This is no criminal action. *Cro. Car.* 538. But if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque*

*tentur scire neminem excusat* is as well the maxim of our law, as it was of the Roman. 4 *Comm.* 27.

In civil proceedings the same distinction exists between ignorance of law and ignorance of fact.

Where a party pays money under a mistake of the law he cannot recover it back. 2 *East.* 469: 3 *M. & S.* 378: 5 *Taunt.* 143. But if he pay it under a mistake of facts, and has been guilty of no laches in not knowing them, he may. 6 *B. & C.* 671. See further tit. *Assumpsit*.

And although the Court of Chancery will relieve where a deed has been signed, or money paid, from ignorance of a fact, or under an erroneous impression concerning it; 1 *P. W.* 354. 3 *P. W.* 125: 2 *Bro. C. C.* 150: 9 *Ves.* 275: 12 *Ves.* 136; the maxim *ignorantia juris non excusat* is as fully established in equity in civil cases, as it is at law; there being numerous cases in which it has refused to interfere where an instrument has been executed, or money paid, under an erroneous notion of the law. 1 *Vern.* 243: 3 *P. W.* 127. n: 1 *Bro. C. C.* 92: 10 *Ves.* 406: 2 *Mud.* 163.

**IKENILD-STREET**. One of the four famous ways that the Romans made in England, called *Stratum Icenorum*, because it took its beginning among the *Icen*, which were the people that inhabited Norfolk, Suffolk, and Cambridgeshire. *Cam. Brit.* See tit. *Watling-street*.

**ILET**. Corruptly eight; a little island. *Blount*.

**ILLEGITIMACY**. See tit. *Bastard*.

**ILLEVIABLE**. A debt or duty that cannot or ought not to be levied; as *nihil* set upon a debt is a mark for *illeviable*.

**ILLITERATE**. If an illiterate man be to seal a deed, he is not bound to do it, if none be present to read it, if required; as reading a deed false, will make it void. 2 *Rep.* 3: 11 *Rep.* 28. A man may plead *non est factum* to a deed read false; as where a release of an annuity was read to an illiterate person, as a release of the arrears only, &c. agreed to be released. *Moor*, 148. If there is a time limited for a person to seal a writing, in such case, *illiteracy* shall be no excuse, because he might provide a skilful man to instruct him; but when he is obliged to seal it upon request, &c., there he shall have convenient time to be instructed. 2 *Nels. Ab.* 946.

If a man for great age cannot see to read, and seals an obligation upon false reading, he shall avoid it, though he was lettered; for now he has all his intelligence by hearing. 11 *Rep.* 28. See tit. *Deed*.

**ILLUMINARE**. To illuminate, to draw



in gold and colours the initial letters and the occasional pictures in manuscript books. See *Brompton*, *sub anno* 1076. Those persons who particularly practised this art were called *illuminatores*, whence our *limners*.

**IMAGES.** By the 3 and 4 Ed. 6. c. 10. § 2. images in churches, alabaster or earth, graven, carved, or painted, are to be destroyed. But by § 6. this does not extend to any image or picture set or graven upon any tomb, in any church, chapel, or church-yard, only for a monument of any king, prince, nobleman, or other dead person, not commonly reputed and taken for a saint.

**IMAGING** (or *compassing*, &c.) the king's death, is high treason: 25 Ed. 3. stat. 5. c. 2. See tit. *Treason*.

**IMBARGO**, *Span. Navium detentio*.] A stop, stay, or arrest upon ships, or merchandize, by public authority. See 18 Car. 2. c. 5. This arrest of shipping is commonly of the ships of foreigners in time of war and difference with states to whom they are belonging: but by an ancient statute foreign merchants in this kingdom are to have forty days' notice to sell their effects and depart, on any difference with a foreign nation. 27 Ed. 3. c. 17. See tit. *Merchant*. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition; and for this end have their lading taken out without any regard to the colours they bear, or the government to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports that may contribute to the success of his enterprise. *Parke on Insurance*, c. 4. p. 78. The king may grant imbargoes on ships, or employ the ships of his subjects, in time of danger, for the service and defence of the nation; but a warrant to stay a single ship, on a private account, is no legal imbargo. *Moore*, 892: *Carth.* 297. Prohibiting commerce in time of war, or of plague, pestilence, &c. is a kind of imbargo on shipping.

Imbargoes laid on shipping in the ports of Great Britain, by royal proclamation, in time of war, are strictly legal, and are equally binding as an act of parliament; because such proclamation is founded on a prior law, namely, that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king to lay such restraints is doubtful; and therefore where a proclamation issued in the year 1756, to prevent the exportation of corn against the words of a statute (22 C. 2. c. 13.) then in force, although the measure was absolutely necessary to prevent a dearth,

it was thought prudent to procure an act of the legislature (7 G. 3. c. 7.), to indemnify all who advised or acted under that proclamation. See *Parke on Insurance*, 79: 1 *Comm.* 270: 4 *Mod.* 177. 179. And see a similar statute 30 G. 3. c. 1.

An imbargo, being only a temporary restraint, does not, like a war of which no person can foresee the termination, put an end to a contract for the conveyance of goods by sea. 8 T. R. 259.

But in the case of an imbargo imposed by the government of the country, of which the merchant is a subject, in the nature of reprisals and partial hostility against the country to which the ship belongs, the merchant may put an end to the contract if the object of the voyage is likely to be defeated by delay. 3 Bos. & P. 291. See further tit. *Insurance*, II. 3.

**IMBRASING** of money. Mixing the species with an alloy below the standard of sterling; which the king by his prerogative may do, and yet keep it up to the same value as before: enhancing of it, is when it is raised to a higher rate, by proclamation. 1 *Hale's Hist. P. C.* 102. See tit. *Coin*.

**IMBEZZLE.** To steal, pilfer, or purloin; or where a person entrusted with goods, wastes and diminishes them. The word *embezzle* is mentioned in several statutes, particularly relating to workers of wool, &c. Stat. 7. Jac. 1. c. 7: 1 Anne, st. 2. c. 18. See tits. *Embezzlement*, *Public Stores*.

**IMBRACERY.** See *Embracery*.

**IMBROCUS.** A brook, a gut, a water-passage. *Somner of Ports and Forts*, p. 43.

**IMMORALITY.** See *Lewdness*.

**IMPALARE.** To put in a pound. *II. Hen.* 1. c. 9.

**IMPANEL**, *impanellare vel impanulare Juratis*.] Signifies the writing and entering into a parchment schedule, by the sheriff, the names of a jury.

**IMPARLANCE**, *interlocutio, vel licentia interloquendi*, from the Fr. *parler*, to speak.] In the common law, is taken for a petition, in court, of a day to consider or advise what answer the defendant shall make to the action of the plaintiff, or to an information or indictment in a criminal case; being a continuance of the cause or prosecution till another day, or a longer time given by the court.

Imparlance is said to be when the court gives the party leave to answer at another time, without the assent of the other party. *Com. Dig.* tit. *Pleader*, D. 1. But the more common signification of imparlance is, time to plead. 2 *Sho.* 310: 5 *Mod.* 62. And it is either *general*, without saving to the defendant any exception, which is always to another

term; 6 *Mod.* 28: or *special*, which is sometimes to another day in the same term. *Mod.* 8. The general imparlance is of course where the defendant is not bound to plead the same term; but a special imparlance is not allowed without leave of the court. *R. E.* 5 *Anne.* A special imparlance is with a saving of all exceptions to the writ, bill, or count, which may be granted by the prothonotary; or they may be still more special with a saving of all exceptions whatsoever, which are granted at the discretion of the court, and are called *general special imparlances*. 12 *Mod.* 529.

A general imparlance is set down and entered in general terms, without any special clause, thus: *And now at this day, to wit, on Thursday next after the Octave of St. Hilary, in the same term, until which day the aforesaid C. D. the defendant, had licence to imparle to the bill aforesaid, and then to answer, &c.*

Special imparlance is where the party desires a further day to answer, adding also these words: *Saving all advantages, as well to the jurisdiction of the court, as to the writ and declaration, &c.* *Kitch.* 200. This imparlance is had on the declaration of the plaintiff: and special imparlance is of use where the defendant is to plead some matters which cannot be pleaded after a general imparlance. 5 *Rep.* 75.

Imparlance is generally to the next term; and if the plaintiff amend his declaration after delivered or filed, the defendant may imparl to the next term, if the plaintiff do not pay costs; but if he pays costs, which are accepted, the defendant cannot imparl. Also if the plaintiff declares against the defendant, but doth not proceed in three terms after, the defendant may imparl to the next term. 2 *Lil. Ab.* 35.

By stat. 60 *G. 3. c. 4.* it is enacted that where any person shall be prosecuted in the Court of K. B. (at Westminster or Dublin), for a misdemeanor either by information or indictment there found, or removed thither, and shall appear in court in person to answer thereto, such defendant, on being charged therewith, shall not be permitted to imparl to the next term, but shall plead or demur within four days, or judgment shall be entered for want of plea: and in case of the defendant's appearing by attorney, a rule to plead, &c. shall be made. As to proceedings on indictments for misdemeanors at sessions, see tit. *Indictment*.

*As to Causes of Imparlance.*—The not delivering a declaration in time is sometimes the cause of imparlance of course: and where the defendant's case requires a special plea, and the matter which is to be pleaded is difficult, the court will, upon motion, grant the defendant an imparlance, and longer time to

put in his plea, than otherwise by the rules of the court he ought to have: if the plaintiff keeps any deed or other thing from the defendant, whereby he is to make his defence, imparlance may be granted till the plaintiff delivers it to him, or brings it into court, and a convenient time after to plead. *Hill.* 22 *Car.* 1. *B. R.*

There are many cases wherein imparlances are not allowed; no imparlance is granted in an *homine replegiando*, or in an assise, unless on good cause shown: nor shall there be an imparlance in an action of special *clausum fregit*; though it is allowed in general actions of trespass. *Hill.* 9. *W. 3:* 3 *Salk.* 186.—Where an attorney, or other privileged person of the court, sues another, the defendant cannot imparl, but must plead presently: if the plaintiff issues out a special original, wherein the cause of action is expressed, and the defendant is taken on a special *capias*, he shall not have an imparlance, but shall plead as soon as the rules are out. 2 *Lil.* 35, 36. See tit. *Practice*.

*Of Pleadings afterwards.*—A plea to the jurisdiction may not be pleaded after general imparlance. *Raym.* 34. Dilatory pleas also cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. 3 *Comm.* 301: *Tidd's Pract.* After imparlance the defendant cannot plead an abatement; if he doth, and the plaintiff tenders an issue, whereupon the defendant demurs, and the plaintiff joins in demurrer, such plea is not peremptory, because the plaintiff ought not to have joined in demurrer, but to have moved the court, that the defendant might be compelled to plead in chief. *Allen,* 65. Though a defendant may not plead in abatement after a general imparlance, yet, if it appear by the record that the plaintiff hath brought his action before he had any cause, the court *ex officio* will abate the writ. 2 *Lev.* 197. See this Dict. tit. *Abatement, Practice*.

The defendant cannot have oyer of a deed in common case after imparlance: and a tender after imparlance is nought. 2 *Lev.* 190: *Lutw.* 238. If it appears upon the record that an imparlance was due, and denied, it is error; but then such error must appear on the record. 3 *Salk.* 168. It has been held, that if the defendant doth not appear on a *dies datus*, the plaintiff shall not have judgment by default, as he may on imparlance, because the *dies datus* is not so strong against him as an imparlance; and therefore the plaintiff must take process against the defendant for not appearing at the time. *Moor,* 79: 2 *Nels.* 497.

After a general special imparlance the defendant may not only plead in abatement of the writ, bill, or count, but also privilege. 1

*Lev. 54: Mod. 529: 5 Mod. 335.* But it seems: being done in the proper judicature, sentence that such plea must be intitled of the term is passed, &c. And it is to be observed, that the declaration is filed. *Impey, K. B.* the same evidence is required in an impeach-

Formerly, when the process in the King's Bench was returnable the last general return of the term, or, in the Common Pleas, when it was returnable on that return, and the declaration was not filed or delivered on the return day, or on the day following, or where the process in either court was returnable before, but the declaration was not delivered or filed, and notice thereof given four days exclusive before the end of the term, the defendant, if completely in court, was entitled to an imparlance, and must have pleaded within the first four days of the next term, provided the declaration were delivered or filed, and notice thereof given, before the essoign day of that term, otherwise the defendant was allowed to imparl to the subsequent term. By a late rule, however, of all the courts (1 *W. 4. r. 3.*), upon every declaration delivered or filed on or before the last day of any term, the defendant, in or out of any prison, was compellable to plead as of such term, without being entitled to any imparlance. Upon this rule it was holden that if the writ and appearance were of one term, and the declaration of another, the defendant was still entitled to an imparlance. 2 *Cr. & J. 140: 1 Price, N. R. 175: 1 Dougl. 304, S. C.*

But now, as the time for pleading is no longer regulated by terms, but the proceedings may be had on writs, except on certain times in term or vacation, the practice of imparling is, it seems, abolished by the 2 *W. 4. c. 39.* so far as it is dependant on the terms; but some of its consequences, as affecting particular proceedings, such as the pleas to the jurisdiction, or in abatement, or claiming consuance, &c., may still remain. *Tidd's Supplem. 127.*

And imparlances may, it is conceived, still exist in actions not commenced under the process given by that act, as in proceedings by *scire facias*, replevin, and actions removed from inferior courts.

**IMPARSONEE.** A parson, *imparsonee*, *persona impersonata*, is he that is inducted, and in possession of a benefice. *Dyer, fol. 40. num. 72.* says a dean and chapter are parsons *imparsonees* of a benefice appropriate unto them. *Cowel.*

**IMPEACHMENT**, from Lat. *impetere*.] The accusation and prosecution of a person for treason, or other crimes and misdemeanors. Any member of the House of Commons may not only impeach any one of their own body, but also any lord of parliament, &c. And thereupon articles are exhibited on behalf of the Commons, and managers appointed to make good their charge and accusation; which

being done in the proper judicature, sentence is passed, &c. And it is to be observed, that the same evidence is required in an impeachment in parliament as in the ordinary courts of justice, but not in bills of attainder. See index to *State Trials*, vol. 6. tit. *Evidence*.

An impeachment before the Lords by the Commons of Great Britain in parliament, is a prosecution of known and established law, and hath been frequently put in practice: being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom. 1 *Hal. P. C. 150.*

A peer may be impeached for any crime. A commoner cannot, however, be impeached before the Lords for any capital offence, but only for high misdemeanors. *Rot. Parl. 4 Ed. 3. n. 2. 6: 2 Brad. Hist. 190: Selden, Judic. in Parl. c. 1.* But see contra, 4 *Comm. c. 19.* in *n.* and tit. *Parliament*.

The articles of impeachment are a kind of bills of indictment found by the House of Commons, and afterwards tried by the Lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans, who in their great councils sometimes tried capital accusations relating to the public: "*Licet apud concilium accusare quoque et discrimen capitis intendere.*" *Tac. de mor. Germ. 12.*

By the 12 and 13 *W. 3. c. 2.* no pardon under the great seal shall be pleadable to an impeachment by the Commons in parliament. But the king may pardon after conviction on an impeachment. 4 *Comm. 400*; and see *ib. 259—261*: and this Dict. tit. *Pardon*.

The House of Commons also seems to possess the power of pardoning the impeached convict by refusing to demand judgment against him; for no judgment can be pronounced by the Lords until it is demanded by the Commons; and in *Lord Macclesfield's* case, the Commons exercised this power by refusing to call on the Lords for judgment. 6 *St. Tr. 762: Com. Journ. 27th May, 1725; 4 Christ. Black. 400. n. 2.*

On the impeachment of *Warren Hastings* for mal-conduct as governor-general of India, the trial of which lasted, by adjournment, for seven years, from 1787 to 1794, it was solemnly determined that an impeachment is not abated, or put an end to, by the prorogation or dissolution of parliament. But to avoid any doubt, an act was passed to prevent prorogation or dissolution from having the effect of putting a stop to the previous proceedings in the House of Commons. See *Raym. 120: 1 Lev. 384*: and tit. *Parliament*, VIII.



**IMPEACHMENT OF WASTE**, *impetio vasti*, from Fr. *empeschement*, i. e. *impedimentum*.] Signifies a restraint from committing of waste upon lands or tenements; or a demand of recompence for waste done by a tenant who hath but a particular estate in the land granted. He that hath a lease to hold without impeachment of waste, hath by that such an interest given him in the land, &c., that he may make waste without being impeached for it; that is, without being questioned, or any demand of recompence for the waste done. 11 Rep. 82. b. See tit. Waste.

**IMPECHIARE**, Fr. *empêcher*; Lat. *impetere*.] To impeach, to accuse and prosecute, for felony or treason. *Spelman* and *Somner* say, that it is derived from the Lat. *impetere*, which is to accuse, or *in jus vocare*; from whence *impetio* signifies an accusation, viz. *fine impetitione vasti*, is without impeaching or accusing him of waste. See *Impeachment*.

**IMPEDIATUS**. *Expediatus*; *impediati canes*, dogs lawed and disabled from doing mischief in the forests, and purlieus of them. *Cowel*. See *Expediate*.

**IMPEDIENS**. A defendant or deforciant. *Cowel*.

**IMPEDIMENTS IN LAW**. Persons under impediments are those within age, under coverture, *non compos mentis*, in prison, beyond sea, &c., who, by a saving in several laws, have time to claim and prosecute their rights, after the impediments removed, in case of fines levied, &c. See tit. *Limitations of Actions*.

**IMPERIALE**. A sort of very fine cloth. *Cowel*.

**IMPESCATUS**. Impeached or accused. *Pat. 18 Ed. 1*.

**IMPETITIO**. See *Impeachment*.

**IMPETRATION**, *impetratio*.] An obtaining any thing by request and prayer: and in our statutes it is a pre-obtaining of church benefices in England from the court of Rome, which belonged to the gift and disposition of the king, and other lay patrons of this realm: the penalty whereof was the same with that inflicted on provisors. See *stats. 25 Ed. 3. st. 6: 38 Ed. 3. st. 2. c. 1*.

**IMPIERMENT**. Impairing or prejudicing, "to the impairment and diminution of their good names." *Stat. 23 H. 8. c. 9*.

**IMPLEAD**, from Fr. *plander*.] To sue or prosecute by course of law.

**IMPLEMENTS**, from Lat. *impleo*, to fill up.] Things necessary in any trade or mystery, without which the work cannot be performed; also the furniture of a house, as all household goods, implements, &c. And implements of household are tables, presses, cup-

boards, bedsteads, wainscot, and the like. In this sense, we find this word often in gifts and conveyances of moveables. *Termes de Ley*.

**IMPLICATION**. A necessary inference of something not directly declared, between parties in deeds, agreements, &c. arising from what is admitted or expressed. When the law giveth any thing to a man, it giveth *implicitly* (or rather *impliedly*) whatsoever is necessary for the enjoying the same.

It is a general rule, that where an estate is to be raised by implication, it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever. *Talb. 3*.

Implication is either necessary or possible; and wherever an estate is raised by that means in a will, it must be by necessary implication; for the devisee must necessarily have the thing devised, and no other person can have it. 2 *Nels. Abr. 494*.

An implication cannot be intended by deed, unless there are apt words; but otherwise in a will. *Brownl. 153*.

An implied intent must not, without clear expression, alter the equitable general law. 1 *Chan. Cas. 297*.

An estate by implication was never thought of in deed, nor in a will, but in case of necessity. 4 *Mod. 156*.

No implication shall be allowed against an express estate limited by express words. 1 *Salk. 226*.

Also it hath been adjudged, that where a particular estate is devised by will expressly, a contrary intent shall not be implied by any subsequent clause. 1 *Salk. 236*.

An express estate for life cannot be enlarged by implication, but by express words it may. 2 *Vern. 449*.

The want of words in some cases may be helped by implication; and so one word or thing, or one estate given, shall be implied by another. There is an implication in wills and devises of lands, whereby estates are gained; as if a husband devises the goods in his house to his wife, and that after her decease his son shall have them and his house, though the house be not devised to the wife by express words, yet it has been held, that she hath an estate for life in it by implication, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 *Ventr. 223*.

Estates for life, and estates tail, may be raised by implication in wills: a testator had three sons, the eldest son dying, leaving his wife with child, to whom the father devised an annuity *in ventre sa mere*, and if his middle son died before he had any issue of his body, remainder over, &c. And it was resolved,

that such son had an estate-tail by implication. *then my property expires; Carta de foresta Moor*, 127. (9 H. 3. c. 13.); but till then it is in some cases

Also estates devised by will, without words of limitation, are frequently enlarged to fee by implication, as where some personal charge is imposed on the devisee; for instance, to pay a specific sum of money (*Cro. Eliz.* 204), or to pay debts and legacies. 1 *Ch. Rep.* 202: 8 *T. R.* 1.

There are conditions and covenants, implied by law, in deeds and grants: and implication will sometimes help law proceedings, and supply defects.

See further *tit. Covenant, Deed, Estate. Intendment, Limitation, Use, Will, &c.*

**IMPORTATION, importatio.** The bringing goods and merchandize into this kingdom from other nations. See *tit. Navigation Acts.*

**IMPOSSIBILITY.** A thing which is impossible in law is all one with things impossible in nature: and if any thing in a bond or deed is impossible to be done, such deed, &c. is void. Yet where the condition of a bond becomes impossible by the act of God, in such case it is held the obligor ought to do all in his power towards a performance: as when a man is bound to enfeof the obligee and his heirs, and the obligee dies, the obligor must enfeof his heir. 2 *Co. Rep.* 74. See *tit. Bond, Condition, Deed.*

**IMPOST**, from Lat. *impono*.] The tax received by the prince, for such merchandizes as are brought into any haven within his dominions, from foreign nations. It may in some sort be distinguished from customs, because customs are rather that profit the prince maketh of wares shipped out; yet they are frequently confounded. *Cowel.* See this Dict. *tit. Customs on Merchandizes, Taxes.*

**IMPOSTORS, religious.** Those who falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. They are punishable by the temporal courts with fines, imprisonment, and infamous corporal punishment. 1 *Hawk. P. C.* c. 5.

**IMPOTENCY**, is a canonical disability to avoid marriage in the Spiritual Court. The marriage is not void *ab initio*, but voidable only by sentence of separation, but to be actually made during the life of the parties. See *tit. Marriage.*

**IMPOTENCY, property by reason of.** A qualified property may subsist with relation to animals *feræ naturæ ratione importentia*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and

IMPRESSING (or *impresting*, i. e. paying

earnest to) **SIAMEN.** The power of impress-

ing men for the sea service, by the king's com-

mission, has been a matter of some dispute,

and submitted to with great reluctance, though

it hath very clearly and learnedly been shown

by *Sir Michael Foster* that the practice of im-

pressing, and granting powers to the admiralty

for that purpose, is of very ancient date, and

hath been uniformly continued, by a regular

series of precedents, to the present time,

whence he concludes it to be part of the com-

mon law. The difficulty arises from hence,

that no statute has expressly declared this

power to be in the crown, though many of

them very strongly imply it. *The stat. 2 Ric.*

2. c. 4. speaks of mariners being arrested and

retained for the king's service, as of a thing

well known, and practised without dispute;

and provides a remedy against their running

away. By the 2 and 3 *P. & M.* c. 16. if any

waterman, who uses the River Thames, shall

hide himself during the execution of any com-

mission of pressing for the king's service, he

is liable to heavy penalties. By 5 *Eliz.* c. 5.

no fisherman shall be taken by the queen's

commission to serve as a mariner; but the

commission shall be first brought to two jus-

tics of the peace, inhabiting near the sea

coast where the mariners are to be taken, to

the intent that the justices may choose out,

and return such a number of able-bodied men

as in the commission are contained, to serve

her majesty. And, by others (7 and 8 *W.* 3.

c. 21; 2 *Anne*, c. 6; 4 and 5 *Anne*, c. 19: 13

*G.* 2. c. 17. &c.) especial protections are al-

lowed to sea-men in particular circumstances,

to prevent them from being impressed. All

which do most evidently imply a power of im-

pressing to reside somewhere; and, if any

where, it must, from the spirit of our constitu-

tion, as well as from the frequent mention of

the king's commission, reside in the crown

alone. 1 *Comm.* 419: *Comb.* 245: *Fost.* 154.

The legality of pressing is so fully esta-

blished, that it will not now admit of a doubt in

any court of justice. In the case of *The King*

*v. Tubbs*, Lord Mansfield said, "The power of

pressing is founded upon immemorial usage

allowed for ages. If not, it can have no ground

to stand upon; nor can it be vindicated or jus-

tified by any reason but the safety of the state.

The practice is deduced from that trite maxim

of the constitutional law of England, that pri-

ate mischief had better be submitted to, than

public detriment and inconvenience should en-

sue. Though it be a legal power, it may, like many others, be abused in the exercise of it." *Cowp.* 517. In that case the defendant was brought up by habeas corpus, upon the ground that he was entitled to an exemption; but the court held that the exemption was not made out, and he was remanded to the ship from whence he had been brought. 1 *Comm.* 420. n.

In addition to the authority cited by *Foster* in support of the legality of pressing scamen, many more are collected by *Barrington* (in his *Obs. on Anc. Stats.* p. 334. &c. edit. 5.), who shows that the crown anciently exercised a similar power of impressing men for the land service, not only for the army, but for the king's pleasure: and instances are given in the case of *Goldsmith's (Aurifabros)*, impressed *pro apparatusibus persone rebus*. 11 *Ed. 1: Rym.* vol. v. part iii. p. 50: and *Minstrels in solatium regis*. *Rym.* 34 H. 6.

A freeholder, as such; 5 *East.* 47; or headborough; 5 *T. R.* 276; or a freeman and live-ryman of London, are not exempt from impressment. 9 *East.* 466. So scamen employed in the coal trade are not privileged. 5 *T. R.* 417. Neither is an apprentice in the Greenland fishery exempt after he has served three years. 6 *East.* 238. Nor a carpenter in a coal and coasting trader. 13 *East.* 549. And it does not appear that the master of any vessel is, merely as such, exempted by law from being impressed, especially if his appointment appear to be collusive. 14 *East.* 346.

But a bargeman employed by the Navy Board is privileged. 2 *Bl.* 1207. So are watermen belonging to fire insurance offices. 14 *G.* 3. c. 78.

A protection from impressment may be granted by the admiralty, which, however, does not seem to amount to an exoneration. 16 *East.* 165.

A person who causes another to be impressed when privileged is liable to an action. 1 *Camp.* 187.

As the power of impressment is of so very extraordinary and arbitrary a nature, it is highly important that those who perform this duty should be duly qualified for that purpose, for the law affords no protection to any of its officers who act without proper authority. If there is any irregularity, therefore, in the execution of the impress warrant, such as its being delegated to a petty officer when directed to be executed only by a commissioned officer, and the death of any individual is occasioned by enforcing its execution, the party causing the death will be guilty of manslaughter; *Fost.* 154; and, under some circumstances, the offence may amount to murder. 1 *East.* P. C. 313. But though the warrant be directed to several officers, one of them alone may ex-

ecute it. 1 *Hale.* 459. Where the officer also, in executing the warrant, behaves with unnecessary severity, or gives vent to private spleen or malice towards those who are the subjects of it, the authority of the warrant will not exempt him from being criminally responsible for his conduct. Therefore, where it appeared that the captain of a man-of-war had acted maliciously in impressing the master of a merchant vessel, the Court of King's Bench granted a criminal information against him. *R. v. Wells*, 1 *Bl.* 19.

Many attempts have been made of late years in the House of Commons to take away from the crown the power of impressment; and there is little doubt but it will shortly be abolished, or only retained under some modified form.

**IMPREST MONEY**, from *in*, and *Fr. prest, paratus*.] Money paid on enlisting soldiers. See *Prest-money*.

**IMPRETIABILIS**. Invaluable; in which sense it is often mentioned in *Mat. Paris*.

**IMPRIMERY**, *Fr.* A print, or impression; the art of printing, and a printing house, are called *imprimery* in some statutes.

**IMPRISH**. 'Those who side with, or take the part of another, either in his defence or otherwise. *Mat. Par.* 127.

**IMPRISONMENT**, *imprisonamentum*.] The restraint of a man's liberty under the custody of another; and extends not only to a gaol, but to a house, stocks, or where a man is held in the street, &c.; for in all these cases the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go about his business as at other times. *Co. Lit.* 253.

None shall be imprisoned but by the lawful judgment of his peers, or by the law of the land: *Magna Charta*, c. 2: *stat.* 25 *Ed.* 3. *et.* 5. c. 4.

No person is to be imprisoned but as the law directs, either by command and order of a court of record, or by lawful warrant, or the king's writ, by which one may be lawfully detained to answer the law. 2 *Inst.* 46: 3 *Inst.* 209.

At common law a man could not be imprisoned in any case, unless he were guilty of some force or violence, for which his body was subject to imprisonment, as one of the highest executions of the law; but imprisonment is inflicted by statute in many cases. 3 *Rep.* 11. Whenever the common law, or any statute, gives power to imprison, there it is lawful and justifiable; but he who does it in pursuance of a statute, must be sure exactly to follow the statute in the order and manner of doing thereof. *Dyer*, 204: 13 *Ed.* 1.

See further on this subject, and connected



therewith, tiths. *Arrest, Bail, Capias, Constable, Commitment, False Imprisonment, Habeas Corpus.*

**IMPROBATION.** The act by which falsehood and perjury is proved. By an act of *reduction-improbation* in the Scotch law a deed may be falsified if refused to be produced. See *Bell's Scotch Law Dict.*

**IMPROPRIATION.** See tit. *Appropriation.*

**IMPROVEMENT.** See *Approvement.*

**IMPRUIARE.** To improve land.

**IMPRUIAMENTUM.** The improving of land. *Cartular. Abbat. Glaston, MS. p. 50.* Or rather the improvement itself, when made.

**IN AUTER DROIT.** In another's right; as where executors or administrators sue for a debt or duty, &c. in right of the testator or intestate.

**INBLAURA.** Profit or product of ground. *Cancl.*

**INBORH and OUTBORH,** Saxon. See *Camden's Britain, in Ottadinis*, where he says, speaking of Edelingham, the barony of Patrick, Earl of Dunbare, which also was *inborow* and *outborow* between England and Scotland, as we read in the books of inquisitions, that is (as he believes), he was to allow, and to observe in this part the ingress and egress of those who travelled to and fro between both realms; for Englishmen in ancient time called in their language an entry and forecourt or gate-house, *inborow.* *Cowel.*

**INCASTELLARE.** To reduce a thing to serve instead of a castle; and it is often applied to churches.—*Qui post mortem patris ecclesiam incastellatam retinebat.* *Gervas Dorob. anno 1144.*

**IN CASU CONSIMILI.** See *Casu Consimili.*

**IN CASU PROVISIO.** See *Casu Provisio.*

**INCAUSTUM, or ENCAUSTUM,** Ink. *Fleta. Lib. 2. c. 27. par. 5.*

**INCENDIARIES.** Burning of houses maliciously, to extort sums of money from those whom the malefactors should spare, was made treason the first year of King Henry VI. 1 *Hale's Hist. P. C. 270.* The law on this subject was consolidated and amended by the 7 and 8 G. 4. c. 30. See tits. *Arson, Malicious Injuries.*

**INCERTAINTY.** See tit. *Certainty.*

**INCEST.** In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, incest and wilful adultery were made capital crimes. But at the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have

been ever since left to the feeble coercion of the Spiritual Court, according to the rules of the canon law. 4 *Comm. 64.* In Scotland the actual commission of this crime appears to be still capital. See *Bell's Scotch Law Dict.*, and this Dict. tit. *Lewdness.*

**INCHANTMENT.** See tit. *Conjuration.*

**INCHANTOR, incantator.]** He who by charms conjures the devil; and they were anciently called *carmina*, by reason in those days their charms were in verse. 3 *Inst. 44.*

**INCHANTRESS, incantatrix.]** A woman who uses charms and incantations. See *Conjuration.*

**INCHARTARE.** To give or grant and assure any thing by an instrument in writing. *Mat. Paris.*

**INCH OF CANDLE,** is the manner of selling goods by merchants, which is done thus: first, notice is to be given upon the Exchange, or other public place, of the time of sale; and, in the mean time, the goods to be sold are divided into lots, printed papers of which, and the conditions of sale, are also forthwith published; and when the goods are exposed to sale, a small piece of wax candle, about an inch long, is burning, and the last bidder when the candle goes out is entitled to the lot or parcel so exposed. If any difference happens in adjusting to whom a lot belongs, where several bid together, the lot is to be put up again; and the last bidder is bound to stand to the bargain, and take the lot whether good or bad. In these cases the goods are set up at such a price; and none shall bid less than a certain sum more than another hath before, &c. *Merch. Dict.* See tit. *Auction.*

**INCIDENT, incidens.]** A thing necessarily depending upon, appertaining to, or following another that is more worthy or principal. A court-baron is inseparably incident to a manor; and a court of piepowder to a fair; these are so inherent to their principals, that by the grant of one the other is granted; and they cannot be extinct by release, or saved by exception, but in special cases. *Kitch. 36: Co. Lit. 151.*

Rent is incident to a reversion; timber trees are incident to the freehold, and also deeds and charters, and a way to lands; fealty is incident to tenures; distress to rent and amercements, &c. *Co. Lit. 151.* Tenant for life or years, hath incident to his estate, estovers of wood. *Co. Lit. 41.* And there are certain incidents to estates-tail; as to be dispunishable of waste, to suffer a recovery, &c. *Co. Lit. 224: 10 Rep. 38, 39.* Incidents are needful to the well-being of that to which they are incident; and the law is tender of them. *Hob. 39, 40.*

If a man, either by grant or prescription, has a right to a wreck thrown on another's

land, of consequence he has a right to a way over the same land to take it; and the very possession of the wreck is in him before seizure. 6 *Mod.* 149. See 14 *Vin. Arb.* tit. *Incidents*.

**INCIDENT DILIGENCE**, is a diligence or process granted before *litis contestation* in improbations, for the recovery of writs craved to be produced, and in many other cases during the dependance of the principal process. *Scotch Dict.*

**INCIPITUR**. In pleading, when parties have come to an issue, the plaintiff should, in strictness, enter it with all the prior proceedings and pleadings upon what is called the issue roll during the term in which the issue is joined. The practice, however, is only to enter what is termed an *incipitur*; that is, the mere commencement or initial words of the paper or demurrer book. See 2 *Tidd's Pr.*

**INCLAUSA**. A home close, or inclosure near the house. *Paroch. Antiq.* pag. 31.

**INCLOSURES**. Large wastes or commons in the West Riding of the county of York, with the consent of the lords of manors, &c. may be inclosed, a sixth part whereof shall be for the benefit of poor clergymen whose livings are under 40*l.* a-year, to be settled in trustees, who may grant leases for twenty-one years, &c. 12 *Ann. c.* 4.

Inclosures of commons and wastes are generally made by local statutes, which are subject to, and regulated by, the provisions of the general Inclosure Act; 41 *G. 3. c.* 109: amended by the 1 and 2 *G. 4. c.* 23.

Allotments under an inclosure act are freehold, unless it is otherwise directed by the act. 2 *T. R.* 415: 2 *M. & S.* 175.

Most inclosure acts, however, declare that the allotments made in respect of any land shall be of the same tenure as the land in respect of which they are set out.

In Scotland, by the act 1661, *c.* 41. proprietors may compel neighbouring proprietors to join in inclosing adjoining properties; bearing a proportion of the expense.

See tit. *Common*.

**INCOME TAX**. (*Now abolished.*)

**INCOMPATIBILITY**, *incompatibilitas beneficiorum*.] Is when benefices cannot stand one with another, if they be with cure, and of such a value in the king's books. *Whitlock's Read.* p. 4. See tit. *Advowson*.

**INCONTINENCY**. See tits. *Adultery, Fornication, Lewdness, Rape, &c.*

**INCOPOLITUS**, a proctor, or vicar. *Leg. Hen. 1.*

**INCORPORATION**, power of. See tit. *Corporation*.

**INCORPOREAL HEREDITAMENTS**. See tit. *Hereditaments*.

**INCREMENTUM**. Increase or improve-

ment; to which was opposed *decrementum*, or abatement. *Paroch. Antiq.* 164. It is used in charters for a parcel of ground inclosed out of a common, or improved.

**INCROACHMENT**, *Fr. accroachment*, a grasping.] An unlawful gaining upon the right or possession of another man. As where a man sets his hedge or wall too far into the ground of his neighbour, that lies next to him, he is said to make incroachment upon him; and a rent is said to be incroached, when the lord by distress or otherwise compels his tenant to pay more than he owes; and so of services, &c. 9 *Rep.* 33. And sometimes this word is applied to power; for the Spencers, father and son, it is said, incroached unto them royal power and authority, *anno 1 Ed. 3.* And the admirals and their deputies are said in stat. 15 *R. 2. c.* 3. to have incroached to themselves divers jurisdictions, &c.

**INCUMBENT**, from *Lat. incumbo*, to mind diligently.] A clerk resident on his benefice with cure; and is so called, because he does or ought to bend all his study to the discharge of the cure of the church to which he belongs. *Co. Lit.* 119. Where an incumbent is put out without due process, he shall be at large to sue for his remedy at what time he pleaseth, &c. *Stat. 4 H. 4. c.* 22. See tits. *Advowson, Church, Parson*.

**INCUMBRANCE**. See tits. *Mortgage, Purchase*.

**INCURRAMENTUM**. The incurring or being subject to a penalty, fine, or amercement; so *incurri alieni* is to be liable to another's legal censure or punishment. *Westm. c.* 37.

**INDEBITATUS ASSUMPSIT**. See tit. *Assumpsit*.

**INDECENCY**. All open and gross indecency is a misdemeanor at common law, and is punishable by indictment, not only as a nuisance to the rest of the community, but as being injurious to public morals. 2 *Str.* 790: *Poph.* 208: 1 *Hawk. c.* 5. § 4: *Com.* 65: 1 *East, P. C. c.* 1. § 1.

Therefore, where a defendant (who was a man of rank and fortune) was indicted for showing himself naked from a balcony in Covent Garden to a great multitude of people, and confessed the indictment, he was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years. *R. v. Sir Charles Sedley, Sid.* 168: 1 *Keble.* 620. So it was held to be an indictable misdemeanor for a man to undress himself on the beach and bathe in the sea, near inhabited houses from which he might be distinctly seen, although the houses had been recently erected, and before their erection it had been usual for men to bathe in great numbers at the place in question; for whatever

place becomes the habitation of civilized men, there the laws of decency must be enforced. *R. v. Crunden*, 2 Camp. 89.

It has likewise been accounted a misdemeanor publicly to exhibit for money a human being of unnatural and monstrous shape. And in one case of this description, where a monstrous child had died, and was embalmed to be kept for show, the Lord Chancellor ordered it to be buried. 2 *Cha. Ca.* 110: 3 *Burn's J.* 578.

By the 5 *G. 4. c.* 83. § 3. any common prostitute wandering in the streets, or in any place of public resort, and behaving in a riotous or indecent manner, shall be deemed an idle and disorderly person, and may be committed to the house of correction to hard labour for any time not exceeding a month. See further tits. *Exposure of the Person, Lewdness.*

**INDECIMABLE**, *indecimabilis*.] That is, not titheable, or by law ought not to pay tithe. 2 *Inst.* 460.

**INDEFEASIBLE** or **INDEFEISIBLE**. That cannot be defeated or made void; as a good and *indefeasible estate*, &c.

**INDEFEASIBLE RIGHT TO THE THRONE**. See tit. *King*.

**INDEFENSUS**. One that is impleaded, and refuseth to make answer. *Mch.* 50 *H. 3. Rot.* 4.

**INDEFINITE PAYMENT**. Is where a debtor owes several debts to a creditor, and makes a payment without specifying to which of the debts it is to be applied. See tit. *Payment*.

**INDEMNITY**. An indemnity was a pension paid to the bishop in consideration of discharging or indemnifying churches, united or appropriated, from the payment of procurations; or by way of recompense for the profits which the bishop would otherwise have received during the time of the vacation of such churches. *Gibbs.* 706. 719.

On the appropriation of a church to any college, &c. when the archdeacon loses for ever his induction money, the recompence he receives yearly out of the church so appropriate, as 12*d.* or 2*s.* more or less, as a pension agreed at the time of the appropriating, is called indemnity. *MS. in Bibl. Cotton*, p. 84.

Acts of indemnity are passed every session of parliament for the relief of those who have neglected to take the necessary oaths, &c. required to qualify them for their offices and employments.

**INDENTURE**, *indentura*.] Is a writing containing some contract, agreement, or conveyance, between two or more persons, being indented in the top answerable to another part, which hath the same contents. *Co. Lit.* 229. A deed of bargain and sale of freehold lands, &c. must be by indenture, inrolled, &c. 27 *H. 8. c.* 16. See tits. *Conveyance, Deed*.

**INDIA COMPANY**. See *East India Company*.

**INDIA GOODS**. See *East India Company, Navigation Acts*.

**INDICAVIT**. A writ of prohibition that lies for a patron of a church, whose clerk is sued in the spiritual court by another clerk for tithes, which amount to a fourth part of the profits of the advowson; when the suit belongs to the king's courts, by the stats. *West.* 2. c. 5: 13 *Ed.* 1. st. 4. The patron of the defendant is allowed this writ, as he is like to be prejudiced in his church and advowson, if the plaintiff recovers in the spiritual court. *Reg. Orig.* 35: *Old Not. Br.* 31.

This writ may be also purchased by the parson sued; and is directed as well unto the judge of the court, as unto the party plaintiff, that they do not proceed, &c. But it is not to be had before the defendant is libelled against in the spiritual court, the copy of which libel ought to be produced in Chancery, before the *indicavit* is granted; and this writ must be brought before the judgment given in the spiritual court; for after judgment there, the *indicavit* is void. *New Nat. Br.* 66. 101. See stat. 34 *Ed.* 1. st. 1. The writ of *indicavit* doth not lie of a less part of the tithes, &c. than a fourth part of the church; if they are not so much, this being surmised by the other party, a consultation shall be had. *Ibid.* The patron of the clerk, who is prohibited by the *indicavit*, may have his writ of right of the advowson of *dismes*, &c. The Ecclesiastical Court may hold a plea of tithes not amounting to the fourth of the church. *Stat. Cumsp. Agatis.* 13 *Ed.* 1. st. 4. See further tits. *Prohibition, Tithes*.

**INDICTED**, *indictatus*.] When any one is accused by bill preferred to jurors at the king's suit, for some offence, either criminal or penal, he is said to be indicted thereof. *Cowel*.

**INDICTIO**. The same with indictment. *Nonnunquam enim fiunt accusationes de foresta, et indictiones vulgariter sic appellatae. Du Fresne.*

**INDICTION**, *indictio; ab indicendo*.] The space of fifteen years, by which computation charters and public writings were dated at Rome; likewise anciently in England, which we find not only in the charters of King Edgar, but of King Henry 3. And by this account of time, which began at the dismissal of the Nicene Council, every year still increased one till it came to fifteen; and then returned again, making *first, second indiction*, &c. *dat apud Chippenham*, 18 *die Aprilis*, *indictione nona, anno Dom.* 1266.

**INDICTMENT**.

**INDICTAMENTUM**, from the Fr. *enditer*, i. e.



*indicare, to show.*] A bill or declaration of complaint drawn up in form of law, exhibited for some offence criminal or penal, and preferred to a grand jury; upon whose oath it is found to be true, before a judge or others, leaving power to punish or certify the offence. *Termes de Ley.*

In strict legal parlance, an indictment is not so called until it has been found a "true bill" by the grand jury; before that time, it is named a bill merely. *Archbold's Cr. Plead.*

Indictment in the Scotch Law, is the form of process by which a criminal is brought to trial at the instance of the Lord Advocate. Where a private party is a principal prosecutor he brings his action in what is termed the form of criminal letters.

What follows relates to indictments in England.

- I. *Of the Nature of an Indictment, how found, &c.*
- II. *For what Offences an Indictment will lie.*
- III. *Of the Joinder of two or more Defendants in one Indictment.*
- IV. *Of the Joinder of two or more Offences.*
- V. *Of the Venue of an Indictment.*
- VI. *Of the Requisites of an Indictment.*
- VII. *Of amending Indictments.*
- VIII. *Where an Indictment may be quashed.*
- IX. *Of granting a Copy of the Indictment.*

I. Lambard says, an indictment is an accusation, at the suit of the king, by the oaths of twelve men of the same county wherein the offence was committed, and returned to inquire of all offences in general in the county, determinable by the court into which they are returned, and their finding a bill brought before them to be true: but when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a presentment; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an inquisition. *Lamb. lib. 4. cap. 5.*

By *Poulton*, an indictment is an inquisition taken and made by twelve men, at the least, thereunto sworn, whereby they find and present, that such a person, of such a place, in such a county, and of such a degree, hath committed such a treason, felony, trespass, or other offence, against the peace of the king, his crown and dignity. *Palt.* 169. An indictment, according to *Lord Chief Justice Hale*, is only a plain, brief, and certain narrative of an offence, committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. *2 Hale's Hist. P. C.* 168, 169.

An indictment seems to be thus shortly well defined:—"A written accusation, of one or more persons, of a crime or a misdemeanor, preferred to, and presented on oath by a grand jury." *4 Comm.* 302.

A bill of indictment is said to be an accusation, for this reason; because the jury that inquires of the offence doth not receive it, until the party that offers the bill, appearing, subscribes his name, and offers his oath for the truth of it. *Standf. P. C. lib. 2. cap. 23.*

No man may be put upon his trial for a capital offence, except on an appeal or indictment, or something equivalent thereto. *H. P. C.* 210.

The duties of the grand jury in finding the indictment have already for the most part been mentioned. See tit. *Grand Jury*.

Although a bill of indictment may be preferred to a grand jury upon oath, they are not bound to find the bill, if they find cause to the contrary; and though a bill of indictment be brought unto them without oath made, they may find the bill if they see cause; but it is not usual to prefer a bill unto them before oath be first made in court, that the evidence they are to give unto the grand inquest to prove the bill is true. *2 Lill. Abr.* 44.

The grand jury are to find the whole in a bill, or to reject it, and not find specially for part, &c. *2 Hawk. P. C. c. 25. § 2.* This rule relates only to cases where the grand jury take upon themselves to find part of the same indictment to be true, and part false; and do not either affirm or deny the facts submitted to their inquiry. But where there are two distinct counts, viz. one for a riot, and the other for an assault, and the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the indictment as to the count found just as if there had been originally only that one count. *Cowp.* 325.

Sheriffs had formerly power to take indictments; which they did by roll indented, one part whereof remained with the indictors. *13 Ed. 1: 1 Ed. 3.*

There is no time limited at common-law for commencing a suit by the king; and therefore in all cases of treason, felony, and misdemeanor, where there is no period specified by statute, the indictment may be preferred at any length of time after the offence.

Indictments for the treason mentioned in the *7 and 8 W. 3. c. 3. § 5.* must be found by a grand jury within three years, not after, if the offence has been committed within England, Wales, or Berwick-upon-Tweed; or Scotland. See *Fost.* 249.

By the *31 El. c. 5.* indictments or informations upon any statutes penal, whereby the forfeiture is limited to the king, must be brought

within two years after the offence committed; if the forfeiture be limited to the king and the prosecutor, the suit must be in one year; and in default thereof, the same must be sued for the king within two years after that year ended. But where a statute limits a shorter time, the suit must be brought accordingly.

**II. For what Offences an Indictment will lie.**—All felonies and capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever, of a public evil example against the common law, may be indicted; but no injuries of a private nature, unless they some way concern the king. 2 *Hawk. P. C. c.* 25. § 4.

A misdemeanor is any crime whatever less than felony, and the word is generally used in contradistinction to felony: misdemeanor, therefore, comprehends all indictable offences which do not amount to felony, as perjury, assault and battery, libels, conspiracies, and public nuisances.

Indictments are for the benefit of the commonwealth and the public good, and to be preferred for criminal not civil matters; they may be of high treason, felony, trespass, and in all sorts of pleas of the crown, but not of injuries of a private nature, which do not concern the king or the public. *Co. Lit.* 126. 203: 4 *Rep.* 44.

All indictments ought to be brought for offences committed against the common law, or against some statute, and not for every slight misdemeanor. 2 *Lill.* 44. Where a statute appoints a penalty to be recovered by bill, plaint, or information, it cannot be by indictment, but as directed to be recovered. An indictment will not lie where only another remedy is provided by statute. *Cro. Jac.* 643: 3 *Salk.* 187.

Where an offence is made punishable by statute, the true rule seems to be, that if the offence was punishable before the statute prescribed a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts, that the doing an act not punishable before shall for the future be punishable in a certain particular manner, there it is necessary to pursue such particular method, and not the common law method of indictment. 1 *Bur.* 543: 2 *Bur.* 799. 805. 834: *Coop.* 524. 650: 3 *B. & A.* 161.

Wherever a statute prohibits a public grievance, or commands a matter of public convenience (as the repair of highways, and the like), all acts and omissions, although without

any corrupt motive, contrary to prohibition or injunction of the statute, are misdemeanors at common law, and are consequently punishable by indictment, unless the statute expressly, or by implication, excludes that proceeding. And it makes no difference in this respect, whether the statute inflicts a particular penalty for the offence or not, or whether the penalty is contained in the same or a subsequent statute. 2 *Hawk. c.* 25. § 4: 1 *Burr.* 543: 2 *Burr.* 832: *Coop.* 618: 4 *T. R.* 205: 5 *T. R.* 507.

But where a statute extends only to private persons, or chiefly relates to disputes of a private nature, an offence against it is not the subject of an indictment; for no injuries of a private nature are indictable, unless they in some measure concern the king, or are accompanied by a breach of the peace. 2 *Hawk. c.* 25. § 4: *Cro. Ec.* 90: 1 *Str.* 190: 3 *Salk.* 188: 1 *Lord R.* 366: 3 *Burr.* 1697. 99. 1706.

With regard to felonies created by statute, it seems clear that not only those crimes which are made felony in express words, but also those which are subjected by statute to judgment of life or member, become felonies thereby, whether the word felony be omitted or mentioned. And where an act declares that the offender shall be deemed to have committed any act feloniously, this makes the offence a felony, and imposes all the common and ordinary consequences thereof. 3 *M. & S.* 556. See 1 *Hawk. P. C. c.* 40. § 2—5. Where an act makes an offence felony which before was only a misdemeanor, it is not afterwards indictable as a misdemeanor only. *R. v. Cross*, 1 *Lord Raym.* 711: 3 *Salk.* 193. And see more fully *Russell on Crimes*, l. 1. c. 3.

By the 7 and 8 *G. 4. c.* 28. § 14. wherever that or any other statute relating to any offence, punishable by indictment or summarily, in describing or referring to the offence or the subject matter with respect to which it shall be committed, or the offender affected by the offence, has used words importing the singular number or the masculine gender only, yet the statute shall be understood *several* as well as *one matter*, and *several* as well as *one person*, and *females* as well as *males*, and *bodies corporate* as well as *individuals*, unless otherwise specially provided, or there be something in the subject or context repugnant to such construction.

It seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law, and indictable as such. 1 *Hawk. P. C. c.* 5. § 4: 1 *East, P. C. c.* 1. § 1. See *tit. Indecency*.

Although bare intention only is not punishable, yet, when any act is done, the law judges of it by the intent: on this ground, the bare

attempt to commit a felony is, in many cases, a misdemeanor, and indictable; and even an attempt to commit a misdemeanor has been decided, in many cases, to be itself a misdemeanor. *Higgins's case*, 2 *East*, 5. 8. 21: *R. v. Phillips*, 6 *East*, 464. And such intentions, manifested by act, are punishable by statute in several cases.

An indictment lies against one for assaulting and stopping another on the highway, being a breach of the peace. *Hil. 22 Car.* It lies for cheating a person at play, with false dice, or any other cheating; but it is not indictable for one man to make a fool of another, in the case of cheats getting money, &c., though action may be brought (2 *Lill.* 44: 1 *Salk.* 479): except in the cases specified in the stat. 7 and 8 *G. 4. c. 29. § 53.*, by which the obtaining property by means of false pretences is made a misdemeanor. See further tit. *Cheats, False Pretences, Frauds*, III.

It was held an indictable offence (and the parties were convicted and severely punished, to conspire, by false rumours, to raise the price of the public funds, on a particular day, with intent to injure the subjects who should purchase on that day. 3 *M. & S.* 67.

Notwithstanding the 6 *G. 4. c. 120.*, it is illegal for workmen to combine for the purpose of dictating to the master whom he shall employ. *M. & Rob.* 179.

A parson may be indicted for preaching against the government of the church, the civil and ecclesiastical government being so incorporated together that one cannot subsist without the other, and both centre in the king; wherefore, to speak against the church, is within the stat. 13 *Car. 2: 1 Sid.* 69: 2 *Nels. Abr.* 959. And a parson was indicted for pronouncing absolution to persons condemned for treason, at the place of execution, without showing any repentance. 5 *Mod.* 363. Also a parson hath been indicted and fined, &c., for drinking healths to the memory of traitors. 3 *Mod. Rep.* 52.

It was held not to be an indictable offence to impede the public intercourse by delivering hand-bills in the streets. 1 *Burr.* 516. But the later and better decision is, that every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence; *R. v. Cross*, 3 *Campb.* 227; where an indictment was maintained for such obstruction, by suffering stage-coaches to stand plying for passengers in the public streets. And for suffering wagons to remain in the street, loading and unloading at a carrier's warehouse. 6 *E. R.* 427. See further tit. *Ways*.

It has been held not indictable to throw down skins into a public way, which accidentally occasions a personal injury. *Stra.* 190.

Nor to kill a hare. *Stra.* 679. Nor can one be indicted for an offence made penal by statute, without it directs to whom the penalty is payable. *Stra.* 628. Nor for acting unqualified as a justice of peace. *Cro. Jac.* 643. Nor for selling short measure. 1 *Wils.* 301: 3 *Burr.* 1697. Nor for excluding commeners, by enclosing. *Cro. Eliz.* 90. Nor for an attempt to defraud, if neither by false tokens nor conspiracy. *Stra.* 793. 866: 6 *Mod.* 105. Nor for secreting another. 2 *Ld. Raym.* 1368. Nor for bringing a bastard child into a parish, not being chargeable there. *Stra.* 644: 3 *Burr.* 1645: 2 *Vez.* 540. Nor for entertaining idle and vagrant persons. 1 *Ld. Raym.* 790. Nor for keeping a house to receive women with child and deliver them. 3 *Burr.* 1646. And cases of nonfeasance and particular wrong are not, generally speaking, the subject of indictment; but the case of neglect to provide for a child of tender years may amount to such offence. See 2 *Campb.* 650: *R. & R.* 20. But this duty seems confined to persons standing in the relationship of parents and masters, and not to extend to brothers. 2 *C. & P.* 449.

Refusing to admit a person to be a freeman of a corporation under an order from the mayor of a city, held not indictable 3 *Salk.* 188. Nor keeping an open shop in a city, not being free thereof. 3 *Salk.* 188. Nor exercising a trade in a borough according to the bye-laws thereof. 4 *Term Rep. K. B.* 77. *R. v. Sharpless*.

Indictment will not lie for a private nuisance, wherein action on the case only lies; and where a person is indicted for trespass, which is not indictable at law, but for which action should be had; or if a man be indicted for scandalous words, as calling another rogue, &c., such indictments are not good, for private injuries are to be redressed by private actions. 2 *Lil. Abr.* 42.

Mere private trespasses, unaccompanied with any breach of the peace, are not indictable. 3 *Burr.* 1699. 1706. So an indictment will not lie for conspiring to commit a mere civil trespass; as going into a preserve to kill the hares of another. *Rex v. Durner*, 13 *East*, 228. But where an indictment stated the forcibly entering a dwelling-house, and with strong hand turning out the occupier, the court refused to quash it. 3 *Burr.* 1699. So an indictment will lie for taking goods forcibly with a breach of the peace, although by the owner whose property they are. 3 *Salk.* 187.

The Court of K. B. held, that indictment would not lie against a miller for receiving good barley to grind for another at his mill, and delivering a mixture of oat and barley-meal different from the produce of the barley, and being musty and unwholesome. 4 *M. &*



S. 214. But mixing alum with bread by a second degree, and accessories before and after common baker was held indictable. 3 M. & S. 11. The fact that these offences are of different degrees, are all dependant one upon another. 2 Hale, 173.

III. *Of the Joinder of two or more Defendants in one Indictment.*—If an offence wholly arises from any joint act that is criminal of a dwelling house, both or either may be found several defendants, they may be all charged in guilty of the whole, but not of different parts one indictment, jointly and severally, or jointly only; and some of the defendants may be convicted, and others acquitted; for the law looks on the charge as several against each, though the words of it purport a joint charge against all; in other cases, the offences of several persons must be laid several, because the offence of one cannot be the offence of another; and every man ought to answer severally for his own crime. 2 Hawk. P. C. c. 25. § 89. And three offences may be joined in one indictment, and the party convicted of one offence, though he is found not guilty of the others. On penal statutes, several things shall not be joined in the indictment, & a demurrer may be in respect of some one thing, to which subject of a demurrer, motion in arrest of judgment, or writ of error. 2 Hawk. P. C. c. 25. § 89: 1 Hal. P. C. 561. 610.

If several commit a robbery, burglary, or murder, they may be indicted for it jointly; or separately; and so where two or more are guilty of battery, extortion, or the like. 1 Salk. 382. And though they have acted separately, if the grievance be the result of the acts of all, they may be indicted jointly for the offence. 1 B. & Ad. 874. So where money was obtained by false pretences, which consisted of words spoken by one defendant in the presence of the others, all of whom acted in concert. 3 T. R. 98. So where two persons join in singing a libellous song; 2 Burr. 985; and the same where two join in any other kind of publication of a libel. But in the publication of a libel, as in the case of booksellers who are not partners sell a libel at their respective shops, they must be separately indicted.

Several defendants cannot be joined in one indictment for perjury; for perjury is a separate act in each: and one may be desirous to have a *certiorari*, and the other not; and the jury, on the trial of all, may apply evidence to all, that is but evidence against one. Stra. 921.

So uttering blasphemous or seditious words are offences several in their nature. And partners cannot be indicted jointly for exercising their trade without having served an apprenticeship. 1 Salk. 382: 2 Str. 623.

Where the act, however, is the same, though the offence is different in degree, several defendants may be properly included in the same indictment as principals in the first and se-

On an indictment charging two persons with a joint and single offence, as stealing in a dwelling house, both or either may be found guilty of the whole, but not of different parts of the charge; and if found guilty separately, judgment cannot be passed upon one unless a verdict be obtained, or a *nolle prosequi* entered as to the other. R. & R. 344. But where several are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of the larceny only. R. & R. 329.

Where two are charged jointly with receiving stolen goods, a joint act of receiving must be proved; for proof that one received in the absence of the other will not suffice. R. & M. 257.

The court will generally quash an indictment for misjoinder; or it may be made the subject of a demurrer, motion in arrest of judgment, or writ of error.

Where there are different counts against different individuals, this, though a ground for quashing the indictment, is, it seems, no cause of demurrer, provided the counts are such in substance as may be joined, and the same judgment passed upon them. 6 East, 41.

#### IV. *Of the Joinder of two or more Offences.*

—A defendant must not be charged with different felonies in different counts of an indictment; as a murder in one count and a burglary in another; or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another. If the objection in such a case be made before the defendant has pleaded, or the jury are charged, the judge in his discretion may quash the indictment; or if it be not discovered until after the jury are charged, the judge may put the prosecutor to his election on which charge he will proceed; 3 T. R. 106; but it is no objection in arrest of judgment. 3 T. R. 98. Thus upon an indictment for receiving stolen goods, if it appear that the articles were received at different times, the prosecutor must elect as to the receipt of which articles he will prosecute; but the mere probability that the goods were stolen or received at different times is no ground for putting the prosecutor to his election. R. & M. 146. So upon an indictment for robbery, and for an assault, &c. in different counts, the prosecutor must elect upon which he will proceed. 2 M. & M. 71: 3 C. & P. 412.

It is no objection in point of law that an indictment charges prisoners in one count as

principals in stealing, and in another as receivers; but upon a case reserved, the judges were divided in opinion whether the prosecutor should have been put to his election and directed that both charges should not for the future be put in the same indictment. *R. & M.* 234: 3 *C. & P.* 413: *R. v. Mudden*, *Moody's C. C.* 277.

However, although a prosecutor cannot thus charge a defendant with different felonies in different counts, yet he may charge the same felony in several counts, in order to meet the facts of the case, as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be goods or house of A. or of B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B. See 2 *B. & P.* 508.

The 7 and 8 *G. 4. c.* 28. § 6. which abolishes the benefit of clergy in cases of felony, provides that nothing therein contained shall prevent the joinder in any indictment, of counts which might have been joined before the passing of that act.

Indictments for misdemeanors may contain several counts for different offences, provided the judgment upon each be the same. 3 *T. R.* 98. 106: 2 *Marsh*, 466: 3 *M. & S.* 539: 8 *East*, 46. See also 2 *Bur.* 984: 2 *Camp.* 131.

**V. Of the Venue of an Indictment.**—The grand jury are sworn to inquire only for the body of the county: and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by statute. At common law, therefore, where a man was wounded in one county and died in another, the defendant was indictable in neither, because no complete act of felony was done in either county.

To obviate this defect, it was provided by the 2 and 3 *Ed. 6. c.* 24. that the trial should be in the county where the death happened.

That statute was repealed by the 7 *G. 1. c.* 64., which introduced several new provisions relative to the trial of felonies and misdemeanors, and of accessaries before or after the fact.

By § 12. where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of 500 yards of any such boundary, or shall be begun in one county and completed in another, it may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

By § 13. where any felony or misdemeanor shall be committed on any person in or upon any coach, wagon, cart, or any other carriage employed in any journey, or on board any vessel employed on any voyage or journey upon any navigable river, canal, or inland navigation, it may also be tried in any county, through any part whereof such carriage or vessel shall have passed in the course of journey or voyage. And where the side or other part of the highway, or the side, bank, or other part of any river or canal shall constitute the boundaries of any two counties, the felony may be dealt with in either of the counties through, or adjoining to, or by, the boundary of any part whereof the coach or vessel shall have passed in the course of the journey or voyage.

For the provisions of this statute with respect to accessories, see tit. *Accessory*.

At common-law, if a man commit a larceny, simple or compound, in one county, and carry the goods with him into another, he may be indicted for the simple and compound larceny in the county where it was committed, or he may be indicted for it as a simple larceny in the county into which, or in any of the counties through which he carried the goods; for in contemplation of law, there is such a taking and carrying away as to constitute the offence of larceny in every place through which (at any distance of time, *R. & M.* 45.) the goods were so carried by him. 1 *Hale*, 507: 2 *Id.* 163: 4 *Comm.* 304: 2 *Russ.* 771.

Persons knowingly receiving stolen goods, whether the same be felony or misdemeanor, may by the 7 and 8 *G. 4. c.* 29. § 56. be indicted, tried, and punished, in any county or place in which they have had or shall have had any such property in his possession, or in any county or place in which the principal may by law be tried.

By § 76. persons stealing property in one part of the United Kingdom, and having it in their possession in another part, may be indicted, &c. in that part where they shall so have the property, and persons receiving, in one part of the United Kingdom, property stolen in another, may be indicted, &c. in that part where they shall so receive such property.

In indictments for assaulting officers of the excise (7 and 8 *G. 4. c.* 53. § 43.), or for offences against the revenue of the customs (3 and 4 *W. 4. c.* 53. § 122.), the venue may be laid in any county. See 9 *G. 2. c.* 35. § 26. For offences against the customs, committed upon the high seas, the venue may be laid in the county into which the offender is taken, and if he be taken to a city or borough, &c., in the county in which such city, &c. is situated. 3 and 4 *W. 4. c.* 53. § 77. See *R. v. Cart-*

twright, 4 T. R. 490. *In re Nunn*, 8 B. & C. 644: 3 M. & R. 75.

In indictments for offences against statutes then in force relating to the stamp duties, the venue may be laid either in the county where the offence was committed, or in the county in which the parties accused, or any of them, shall have been apprehended. 53 G. 3. c. 108. § 25.

In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended or is in custody; (R. & R. 48): 9 G. 4. c. 31. § 22; or in the county in which the second marriage took place.

In indictments for forgery, and uttering forged instruments, the venue may be laid and the offence charged to have been committed in the county in which the offender is apprehended or is in custody; 1 W. 4. c. 66. § 24; or in which the offence was committed. See R. & R. 212. And accessories before and after the fact in felony, and aiders and abettors in misdemeanor under that act, may be indicted, and the offence charged to have been committed in any county in which the principal offender may be tried. 1 W. 4. c. 66. § 24.

In indictments for embezzlement, against persons in the public service, the venue may be laid in the county or place where the party is apprehended or the offence is committed. 2 W. 4. c. 4. § 5.

In indictments for offences relating to the coin of the realm, where two or more persons have acted in concert in different counties or jurisdictions, the venue may be laid and the offence charged to have been committed in any one of those counties or jurisdictions. 2 W. 4. c. 34. § 15.

In indictments for felonies or other offences committed in Wales, the venue might formerly have been laid in the next adjacent English county. 26 H. 8. c. 6. § 6: 34 and 35 H. 8. c. 26. § 84. But these acts are now repealed by implication by the 11 G. 4. and 1 W. 4. c. 70. § 14; and in indictments for offences committed in Wales, the venue must, as in England, be laid in the county in which the offence is committed, unless otherwise provided for by statute.

Where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of stats. 26 H. 8. c. 13: 33 H. 8. c. 23: 35 H. 8. c. 2: 5 and 6 E. 6. c. 11.

Felonies committed out of the realm, in burning or destroying the king's ships, magazines, or stores, may by stat. 12 G. 3. c. 24 § 2. be inquired of and tried in any county of England, or in the place where the offence is committed. By stat. 13 G. 3. c. 63. misde-

meanors committed in India may be tried upon information or indictment in the Court of King's Bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. See tit *Depositions*.

And in indictments for offences committed by persons employed in any public service abroad, the venue may be laid in Middlesex. 42 G. 3. c. 85. § 1. See 5 M. & S. 403.

By the 9 G. 4. c. 31. § 7. if any of the king's subjects are charged in England with murder or manslaughter, or being accessory thereto, the same being committed on land out of this kingdom, whether within the king's dominions or without, justices of the peace of this kingdom may take cognizance thereof, and the offender may be tried by special commission in any county; but peers shall be tried by their peers, as heretofore used: and this act not to prevent any person from being tried in any place out of the kingdom, as such persons might have been tried before passing this act.

By § 8. when a person feloniously stricken, poisoned, or hurt, upon the sea, or at any place out of England, shall die thereof in England, or being so stricken, &c. in England shall die thereof upon the sea, or at any place out of England, such offence, whether it be murder or manslaughter, or being accessory, may be tried or punished at the place in England in which such death, stroke, poisoning, &c. shall happen.

With respect to offences committed within the jurisdiction of the admiralty, see that tit. and the forgery act; 11 G. 4. and 1 W. 4. c. 66. § 27; which enacts that offences under that act shall be dealt with in the same manner as any other offences committed within such jurisdiction.

By the 7 G. 4. c. 64. § 20, no judgment upon an indictment or information for felony or misdemeanor shall be stayed or reversed for want of a proper venue, where by such indictment, &c. the court shall appear to have had jurisdiction.

VI. *Of the Requisites of an Indictment.*—Indictments must have a precise and sufficient certainty. By stat. 1 H. 5. c. 5. all indictments must set forth the Christian name, surname, and addition of the state and degree, mystery, town, or place and county of the offender; and all this to identify his person.

But by the 7 G. 4. c. 64. § 19. no indictment or information shall be abated by reason of any misnomer or want of addition, or wrong addition of the defendant; but the court may forthwith cause the indictment, &c. to be amended according to the fact.

The time and place are also to be ascertain-



ed, by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place to be within the jurisdiction of the court; unless where the place is laid, not merely as a venue, but as part of the description of the fact. 2 *Hawk. P. C. c.* 25.

If an indictment be generally of offences at several times, without laying any one of them on a certain day, as if it be laid between such a day and such a day, it hath been adjudged that the indictment is void: but a mistake in not laying an offence on the very same day, on which it is afterwards proved upon the trial, is not material upon evidence. 2 *Hawk. c.* 25. § 82. And it is said, the crown is not bound to set forth the very day, when treason, &c. was committed: evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alleged in the indictment, where it is laid on such a day, and divers other days, as well before as after; because the time is only a circumstance, and of form some day must be alleged, but it is not material. 1 *Salk.* 188.

But sometimes the time may be material, where there is any limitation in point of time assigned for the prosecution of offender, as by stat. 7 *W. 3. c.* 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king), unless the bill of indictment be found within three years after the offence committed. *Post.* 249. And, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.

Now by the 7 *G. 4. c.* 64. § 20. no judgment on an indictment or information for felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for omitting to state the time at which any offence was committed, in any case where time is not the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened.

The offence itself must also be set forth with clearness and certainty; and in some crimes, particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done

treasonably, and against his allegiance; anciently, *proditoriè et contra ligeantia suæ debitum*; else the indictment is void. In indictments for murder, it is necessary to say, that the party indicted, *murdered*, not *killed* or *slew*, the other, which was expressed in Latin by the word *murdravit*. In all indictments for felonies, the adverb *feloniously* [*feloniciè*] must be used; and for burglaries also, *burglariter*, or in English, *burglariously*; and all these to ascertain the intent. In rapes, the word *rapuit* or *ravished* is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies also, the words *feloniciè cepit et asportavit* [*feloniously took and carried away*] are necessary to every indictment; for these only can express the very offence.

In indictments for murder, it was formerly considered necessary that the length and breadth of the wound should in general be expressed, in order that it might appear to the court to have been of a mortal nature; but if it went through the body, then its dimensions were immaterial, for that was apparently sufficient to have been the cause of the death. Also, where a limb, or the like, was absolutely cut off, there such description was impossible. 5 *Rep.* 122.

But it was never requisite to prove the wound as laid. 2 *Hale*, 186. And it has been decided by ten judges, that it is not necessary, in an indictment for murder, to state the length, breadth, or depth of the wound. *R. & M.* 97.

Neither is it necessary in such an indictment, where the murder is expressed to have been committed with a certain knife, to prove this as strictly laid; for if it be proved that the deceased was killed with any other weapon, as a dagger, &c., capable of producing the same kind of wound stated in the indictment, the variance is not material. 9 *Co.* 67. *a.*: *Gillb. Evid.* 231.

But if the species of death would be different, as if the indictment allege a stabbing or shooting, and the evidence prove a stabbing or starving, the variance would be fatal. *Id.* However, if the indictment state a death by one kind of poison, proof of death by another kind will support the indictment. *Id.* And see 2 *Hale*, 185, 186; 2 *Hawk. c.* 23. § 84: *R. & M.* 113. 139. 345.

In indictments the value of the things, which is the subject or instrument of the offence, must sometimes be expressed.

In indictments for larcenies, the value of the articles stolen is always stated, and previous to the abolition of the distinction of grand and petit larceny, it was requisite, in order to a conviction of the former offence, to prove

the articles or some of them, stolen at the time exceeded the value of 1s.; but now, by the 1 and 8 G. 1 c. 29, § 2. Simple larceny is of the same nature, and subject to the same incidents, as grand larceny. See further tit. *Larceny*.

In homicides of all sorts, the value of the weapon with which the offence is perpetrated is always expressed, although the value is immaterial. It seems to be stated in the indictment, because the instrument is forfeited as a deodand to the king, and the township is liable for its value if it be not forthcoming. See 2 Hale, 185: 4 Comm. c. 23.

Indictments ought to be more certain than common pleadings in law, because they are more penal, and to be answered with more precision. *Hil. 23 Car. B. R.* They must be precise and certain in every point, and charge some offence in particular, and not a person as an offender in general, or set down goods, &c. stolen, without expressing what goods; and it ought to be laid positively, not by way of recital, &c. or be supplied by implication. *Cro. Jac. 19: 2 Hawk. P. C. c. 25.*

An indictment alleging that defendants conspired by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; the gist of the offence being the conspiracy, the Court of K. B. held that it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences. 2 B. & A. 204.

False Latin, anciently, did not hurt an indictment, if by any indictment it could be made good: but if any word was not Latin, or allowed by law as a word of art, or if it had been insensible in a material point, the indictment was insufficient. 5 Rep. 121: 2 Cro. 108: 3 Cro. 465. An indictment should not be set aside for a false concord between the substantive and the adjective, &c. the expressions being significant to make the sense appear. 5 Co. Rep. 121.

But an indictment against two or more, laying the fact in the singular number, as if against one, hath been held insufficient for the uncertainty. 2 Hawk. c. 25: 1 H. 5.

A person may be indicted for felony against an unknown person: and when the name of one killed is unknown, or goods are stolen from a person that cannot be known, it is sufficient to say in the indictment that *one unknown was killed by the person indicted*, or that *he stole the goods of one unknown*. *Wood's Inst. c. 21* But though an indictment may be good for stealing the goods *cujusdam ignoti*, of a person unknown, yet a property must be proved in somebody at the trial; otherwise it shall be presumed to be in the prisoner by his plead-

ing not guilty. *Mol Cas. in L. & E. 319.* Where a person injured is known, his name ought to be put into the indictment. 2 Hawk. c. 25.

By the 7 G. 4. c. 64. § 14. in indictments or information for felony or misdemeanor, it shall be sufficient to state the ownership of property, real or personal, to be in *any one partner*, by name, *and others*; whether such persons be partners in trade, joint tenants, parceners, or tenants in common: and the like shall be sufficient where in any indictment, &c. it shall be necessary to mention for any purpose any such partners, &c.

By § 15. property belonging to counties may be laid to be in the inhabitants, without naming any.

By § 16. property ordered for the use of the poor of any place, or to be used in the work-house, &c., or by the master or mistress thereof, &c., may be laid to be in the overseers of the poor for the time being: and materials, tools, &c., for repairing, &c. *highways*, may be stated to belong to the surveyor.

By § 17. in indictments or information for felony or misdemeanor, committed with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing, or other materials, tools, or implements relating to any turnpike roads, the same may be stated to belong to the trustees or commissioners of the road, without specifying any names.

Offences committed with respect to sewers, or other matters under the management of the commissioners of sewers, may be in like manner stated to belong to them. § 18.

If a word of *substance* be omitted in the indictment, the whole indictment is bad; but it is otherwise where a word of *form* is omitted, or there is an omission of a synonymous word, where the sense is the same, &c.

When an indictment is drawn upon a statute, it ought to pursue the words of it, if a private act; but it is otherwise on a general statute: it is best not to recite a public statute; the recital is not necessary, for the judges are bound *ex officio* to take notice of all public statutes, and mis-recitals are fatal; so that it is the surest way only to conclude generally "against the form of the statute." 4 Rep. 48.

Though there be no necessity to recite a public statute in an indictment, yet if the prosecutor take upon him to do it, and materially vary from the substantial part of the purview of the statute, and conclude *contra formam statut. predict.* he vitiates the indictment. *Plowd. 79. 83: Cro. Eliz. 236.* But many mis-recitals may be saved by a general conclusion *contra formam statut. predict.* &c. And mistakes may be helped by

the constant course of precedents upon such statutes. 2 Hawk. c. 25. § 101. An indictment is to bring the fact making an offence within all the material words of the statute, or the words *contra formam statuti*, will not make it good. 2 Hawk. c. 25. § 115.

It was formerly a good objection, even after verdict, to an indictment founded on several statutes, as when one statute creates the offence, and the other the penalty, to conclude, "*contra formam statuti*," instead of "*statutorum*;" but now, by the 7 G. 4. c. 64. § 20. the insertion of the words, "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*, shall not be a ground for staying or reversing judgment upon any indictment or misdemeanor.

By § 21. where the offence charged (in any indictment or information for felony or misdemeanor) has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

Judgment shall not be given by the statute upon an indictment which doth not conclude *contra formam statuti*: and judgment by statute shall never be given upon an indictment by common law, as every indictment which doth not thus conclude shall be taken to be. 2 Hawk. P. C. c. 25. § 4. And notwithstanding the 7 G. 4. c. 64. § 20. the omission of "against the form of the statute" is fatal in an indictment for an offence which, but for a statute, would be none. Moo. C. C. 313. But where persons were indicted on the statute of stabbing, and the evidence was not sufficient to bring them within the statute, they might have been found guilty of general manslaughter at common law, and the words *contra formam statuti* rejected as useless: in other cases the same has been also adjudged; though formerly it was held, that an indictment grounded on a statute, which would not maintain it, could not in any case be maintained as an indictment at common law. 2 Hawk. P. C. c. 25. § 4.

When the offence is committed in a reign preceding that in which the indictment is presented, it must conclude against the peace of the late king. 3 Burr. 1901: 2 N. R. 189: Hawk. P. C. c. 62. c. 25. § 93: Bac. Abr. Indictment, G. 7. But if the offence take place partly in one reign and partly in another, as if a nuisance be built in one king's reign and continued in that of another, the indictment must conclude against the peace of both kings. Yelv. 66: 2 N. R. 189: Hawk. P. C. c. 62. c. 25. § 93: Bac. Abr. Indictment, G. 7. So for

compassing the king's death, if one of the overt acts laid be the actual murder of the king, the like conclusion must take place. Kell. 2: 1 Chitt. C. L. 247.

Where the offence was alleged to have been committed in the present reign, and the conclusion was "against the peace of our said late lord the king," it was held that the word *late* might be rejected as surplusage. R. & R. 415.

It seems certain that immaterial averments, which are not connected with the charge in the indictment, need not be proved. Leach, 677: 5 T. R. 436.

And by the 7 G. 4. c. 64. § 20. no judgment on any indictment or information for felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, or for the omission of the words "as appears by the record," or "with force and arms," "against the peace." See farther tit. Judgment, IV.

VII. *Of amending Indictments.*—Indictments may be amended the same term where-in brought into court, and not after. But criminal prosecutions are not within the benefit of the old statutes of amendments; so that no amendments can be made to an indictment, &c., without the concurrence of the grand jury, but such only as is allowed by the common law; 2 Lil. 45; or by the 7 G. 4. c. 64. § 19. and the 9 G. 4. c. 15. The body of a bill of indictment removed into B. R. may not be amended, except from London, where the tenure only of a record is removed; though the caption of an indictment from any place may, on motion, be amended by the clerk of the assizes, &c., so as to make it agree with the original record. Captions of indictments ought to set forth the court in which, and the jurors by whom, and also the time and place at which, the indictment was found, and that the jurors were of the county, city, &c. Also they must show, that the indictment was taken before such a court as had jurisdiction over the offence indicted. 2 Hawk. P. C. c. 25. While the jury who found a bill of indictment is before the court, it may be amended by their consent in matter of form, the name or addition of the party, &c. Kel. 37. Clerks of the assize and of the peace, &c., drawing defective bills of indictment, shall draw new bills without fee, and take but 2s. for drawing any indictment against a felon, &c., on pain of forfeiting 5l. 10 and 11 W. 3. c. 23.

If one material part of an indictment is repugnant to, or inconsistent with, another, the whole is void; but where the sense is plain,



the court will dispense with a small impropriety in the expression. 2 *Hawk. P. C.* c. 25.

Many objections to indictments are overruled. 5 *Rep.* 120. Where an indictment is void for insufficiency, or if the trial is in a wrong county, another indictment may be drawn for the same offence, whereby the insufficiency may be cured; and the indictment may be laid in another county (it is said), though judgment be given. See 4 *Rep.* 45. a.

As to the amendment of indictments in cases of misnomer, &c. see *ante*, VI.

And as to the amendment of indictments (under the 9 *G.* 4. c. 15.) where there is any variance from printed documents, see *tit. Amendment*.

#### VIII. Where an indictment may be quashed.

—By the common law, the court may quash any indictment for such insufficiency as will make the judgment thereon erroneous. But the court may refuse to quash an indictment preferred for the public good, though it be not a good indictment, and put the party to traverse, or plead to it. *Mich.* 22 *Car. B. R.* Also the court will grant time for the king's counsel to maintain an indictment, if they desire it.

Judges are not bound *ex debito justitiæ* to quash an indictment, but may oblige the defendant either to plead or demur to it; and where indictments are not good, the parties indicted may avoid them by pleading. 2 *Lil.* 42: 2 *Hawk.* 258. So the court usually quash indictments for forgery, perjury, and nuisances, notwithstanding the indictments are faulty; and it is against the course of the court to quash an indictment for extortion. 3 *Lil.* 411: 5 *Mod.* 31: 3 *D. & R.* 621.

So if the party indicted is outlawed upon the indictment, the court will not quash the indictment, though erroneous; but will force the party outlawed to bring his writ of error to reverse the outlawry. *Mich.* 24 *Car. B. R.*

One that is convicted upon an erroneous indictment, cannot, after the conviction, move to have the indictment quashed; but must bring his writ of error to reverse the judgment given against him upon the indictment. 2 *Lil.* 43.

If an indictment be good in part, though the other part of it is bad, the court will not quash it; for if an offence sufficient to maintain the indictment be well laid, it is good enough, although other facts are ill laid. *Latch.* 173: *Poph.* 208: 1 *Salk.* 384.

Where, however, an indictment is so defective that no judgment can be given upon it, even should the defendant be convicted, the

court will generally, upon application, quash the indictment.

The stat. 7 *W.* 3. c. 3. ordains, that no indictment for treason, &c., or any process thereon, shall be quashed, on motion of the prisoner, or his counsel, for mis-writing, false Latin, &c., unless exception be made before evidence given in court; nor shall any defects, &c., after conviction, be caused to arrest judgment; though any judgment given upon such indictment may be reversed on a writ of error, &c.

Before the application will be allowed on the part of the prosecution, a new bill for the same offence must have been preferred and found against the defendant. 2 *East*, 226. And the court generally imposes other terms upon the prosecutor, as the payment of the costs incurred by the defendant on the former indictment. 3 *Burr.* 1469. And see 1 *W. Bl.* 460: 3 *B. & A.* 373.

If the application be by the defendant, it must be made before plea pleaded. *Post.* 231: *Holt*, 684: 4 *St. Trials*, 677.

But where the application is on the part of the defendant, the court has almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason or felony. *Com. Dig. Indictment* (H.) And see 1 *Wils.* 325.

Counts in an indictment cannot be struck out, as they may in an information; for the court cannot strike out that which the grand jury have found. *Hardr.* 203.

#### IX. Of granting a copy of the indictment.—

In high treason, the prisoner is, by the virtue of the 7 *Anne*, c. 21., entitled to have a copy of the indictment, with a list of the witnesses and jurors, delivered to him ten days before the trial, in the presence of two witnesses.

In cases of felony, a copy of the indictment is never granted without the permission of the court.

Although a party indicted for felony is not entitled to a copy of the indictment; 1 *Chitt. Ch.* 403; yet, if any legal exception be taken to its form, the court will, as a favour, allow a copy to be taken of the part which it is material to examine. 1 *Lev.* 68: 1 *Sid.* 85: *Hawk. P. C.* b. 2. c. 39. § 13. And the prisoner is, in all cases, allowed to have the record read over to him with sufficient distinctness, even twice, in English. *Id. Ibid.* And in a case where the defendant's object was to reverse an outlawry before conviction for murder, the record was read so slow as to afford an opportunity of taking it down in shorthand. *Hard. pl.* 487. a; cited 1 *Chitt. C. L.* 494.

In misdemeanors the defendant is entitled to

a copy of the record as a matter of right, without any application to the court. 1 *Bl.* 385; *Selv. N. P.* 952. So where a party is convicted before a magistrate, he is entitled to a copy of the conviction, in order to defend himself from an action for the same offence. 3 *Burr.* 1721.

See further on the subject of indictments at length, 2 *Harok. P. C.* c. 25. and the tits. relating to indictable offences in this Dict.

**INDICTOR.** He that indicteth another man for any offence; as *indictor* is the party that is indicted.

**INDISTANTER.** Without delay. *Mat. Westm. anno.* 1244.

**INDIVISUM.** What two persons hold in common without partition; as where it is said he holds *pro indiviso*, &c. *Kitch.* 241.

**INDOLIS.** A studious young man, or a youth. *Mon. Angl.* 3 tom. p. 120.

**INDOMIT.** Boisterous and ungovernable. *Law French Dictionary.*

**INDORSEMENT,** *indorsementum.*] Any thing written on the back side of a deed; thus, receipts for consideration-money, and the sealing and delivery, &c., on the back of deeds, are called *indorsements*. *West. Symb. par.* 2. § 157.

On sealing of a bond, any thing may be indorsed or subscribed on the back thereof, as part of the condition, and the indorsement and that shall stand together. *Moor*, 679. See tits. *Bond. Condition*. An indorsement on a deed after it has been signed by the parties, but written at the same time with the sealing and delivery, is part of the deed. 1 *Stark.* 162.

There is also an indorsement of bills or notes, of what part thereof is paid, and when, &c., or for negotiation, by writing the payee's name on the back of bills of exchange, &c. See tit. *Bills of Exchange*.

An indorsement of the grand jury of "a true bill" made upon the bill, becomes part of the indictment, and renders it a complete accusation against the prisoner. *Yelv.* 99; *Dig. Com. Indictment (A)*: 1 *Chitt. C. L.* 324.

**INDOWMENT.** See *Endowment*.

**INDUCEMENT.** What is alleged as a motive or incitement to a thing; the term is used specially in several cases, viz. inducement to actions, to a traverse in pleadings, a fact or offence committed, &c. Inducements to actions need not have so much certainty as in other cases. A general *indebitatus* is not sufficient, where it is the ground of the action; but where it is but the inducement to the action, as in consideration of forbearing a debt till such a day (for that the parties are agreed upon the debt), this being but a collateral promise, is good without showing how due. *Cro. Jac.* 548: 2 *Mod.* 70.

The cases which relate to the necessity of proving particular averments (as was said by *Mr. Justice Chambre* in *Turner v. Eglis*, 3 *B. & P.* 463.) only distinguish between that which is material and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of the action. And in *Smith v. Taylor*, 1 *N. R.* 210. the same learned judge observes, that the rules of evidence as applicable to the allegation of a declaration, depend upon the way in which the facts alleged are introduced. If they be mere matters of inducement, they do not require such strict proof as those allegations which are precisely put in issue between the parties; and see *Gwinnet v. Phillips*, 3 *T. R.* 646., where *Mr. J. Buller* laid down that averments which are mere inducements need not be precisely proved; and see 1 *Phill. Ev.* 105; and 1 *Stark. Ev.* 390. n. (b).

So it is laid down that, in general, traverse is not to be taken on matters of inducement, that is, matter brought forward only by way of explanatory introduction to the main allegations; but this is open to many exceptions, for it often happens that introductory matter is in itself essential, and of the substance of the case, and, in such instances, though in the nature of inducement, it may nevertheless be traversed. *Com. Dig. Pleader, G.* 14: *Cro. Eliz.* 168: 1 *B. & B.* 531.. See *Stephen on Pleading*,

A man ought to induce his traverse when he denies the title of another, because he should not deny it till he show some colourable title in himself; for if the title traversed be found naught, and no colour of right appears for him who traversed, there can be no judgment given; but an inducement cannot be traversed, because that would be a traverse after a traverse, and quitting a man's own pretence of title, and falling upon another. *Cro.* 265, 266; 3 *Stalk.* 357. An inducement to a traverse must be such matter as is good and justifiable in law. *Cro. Eliz.* 829. There is an inducement to a justification, when what is alleged against it is not the substance of the plea, &c. *Cro. Jac.* 138: *Moor*, 847: 2 *Nels. Arb.* 986. See further tit. *Pleading*.

**INDUCIÆ LEGALES.** The days between the citation of the defendant and day of appearance. *Bell's Scotch Law Dict.* The days between the date and the return of a writ.

**INDUCTION,** *inductio*, i. e., a leading into.] The giving a person possession of his church. After the bishop hath granted institution, he issues out his mandate to the arch-deacon to induct the clerk, who thereupon either does it personally, or usually commissions some neighbouring clergyman for that purpose; which is compared to livery and seisin, as it is a put.

ting the minister in actual possession of the church, and of the glebe lands, which are the temporalities of it. This induction is done in the following manner:—one of the clergy commissioned takes the parson to be inducted by the hand, lays it on the key of the church, and pronounces these words:—*By virtue of this commission, I induct you into the real and actual possession of the rectory of, &c., with all its appurtenances.* Then he opens the church door, and puts the parson into possession thereof, who commonly tolls a bell, &c., and thereby shows and gives notice to the people that he hath taken corporal possession of the said church. If the key of the church door cannot be had, the clerk to be inducted may lay his hand on the ring of the door, the latch of the church gate, on the church wall, &c., and either of these is sufficient: also induction may be made by delivery of a clod, or turf of the glebe, &c. Ordinarily, the bishop is to direct his mandate to the archdeacon, as being the person who ought to induct or give possession unto the clerks instituted to any churches within his archdeaconry; but it is said, the bishop may direct his mandate to any other clergyman to make induction. See stat. 38 Ed. 3. s. 2. c. 3. And by prescription, others, as well as archdeacons, may make inductions. *Parson. counsel.* 8. See 1 *Com.* 391.

An induction made by the patron of the church is void; but bishops and archdeacons may induct a clerk to the benefices of which they are patrons, by prescription, &c. 11 *H.* 4. 7. The dean and chapter of cathedral churches are to induct prebends; though it hath been held, if the bishop doth induct a prebend, it may be good at the common law. 11 *H.* 4. 7: 11 *H.* 6. In some places a prebend shall be in possession, without any induction, as at Westminster, where the king makes collation by his letters patent. If the king grants one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the bishop.

But no induction is necessary to a *donative* where the patron by donation in writing puts the clerks into possession, without presentation, &c. 11 *H.* 4. 7. If the authority of the person who made the mandate for induction determines, by death or removal, before the clerk is inducted, the induction afterwards will be void; as where, before it is executed, a new bishop is consecrated, &c. But if the archbishop, during the vacancy of a see, as guardian of the spiritualities, issue a mandate to induct a clerk to a church, it is good, though not executed before there is a new bishop. 2 *Lev.* 299: 1 *Ventr.* 309.

Induction is the investiture of the temporal part of the benefice, as institution is of the

spiritual. And when a clerk is presented, instituted, and inducted, into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson impersonance. *Go. Lit.* 300: 1 *Comm.* 391.

Induction is a temporal act; and if the archdeacon refuse to induct a parson, or to grant a commission to others to do it, action on the case lies against him, on which damages shall be recovered: he may likewise be compelled, by sentence in the Ecclesiastical Court, to induct the clerk, and shall answer the contempt. 12 *Rep.* 128.

It is induction which makes the parson complete incumbent, and fixes the freehold on him; and a church is full by induction, which cannot be avoided but by *quare impedit* at common law. 4 *Rep.* 79: *Plowd.* 529: *Hob.* 15. A bishop sued in the Court of Audience, to repeal an institution, after induction had, and prohibition granted; because an institution is examinable in the Spiritual Court after induction, but then a *quare impedit* lies. *Moor.* 860. It is not the admission and institution, but the induction to a second benefice, which makes the first void, in case of pluralities, &c. *Moor.* 12. See this Dict. tit. *Ad-vowson*, II., *Parson*.

**INDULGENCES.** According to the doctrine of the Romish church, all the good works of the saints, over and above those which were necessary towards their own justification, together with the infinite merits of Jesus Christ, are deposited in one inexhaustible treasury. The keys of this were committed to St. Peter, and to his successors the popes, who may open it at pleasure, and by transferring a portion of this superabundant merit to any particular person, for a sum of money, may convey to him either the pardon of his own sins, or a release for any one in whom he is interested, from the pains of purgatory. Such indulgences were first invented in the eleventh century by Urban II. *Robertson's Chur.* V. ii. 79. See the 25 *H.* 8. c. 21. § 27.

**IN ESSE, in being.]** The learned make this distinction between things *in esse* and *in posse*; a thing that is not, but may be, they say is *in posse* or *in potentiâ*; but what is apparent and visible, they allege is *in esse*, viz. that it has a real being, whereas the other is casual, and but a possibility. A child before he is born, is a thing *in posse*; after he is born, and for many legal purposes after he is conceived, he is said to be *in esse*, or actual being. See tit. *Posthumous Children*.

**INEWARDUS, inwardus.]** A guard, a watchman, one set to keep watch and ward. *Lib. Domesday, Chent. Heref.*

**INFALISTATUS.** This word occurs only



in *Ralph de Hengham, Summa parva, cap. 3.* recapitulating the several punishments for felony. Mr. *Seldon*, in his notes on that author, says, "It appears that several customs of places made in those days capital punishments several. But what is *infalstatus*? In regard of its being a custom used in a port town, I suppose it was made out of the French word *fulize*, which is *fine sand by the water side, or a bank of the sea*. In this sand or bank it seems their execution at Dover was." The elaborate *Du Fresne* condemns this derivation and this sense of the word, but yet gives no better. Therefore (till we have more authority) we may conclude that *infalstatus* did imply some capital punishment inflicted on the sands or sea-shore: perhaps *infalstatus* was exposing the malefactor to be laid bound upon the sands, till the next full tide carried him away; of which custom there is some dark tradition. The penalty took its name from the Norman *falese* *falesia*, which signified not only the sands, but rather the rocks and cliffs adjoining or impending on the sea-shore. *Cowel*. See the like use of *Jalesia* in *Mon. Angl. tom. 2. p. 165. b.*

**INFAMY.** As to persons disqualified by infamy from being witnesses, see tit. *Evidence, II.*

**INFAMOUS CRIME.** By 7 and 8 G. 4. c. 29. § 7. offenders who shall by intimidating another, by threatening to accuse him of any infamous crime, extort or gain from such party, money, chattel, or valuable security, are guilty of robbery, and shall suffer death.

In *Hickman's case, R. & M. 34* it was held by the judges, that when a statute inflicted punishment for falsely accusing another of an infamous crime, such crimes only were to be deemed infamous as subjected a man to infamous punishment, or incapacitated him from being a witness; and therefore a threat to accuse a man of having made overtures to a prisoner to commit sodomy with him, did not amount to a threat to charge him with an infamous crime.

But by § 9. of the above statute, buggary and assaults with intent to commit such crime, and every attempt or endeavour to commit it, or solicitation, persuasion, promise or threat, offered or made whereby to move or induce men to commit or permit the said crime, shall be deemed an infamous crime within the meaning of the act.

As to sending letters threatening to accuse of any such crime with intent to extort money, see § 8. of the above act, under tit. *Threats*.

**INFANGTHEF, INFANGENETHEOF,** from Sax. *fang* or *fangen*, i. e. *capere* and *thEOF*, *fur*.] A privilege or liberty granted unto lords of certain manors, to judge any thief taken within their fee. *Bract. lib. 3. c. 35.* In some

ancient charters it appears that the thief should be taken in the lordship, and with the goods stolen, otherwise the lord had no jurisdiction to try him in his court: though by the laws of King Edward the Confessor, he was not restrained to his own people or tenants, but might try any man who was thus taken in his manor: it is true afterwards, the word *infangthef* signified *Latro captus in terra alicujus seisinis de aliquo Latrocinio de suis propriis hominibus*. See *stat. 1 and 2 P. & M. c. 15.* The franchises of *infangthef* and *outfangthef*, to be heard and determined in court-barons, are antiquated, and long since gone. 2 *Inst. 31.* The word is sometimes preceded by an *II.*

**INFANT, infans.]** A person under twenty-one years of age: whose acts are in many cases either void or voidable. *Co. Lit. lib. 1. cap. 21 lib. 2. cap. 28.*

- I. *The several Ages distinguished by Law for various Purposes, and herein of Criminal Acts committed by Infants.*
- II. *Who are subject to, or free from, the Incapacities of Minors; and of Infants in ventre sa mere.*
- III. *Of the Trial of Infancy.*
- IV. *Of what Offices, Trusts, and Functions, an Infant is capable.*
- V. *Of the Civil Acts of an Infant, and how far they are good, voidable, or void, &c.*
- VI. *Of an Infant's Liability on Contracts for Necessaries, and other Contracts.*
- VII. *Of an Infant's Power to enforce Contracts.*
- VIII. *How an Infant may be sued and may sue.*
- IX. *Of his Liability for Torts.*

I. 1. Though a person is styled in law an infant, till attaining the age of twenty-one years, which is termed his full age, yet there are many actions which he may do before that age, and for which various times or ages are appointed. Thus, a male at twelve years old may take the oath of allegiance; at fourteen he is at years of discretion, and therefore may disagree or consent to marriage (see *post*); may choose his guardian; and if his discretion be actually proved, may make his testament of his personal estate; at seventeen might, previous to the 38 G. 3. c. 87. have been an executor; and at twenty-one is at his own disposal, and may alien his lands, goods, and chattels. A female also, at seven years of age, may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage (see *post*), and if proved to have

sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen might, before the above statute, have been an executrix; and at twenty-one may dispose of herself and her lands: so that full age, in male or female, is twenty-one years: which age is completed on the day preceding the anniversary of a person's birth. *Salk.* 44. 625: *Ld. Raym.* 480. 1096: 1 *Bro. P. C.* 468. (8vo. edit.) *Toder v. Sansam*. If, therefore, one is born on the 1st of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by near forty-eight hours; the reason is, that in law there is no fraction of a day, and if the birth were on the first second of one day, and the act on the last second of the other, then twenty-one years would be complete; and in law it is the same, whether a thing is done upon one moment of the day or another; and hence probably originated the distinction of a year and a day, &c., by which is meant a year complete in common acceptation.

From the observations made on the daily actions of infants, as to their arriving at discretion, the laws and customs of every country have fixed upon particular periods, on which they are presumed capable of acting with reason and discretion; in our law the full age of man or woman is twenty-one years. 3 *New Ab.* 118.

Therefore, if one under the age of twenty-one years makes his will, and thereby devises his lands, and after attains the age of twenty-one years and dies, without making a new publication thereof, *this devise is void*. *Dyer*, 143: *Raym.* 84: 1 *Sul.* 162.

Though a person under the age of twenty-one cannot directly dispose of his lands, yet as one under that age may (pursuant to the statute 12 *Car. 2. c. 24.*) dispose of the custody of his infant child, it is said, such disposition draws after it the land, &c. as incident to the custody. *Vaugh.* 178.

The reason why an infant male at fourteen, and female at twelve, may dispose of their personal estate at those ages is, that the common law has appointed no time, being a matter cognizable in the Spiritual Court, which herein proceeds according to the civil law; by which law infants at those ages are presumed to have sufficient discretion to make such disposition; therefore their testaments in these cases are not to be set aside, or controlled in Chancery, or the temporal courts. 2 *Mod.* 315: 2 *Jones*, 210: *Comb.* 50: 1 *Vern.* 469: *Preced. Chan.* 316.

Though the age of consent to a marriage in an infant male is fourteen, and a female in twelve, yet they may marry before, and if they agree thereto when they attain these ages, the

marriage is good, but they cannot disagree before then: and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound or neither. *Co. Lit.* 33. 78, 79: 2 *Inst.* 434: 3 *Inst.* 88, 89: 6 *Co.* 22: 7 *Co.* 43: 1 *Rol. Abr.* 340, 341.

But though the party above age may as well disagree as the other, yet it is said that the party cannot do it *before* the other arrives at the proper age; also it is said to have been adjudged, that if a man marries a woman that is within the age of twelve years, and after the woman at eleven years of age disagrees to the marriage, and after the husband takes another wife, and hath issue by her, that this is a bastard; *for the first marriage continues notwithstanding the disagreement of the woman*; for she cannot disagree within the age of twelve years, and so her disagreement is void. *Co. Lit.* 79: 1 *Rol. Ab.* 341.

If a man marries a woman who is *within* the age of twelve years, and after the feme covert within the age of consent disagrees to the marriage, and after the age of twelve years marries another, the first marriage is absolutely dissolved, so that *he may take another wife*; for though the disagreement within the age of consent was not sufficient, yet her taking another husband after the age of consent *affirms the disagreement*, and so the marriage avoided *ab initio*. 1 *Rol. Abr.* 341. See the case of Mr. Fitzgerrard, Lord Decius, and Mr. Villers, 3 *New Abr.* 119, 120. See also 1 *Inst.* 33: 1 *Rol. Ab.* 340: *Dyer*, 369: *Moore*, 575: 1 *Rol. Abr.* 341: 1 *Inst.* 79: 7 *Co.* *Keen's case*: 6 *Co. Abrosia* *George's case*: 7 *H. 6.* 11: 6 *Co.* 22.

At common law, if both parties were of the age of consent, their marriage was valid without the concurrence of any other persons; but by various statutes now repealed, and by the present Marriage Act, 4 *G. 4. c. 76.* the consent of parents or guardians, or of the Court of Chancery, is requisite, where either of the parties is under twenty-one, and has not been previously married. See further *tit. Marriage*.

At common law an infant at fourteen was *out of ward* of guardian in socage, to *choose a guardian*; and at fifteen to have had *aid pur fair Fitz. Chevailler*. *Co. Lit.* 98. b: *Heb.* 225.

The authority of a guardian in socage ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may choose a new guardian. *Lit. sect.* 103: *Co. Lit.* 75: 2 *Inst.* 135.

One within the age of twenty-one years may do homage, but not fealty; because, in doing of fealty he ought to be sworn, which an infant cannot be. *Co. Lit.* 65. b: 2 *Inst.* 11.

An infant at the age of seventeen may be a *procurator* as well as *executor*; and in this both the civil and common law agree. 5 Co. 29. b: Off. Ex. 307: 1 Hal. Hist. P. C. 17.

Now by the 38 G. 3. c. 87. § 6, 7. an infant is incapable of acting as an executor until he attain twenty-one. See tit. *Executor*, 11.

By the custom of gavelkind, an infant at the age of fifteen is reconed at full age to sell his lands; and this seems to have been taken from the civil law, which recons fourteen the *ætas pubertatis*; for they reconed that though the infant had ended his years of guardianship at fourteen, yet he might not have completed his account with his guardian till the age of fifteen, and that was esteemed to be the age when he was completely out of guardianship; therefore at this age he was allowed to sell the lands descended to him; but in this the customs of England differ from the civil law; for the civil law does not allow of this disposition till the age of twenty-five; therefore this must have been allowed by the old Saxon law, because they thought that much time was lost, if the infant could only use his own estate without being able to dispose of it in a way of traffic, or in marriage, till twenty-five; therefore they allowed the infant to sell (but under great limitations and restrictions, that he might not be defrauded); and by this means they thought there was sufficient provision made for the necessity of commerce. Lamb. 624, 625. See tit. *Gavelkind*.

Also, by custom in some places, an infant seized of lands in socage may, at the age of fifteen years, make a *lease for years*, which shall bind him after he comes of age; for the custom makes fifteen his full age to that purpose. Co. Lit. 45. b.

Also, by the custom of London, an infant unmarried, and above the age of fourteen, if under twenty-one, may bind himself apprentice to a freeman of London, by indenture with proper covenants; which covenants, by the custom of London, shall be as binding as if he were of full age. Moore, 134: 2 Buls. 192: 2 Rol. Rep. 305: Palm. 361: 1 Mod. 271. See stats. 5 Eliz. c. 4: 43 Eliz. c. 2: and this Dict. tit. *Apprentice*.

2. With regard to capital crimes, the law is still more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open. LL. Athelstan, Wilk. 65. From thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or in-

capacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent of any capital crime which he in fact committed. But by the law as it now stands, and has stood at least ever since the time of Edward III. the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age, indeed, an infant cannot be guilty of felony; Mir. c. 4. § 15: 1 Hal. P. C. 27: Plowd. 19; for then, by presumption in law, he cannot have discretion; and, in fact, a felonious discretion is almost an impossibility in nature, and no averment shall be received against that presumption; but it eight years old, he may be guilty of felony. Dalt. Sus. C. 147. Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. 1 Hal. P. C. 26, 27. And there was once an instance, where a boy of eight years old was tried at Abington for firing two burns; and it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Emlyn on 1 Hal. P. C. 25. Thus also, at the assizes for Bury, in the year 1748, one William York, a boy of ten years old, was convicted on his own confession of murdering his bed-fellow: there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as sparing this boy merely on account of his tender years might be of dangerous consequences to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges, that he was a proper subject of capital punishment. Foster, 72. But in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction. 4 Comm. 22. 24.

Lord Hale lays down the following further



cautions on this subject:—If the party be above twelve, though under fourteen, and appears to be *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he hath not attained the age of fourteen; but herein, according to the nature of the offence and circumstances of the case, the judge may, or may not, in discretion, relieve him, before or after judgment, in order to obtain the king's pardon. If an infant be above seven, and under twelve years, and commit a capital offence, *prima facie*, he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil: yet if it appear, by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him; for *malitia supplet aetatem*: but herein the circumstances must be inquired of by the jury, and the infant is not to be convicted upon his confession: also herein, my Lord Hale says, that it is prudent after conviction to respite judgment, or at least execution; but that if he be convicted, the judge cannot discharge, but only relieve him from judgment, and leave him in custody till the king's pleasure be known. 1 Hal. Hist. P. C. 26, 27.

An infant under fourteen is presumed by law to be unable to commit a rape, and therefore it seems cannot be guilty of it; and though in other felonies *malitia supplet aetatem*; yet as to this fact, the law presumes him impotent, as well as wanting discretion. 1 Hale, 630. And see 3 C. & P. 396.

In criminal cases, the law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least as liable as others to commit); for these an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one. 1 Hal. P. C. 20, 21, 22.

So he is liable for perjury and cheating. 2 Bac. Ab. 593. And may be convicted on a penal statute. See 4 Comm. 308: 2 B. & P. 93. 530: 8 T. R. 545.

Where infants are prosecuted for misdemeanors, it is the constant practice for them to appear by attorney in the Crown Office. 2 Ld. Raym. 1284: Tidd. 92: 1 Chlt. C. L. 411.

II. The privilege or incapacity of infancy does not extend to the king; for the political rules of government have thought it necessary, that he who is to govern the whole kingdom should never be considered as a minor, incapable of governing himself and his affairs. Co. Lit. 43: Dyer, 209. b.

Therefore, if the king within age make any lease or grant, he is bound presently, and cannot avoid them, either during his minority, or when he comes of full age. Plowd. 213. a.: 5 Co. 27: 7 Co. 12. So, if the king aliens land which he had by descent from his mother, he shall not defeat it, by reason that he was within age at the time of the alienation; for his body politic, which is annexed to his body natural, takes the imbecility of the natural body, and draws it, and all the effects thereof, to itself; *quia magis dignum trahit ad se minus dignum*. See Plowd. 213, 214.

So if the king consent to an act of parliament during his minority, yet he cannot afterwards avoid this act; because the king, as king, cannot be a minor; for as king he is a body politic. Co. Lit. 43: 1 Rol. Ab. 728.

Also the acts of a mayor, and commonality, shall not be avoided, by reason of the nonage of the mayor. Cro. Car. 557: 5 Co. 27.

Although a duke, earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to hold two benefices with cure, as if he was of full age. 4 Co. 119.

An infant in gavelkind shall have his age, and all other privileges of the infant at common law; because, though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at common law. 1 Rol. Ab. 144.

A bastard being impleaded shall have his age: for that *dilatory plea must be determined before the pleas in chief can come on*; so that the plea of infancy will stay the suit before it can be inquired whether he is or is not a bastard. Co. Lit. 244. b.

An infant *in ventre sa mere*, or in the mother's womb, is supposed, in law, to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. (See *post* this division.) It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. Stat. 10 and 11 W. 3. c. 16: 1 Comm. 130. See this Dict. tit. *Posthumous Children*.

A child *in ventre sa mere* may be appointed executor; also if there are two or more at a birth they shall be joint executors, or joint

legatees of the thing bequeathed. *Godolph. Orph. Leg.* 102.

If there be a bastard *eigne* and *mulier pu- isne*, and the bastard enters, and dies seised, his issue shall inherit the lands, and exclude the *mulier* for ever; but in this case if the bastard had died leaving issue *in ventre sa mere*, and the *mulier* had entered, and then a son is born, yet he cannot enter upon the *mulier*: herein our law differs from the civil law; for our law requires an immediate descent, which cannot be before the person is *in esse*; also by our law the freehold cannot be in abeyance. *Co. Lit.* 244.

A devise of lands to an infant *in ventre sa mere* is good, and the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. Though formerly it was doubted. *Vide* 11 *H. 6.* 13: *Bro. Devise.* 32: *Moor.* 177. 637: 2 *Buls.* 273: *Cro. Eliz.* 423: 1 *Lev.* 135: 1 *Sid.* 153: *Raym.* 163: 1 *Keb.* 85: 1 *Salk.* 231: 2 *Mod.* 9.

However, all the books agree, that a devise to an infant *when he shall be born, or when God shall give him birth*, is good, as *an executory devise*, and that the freehold shall descend to the heir at law in the meantime. 1 *Sid.* 153: *Raym.* 163: *S. C. Snow v. Cutler.* It may be devised to *Trustees*.

So it is clear, that, if land be devised for life, the remainder to a posthumous child, this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instante* that it determines, it is sufficient. *Moor.* 673: 3 *Lev.* 408: 4 *Mod.* 359: 1 *Salk.* 227: *Carth.* 309. See this Dict. tit. *Remainder, Estate, Posthumous Child, Executory Devise.*

Also it seems agreed, that a man may surrender copyhold lands immediately to the use of an infant *in ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance; and therefore, if there be a person to take at the time of the admittance, it is sufficient, and not like a grantor at common law, which, putting the estate out of the grantor, must be void if there be nobody to take. 1 *Rol. Rep.* 109. 138: 2 *Butst.* 273: *Co. Copyh.* and see *Moor.* 627: and this Dict. tit. *Copyhold.*

If a usurpation be had on one *in ventre sa mere*, at the next turn after his birth, he shall be relieved on the statute of *Westm. 2. cap. 5.* *Hob.* 240.

An infant *in ventre sa mere* may have a distributive share of intestate property even with the half blood. 1 *Ves.* 81. It is capable of taking a devise of lands. See *ante*, and 2 *Atk.* 117: 1 *Freem.* 214. 293. It takes, under a

marriage settlement, a provision made for children living at the death of the father. 1 *Ves.* 85. And it has lately been decided, that marriage, and the birth of a posthumous child, amount to revocation of a will executed previous to the marriage. 5 *T. R.* 49. It takes lands by descent, though, in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child, which seems to be the only interest it loses by its situation. 3 *Wils.* 526. See this Dict. tit. *Descent, Posthumous Children.*

III. *Infancy* is to be tried by inspection of the court, or by jury: and herein it is laid down as a rule in some books, that wheresoever it is alleged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection; but where the infant is of full age at the time of the plea, there it shall be tried *per pais*. 1 *Lev.* 142: 1 *Sid.* 321: 1 *Keb.* 796: *Cro. Jac.* 59. 581.

But as to judicial acts, or acts done by an infant in a court of record, and which he is allowed to avoid, the trial thereof must be by inspection; therefore, if an infant has levied a fine, he must reverse it by the writ of error: and this must be brought during his minority, that the court may by inspection determine the age of the infant. *Co. Lit.* 380: *Moor.* 76: 2 *Rol. Ab.* 15: 2 *Inst.* 483: 2 *Butst.* 320: 12 *Co.* 122.

If an infant brings a writ of error to reverse a fine for his nonage, and, after inspection and proof of infancy, by witnesses, dies before the fine is reversed, his heir may reverse it; because the court, having recorded the nonage of the cognizor, ought to vacate his contract when he appeared to be under a disability at the time he entered into it. *Co. Lit.* 380: *Moor.* 122.

An infant acknowledged a fine, and the cognizances omitting to have the fine ingrossed till he came of age, in order to prevent the infant from bringing a writ of error; yet the court upon view of the conuzance produced by the infant, and upon his prayer to be inspected and his age examined, recorded his nonage, to give him the benefit of his writ of error which he must otherwise lose, his nonage determining before the next term. *Moor.* 189: and *vide Cro. Jac.* 230, 231.

So if an infant has suffered a common recovery by appearing in person, this must be reversed during his minority by inspection of the judges. But it is said, that if an infant has suffered a recovery, in which he appeared by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an infant. 1 *Sid.* 321: 1 *Lev.* 142.

In case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriff, commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris si predictus A sit plenæ ætatis neene.*" 9 Rep. 31.

This question of nonage was formerly, according to *Glouc. 1. 13. c. 15.*, tried by a jury of eight men; though now it is tried by inspection. If, however, the court has, upon inspection, any doubt of the age of the party (as may frequently be the case), it may proceed to take proofs of the fact, by witnesses, churchbooks, &c.; and particularly may examine the infant himself upon an oath of *vere dicere veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather, or the like. 2 Rol. Ab. 573.

It is said, that in all cases where the party pleads that he was within age at B., and alleges a place, that there the trial may be well enough where it is alleged: where no place is alleged, there, in personal actions, where the writ is brought: and in real actions where the right of the land lies, and if not, where the action is brought. *Skin. 10, 11: Cro. Eliz. 818.*

It is incumbent on the party setting up minority as a defence, to prove it. 2 Stark. (N. P.) 330.

IV. An infant, it seems, is capable of such offices as do not concern the administration of justice, but only require skill and diligence; and there he may either exercise them himself when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, gaoler, &c. *Plowd. 379. 381: 9 Co. 48. 97.* See tit. *Offices*.

But it is said, that an infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because by intendment of law he hath not sufficient knowledge, experience, and judgment, to use the office, and also because he cannot make a deputy. *Co. Lit. 3. b.: 2 Rol. Ab. 153: March, 41. 43: Cro. Eliz. 636: Cro. Car. 556.*

Nor can he be appointed clerk of the Court of Requests, being an office of public and pecuniary trust. 5 B. & A. 81.

Infancy is a good cause of refusal of a clerk; also by the statutes 13 Eliz. c. 12. and 13 and 14 Car. 2. c. 4. no one is to be admitted a deacon unless he be twenty-three at least, nor a priest unless he be twenty-four. *Giba. Cod. 168: 3 Mod. 67.*

An infant cannot be an attorney, bailiff, factor, or receiver. 4 F. N. B. 118: 1 Rol. Ab. 117: Co. Lit. 172: Cro. Eliz. 637. An infant cannot exercise an office in a corporation. *Rep. temp. Hardw. 5, 9.*

An infant cannot be a common informer; for the 15 Eliz. c. 5. directs that such shall sue in proper person, or by attorney, which an infant cannot do. *Bull. N. P. 196.*

As to infants being witnesses, there seems to be no fixed time in which children are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination in court. See *Bull. N. P. 293.*

In a criminal case, where an infant is a material witness, it is usual for the court to examine him as to his competency before he goes before the grand jury; and if he be found incompetent for want of proper instruction, the court will, in its discretion, postpone the trial, in order that he may be instructed so as to be qualified to take an oath. Neither the testimony of the child without oath, nor evidence of any statement made to another person, is admissible. *Leach's C. C. L. 337: Phill. on Ev. 19.*

An infant cannot be a juror. *Hob. 325.*

An infant, or one under the age of twenty-one years, cannot be elected a member of the House of Commons: nor can any lord of parliament sit there till he be of the full age of twenty-one years. 2 Inst. 47. See tit. *Parliament*. As to infant trustees, see *post*, V.

If an infant be lord of a manor, he may grant copyholds, notwithstanding his nonage; for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised, and are demisable time out of mind. See tit. *Copyhold*.

An infant may present to a church; and here it is said that this must be done by himself, of whatsoever age he be; and cannot be done by his guardian, for the guardian can make no advantage thereof; consequently has nothing therein whereby he can give an account; therefore the infant himself shall present. *Co. Lit. 17. b. 89. a: 29 Ed. 3. c. 5: 3 Inst. 156.* See further, tit. *Guardian*, II.

V. Infants have various privileges and various disabilities; but their very disabilities are privileges, in order to secure them from hurting themselves by their own improvident acts.

With regard to estates and civil property, an infant hath many privileges, which will be better understood on further investigation; but this may be said in general, that an infant shall lose nothing by non-claim or neglect of demanding his right; nor shall any other laches



or negligence be imputed to an infant, except in some very particular cases. 1 *Inst.* 246. 380: *Wood's Inst.* 13. *Laches* shall prejudice an infant, if he presents not to a church in six months. *Lat.* 402.

An infant is much favoured by law; therefore it gives him many privileges above others; one who is an infant shall not be amerced, and if he be bail, he may be discharged by *audita querela*, &c. 1 *Inst.* 272: 8 *Rep.* 61: *Jenk Cent.* 47. 319. But if an infant hath franchises or liberties, and do abuse, or disuse them, he shall forfeit them as a man of full age may. 1 *Inst.* 3. 133: 1 *And.* 311: *Bro.* 48.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions; part have been mentioned (see *ante*, I.) in reckoning up the different capacities which they assume at different ages; and there are others, a few of which when mentioned will serve as a general specimen of the whole.

And, first, it is true, that infants cannot alien their estates: but infant trustees or mortgagees are, by stat. 1 *W. 4. c.* 60. § 6. enabled to convey, under the direction of the Court of Chancery, the estates they hold in trust or mortgage, to such persons as the court shall appoint; see tit. *Trust*.

It is further generally true, that an infant under twenty-one can make no deed but what is afterwards voidable; yet by custom in certain cities, &c. he may bind himself apprentice by deed indented, or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. See *stats.* 5 *Eliz. c.* 4: 43 *Eliz. c.* 2: *Cro. Car.* 179: *stat.* 12 *Car. 2. c.* 24: and this Dict. tit. *Apprentice*, *Guardian*.

An infant is capable of inheriting, for the law presumes him capable of property; also an infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto; because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the infant agrees to the purchase, he cannot afterwards avoid it; but if he dies during his minority, his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract. *Co. Lit.* 2. 8: 2 *Inst.* 203: 2 *Vern.* 203.

If an infant bargain and sell his land by deed indented and inrolled, yet he may plead nonage; for notwithstanding the statute 27 *H.*

*c.* 16. makes the inrolment in a court of record necessary to complete the conveyance; yet the bargainee claims by the deed as at common law, which was, and therefore is, still defensible by nonage. 2 *Inst.* 673.

The feoffment of an infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. *Co. Lit.* 380: *Dyer*, 104: 2 *Roll. Ab.* 572: 4 *Co.* 125. a.

Therefore if an infant make a feoffment and livery in person, he shall have no assise, &c., but must avoid it by entry; for it is to be presumed in favour of such solemnity, that the assembly of the county then present would have prevented it, if they had perceived his nonage, and therefore the feoffment shall continue till defeated by entry, which is an act of equal notoriety. 8 *Co.* 42.

But if the infant had made a letter of attorney to deliver seisin, he might have an assise, &c. 2 *Roll. Ab.* 2: *Noy*, 130: *Palm.* 237.

All gifts, grants, &c. of an infant, which do not take effect by delivery of his hand, are void; and if made to take effect by delivery of his own hand, are voidable by himself, and his heirs, and those which shall have his estate. And privies in blood (as the heir-general or special) may avoid a conveyance made by their ancestor during his infancy. But privies in estate, such as the donor of an estate-tail where the tenant in tail dies without issue; or privies in law, as the lord by escheat where there is no heir, shall not avoid a conveyance made by an infant.

If a man within age, seised in right of his wife, makes a feoffment and dies, his heir cannot enter and avoid it, because no right descends to him; for the baron, if he had lived, could have entered only in right of his wife. And no person shall take advantage of the infancy of his ancestor, but he who hath a right descending to him from that ancestor, though the heir may take the benefit of a condition, notwithstanding no right descended to him from his ancestor. 8 *Rep.* 42, 43, 44: and see 3 *Rep.* 35.

If husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, the wife may enter and avoid the deed. 1 *Inst.* 337. Though if there be two joint tenants within age, and one of them makes a feoffment in fee of the moiety during his infancy, and dies, the survivor cannot enter; but the heir of the feoffor may enter into the moiety, &c. 8 *Rep.* 43.

If an infant take a lease for years rendering rent; if he enter upon the land, he shall be

charged with an action during his minority, because the purchase is intended for his benefit; but he may waive the term, and not enter, and if more rent be reserved upon the lease than the land is worth, he may avoid it. 2 *Bulst.* 69. At common law, where an infant leases for years, he may affirm the lease, or bring trespass against the lessee for the occupation. 18 *Ed. 4. Bro. Tresp.* 338. If an infant makes a lease for years with remainder over, rendering rent, and, at full age, accepts the rent of the tenant for years, this shall be an assent to him in remainder, so that he shall not oust him after. *Plowd.* 546.

A lease made by an infant reserving rent is voidable; but if there be no rendering rent, it is, absolutely void. *Latch.* 199. But if an infant make a lease paying rent, and after his coming of age he accepts the rent, the voidable lease is made good; and an infant's lease in ejectment is good; 2 *Lil. Abr.* 55: 3 *Salk.* 196; though in such case he must give a security for the costs. 1 *Wils. part 1. p.* 130. An infant cannot surrender a future interest by taking a new lease: his surrender by deed, and by acceptance of a second lease, are void, except there be an increase of the term, or a decrease of the rent; for where no benefit comes to him, his acts are merely void. *Cro. Car.* 502.

Now by the 1 *W. 4. c.* 65. § 12. 16, 17. infants are enabled, or their guardians in their names, under the direction of the court, to grant renewals of former leases, to surrender leases in order to a beneficial renewal thereof, or to grant new leases of their estates. See further *tit. Lease.*

All acts of necessity bind infants—as presentations to benefices, admittances, and grants of copyhold estates, and assenting to legacies, &c. 3 *Salk.* 190. So dower is demandable of an infant heir. *Bull. N. P.* 117. So an infant is compellable to pay a copyhold fine. *Burr.* 1717.

By the 1 *W. 4. c.* 65. § 3, 4. an infant may be admitted to copyholds in person or by his guardian; or if he have none, by attorney, whom he is empowered to appoint by writing, under hand and seal.

By § 5, 6, 7. on default, the lord may appoint an attorney; may demand fines; and, if not paid, may enter and receive the profits of such copyholds till he is satisfied.

But § 9. provides that no forfeiture shall be incurred by any infant not appearing, or refusing to pay fines; which were not warranted by custom, may, by § 10. be controverted as before the passing of the act.

By § 8. guardians paying fines may reimburse themselves out of the rents.

Conditions annexed to lands, whether the estate come by grant or descent, bind infants;

and where the estate of an infant is upon condition to be performed by the infant, if the condition is broken during the minority, the land is lost for ever. 1 *Inst.* 233. 380. Though a statute is not extendible against an infant, yet Chancery will give relief against infants. 1 *Lev.* 198.

If a trespass be done to an infant, and he submits to an award, it is said the award shall not be binding on him. 2 *Danv.* 770. See *tit. Award.* An infant is not bound by his consent not to bring a writ of error; for though the judgment binds him, yet it binds but as a judgment reversible. *Rep. Hardw.* 104. Agreements, &c. made by an infant, although he be within a day of his full age, shall not bind him. *Plowd.* 364. Where an infant enters into bond, pretending to be of full age, though he may avoid it by pleading his infancy, yet he may be indicted for a cheat. *Wood's Inst.* 585.

As so *judicial acts*, and acts done by an infant in a court of record, they regularly bind the infant and his representatives, with the exception of fines and recoveries (provided such recoveries were levied in person, and not by guardian), see *post*, which might have been, and still, notwithstanding their abolition by the 3 and 4 *W. 4. c.* 74. may be reversed by writ of error during his minority, where levied previously to the 31st December 1833. See *ante*, II.: and *tit. Fine and Recovery.*

Where an infant might have levied a fine, he might declare the uses of it also by deed: and the infant's declaration of uses should be good and binding to the infant and his heirs, so long as the fine continued unreversed. *Hob.* 224: 2 *Leon.* 193: 2 *Rep.* 58: 10 *Rep.* 42. It was formerly held, that an infant appearing by guardian could not suffer a common recovery; 10 *Rep.* 42; but it was afterwards allowed in many cases, and by all the judges, that an infant might suffer a common recovery by guardian, and he should not avoid it: for by intentment he shall have recompence in value; and if it was not for the good of the infant, he might have recompence over against his guardian. 2 *Danv. Abr.* 772. A common recovery might have been had against an infant, being examined solely and secretly; and he might have suffered a recovery by guardian in open court. *Hob.* 196: 2 *Bulst.* 255: 2 *Nels. Abr.* 994: and see *Sid.* 321: 2 *Nels.* 995: and *tit. Recovery.*

Partition, by writ *de partitione faciendâ*, binds infants, because by judgment in a court of justice, to which no partiality can be imputed. *Co. Lit.* 171. *b.*

If an infant acknowledge a recognizance or statute, it is only voidable; and the infant at his peril must avoid them by *audita querela*, as he must a fine or recovery by writ of error

during his minority; for such conveyances or other acts of record become obligatory and unavoidable, if they be not act aside before the infant comes of age, the reason is, because these contracts being entered into under the inspection of the judge (who is supposed to do right), the infant cannot against them aver his disability, but must reserve them by a judgment of a superior court, who, by inspection, has the same means to determine whether the inferior jurisdiction has done right that first received the contract. *Moor*, pl. 206: 2 *Inst.* 483. 673: *Co. Lit.* 380: *Keilw.* 10: *Reg.* 149: 10 *Co.* 43. a.

An infant confessed judgment in an action of debt brought against him; and it was held *audita querela* did not lie upon this judgment, though it would on a statute or recognizance; but the party ought to bring a writ of error in the Exchequer Chamber, by virtue of the statute 27 *Eliz.* *Moor*, 460. See 3 *Salk.* 196: 1 *Inst.* 233. 380: *Moor*, 189.

A warrant of attorney given by an infant was declared by the Court of C. P. to be absolutely void, and that court refused to confirm it, though the infant appeared to have given it (knowing it was not valid) in collusion with another. 1 *H. Blackst.* 75.

Though the court on the ground of minority and the want of a proper memorial will set aside a judgment entered upon a warrant of attorney to secure an annuity; they will not on those grounds alone order the deeds to be delivered up to be cancelled. 2 *Bing.* 475.

VI. *Of an Infant's Liability on Contracts for Necessaries, and other Contracts.*—1. *On Contracts for Necessaries.*—As to contracts for necessaries, made by infants, it is to be observed that (strictly speaking) all contracts made by infants are either void or voidable; because a contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power, in most cases, to recede from and vacate it when it may prove prejudicial to them; but in this contract for necessaries they are absolutely bound, and this likewise is in benignity to infants; for if they were not allowed to bind themselves for necessaries, nobody would trust them, in which case they would be in worse circumstances than persons of full age. 10 *H.* 6. 14: 18 *Ed.* 4. 2: 1 *Roll. Ab.* 729.

Therefore it is clearly agreed, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself

afterwards. *Co. Lit.* 172. a. &c. This binding means by parol: in fact, for necessaries, if there is not an actual promise, the law implies a promise, but the infant will not be bound by any bond, note, or bill, which he gives, though for necessaries; therefore a tradesman's best security will be the actual or implied promise. With respect to schooling, &c., it must be in cases where the credit was given, *bona fide*, to the infant. But where an infant is *sub potestate parentis*, and living in the house with his parents, he shall not then be liable even for necessaries. 2 *Black. Rep.* 1325.

It must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate, which regularly must be left to the jury; but if the jury find that the things were necessaries, and of reasonable price, it shall be presumed they had evidence for what they thus find: and they need not find particularly what the necessaries were, nor of what price each thing was: also, if the plaintiff declares for other things as well as necessaries, or alleges too high a price for those things that are necessaries, a jury may consider of those things that were really necessary, and of their intrinsic value, and proportion their damages accordingly. *Cro. Jac.* 360: 2 *Roll. Rep.* 144: *Poph.* 151: *Palm.* 361: *Gouls.* 168: *Godb.* 219: 1 *Leon.* 114.

If an infant promises another, that if he will find him meat, drink, and washing, and pay for his schooling, that he will pay 7l. yearly, an action upon the case lies upon this promise; for learning is as necessary as other things; and though it is not mentioned what learning this was, yet it shall be intimated what was fit for him, till it be shown to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good, if it appears that the learning, meat, drink, and washing, could not be afforded for a less sum than 7l. 1 *Roll. Ab.* 729: *Palm.* 528: 1 *John.* 182.

Assumpsit for labour and medicines in curing the defendant of a distemper, &c. who pleaded infancy, the plaintiff replied, it was for necessaries generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain how, or in what manner, the medicines were necessary; but it was adjudged that the replication in this general form was good. *Carth.* 110.

If an infant be a mercer, and hath a shop in a town, and there buys and sells, and contracts to pay a certain sum to J. S. for wares sold to him by J. S. to resell, yet he



is not chargeable upon this contract, for this should an infant promise to give an unreasonable price for necessaries, that would not bind him; and that therefore it may be said that the contract of an infant for necessaries, as a contract, does not bind him any more than his bond would; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessaries. *Cases in Law and Equity*, 85. And in a case where a warrant of attorney was given by an infant and another, and judgment entered up thereon, the court on motion ordered the name of the infant to be struck out, and set aside the judgment as against him. *2 Black. Rep.* 1133.

And as the contract of an infant for wares, for the necessary carrying on his trade, where he subsists, shall not bind him; so neither shall he be liable for money which he borrows to lay out for necessaries; therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessaries. *5 Mod.* 368; *1 Salk.* 386, 387.

In debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessaries, viz. 10*l.* for clothes, and 15*l.* money lent for and towards his necessary support at the university; the defendant rejoined, that the money was lent him to spend at pleasure; *abs. au hoc*, that it was lent him for necessaries; and issue hereupon was found for the plaintiff, who had judgment in C. B., but was reversed in B. R. on a writ of error; for the issue only being, whether this money was lent the infant for necessaries, not whether it was laid out in necessaries, cannot bind the infant whichever way it is found; for it might have been borrowed for necessaries, and laid in a tavern: and the law will not intrust the infant with the application and laying of it out. *1 Salk.* 386. See *contra*, as to a single bill given for necessaries, *1 Lev.* 86; *1 Keb.* 382. 416. 423. *S. C. : Co. Lit.* 172. *S. P. : Sed qu.?* See *post*.

So if one lends money to an infant, who actually lays it out in necessaries, yet this will not bind the infant, nor subject him to an action; for it is upon the lending that the contract must arise, and after that time there could be no contract raised to bind the infant, because after that he might waste the money, and the infant's applying it afterwards for necessaries will not, by matter *ex post facto*, entitle the plaintiff to an action. *1 Salk.* 279.

Although an infant shall be liable for his necessaries, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the infant. *Cro. Eliz.* 290; *Moor.* 679. *pl.* 929. *Co. Lit.* 172; *1 Rol. Ab.* 720. See *post*. But a bond or single bill for the exact amount of necessaries furnished will be valid. *Esp. N. P.* 164.

It is also said, that an infant cannot either by parol contract, or a deed, bind himself, even for necessaries, in a sum certain; and that

If an infant becomes indebted for necessaries, and the party takes a bond from the infant, this shall not drown the simple contract, because the bond has no force. *Cro. Eliz.* 920.

Debt on bond with a penalty; plea infancy; replication that after making the bond, and before commencement of the suit, he attained his full age, and afterwards, and before the suit, assented to, and ratified and confirmed the bond. Upon special demurrer the Court of K. B. held the replication bad, for an infant cannot give a bond with a penalty for the payment of interest, and unless he be estopped by some act at full age of as high authority as the bond, he shall avoid it. *3 M. & S.* 477; and see *8 East*, 330.

It is agreed, that an action on an account stated will not lie against an infant, though it be for necessaries; for he not having discretion, is not to be liable to stated accounts. *Co. Lit.* 172; *Land.* 110; *Acq.* 87; *1 T. R.* 40; *2 Stark.* 36; *4 C. & P.* 104.

If an infant comes to a stranger, who instructs him in learning, and boards him, there is an implied contract in law, that the party should be paid as much as his board and schooling are worth; but if the infant at the time of his going thither was under the age of discretions, or if he were placed there upon a special agreement with some of the child's friends, the party that boards him has no remedy against the infant but must resort to them with whom he agreed for the infant's board, &c. *Allen*, 94.

Necessaries for an infant's wife are necessaries for him; but if provided only in order for the marriage, he is not chargeable, though she use them after. *Stra.* 168. An infant shall be liable for the nursing his child. *Esp. N. P.* 161.

Debts contracted during infancy form, however, a good consideration to support a promise made to pay them when a person is of full age. *2 Lev.* 144; *2 Leon.* 215. And where the defendant pleads infancy, and the plaintiff

replies that the defendant confirmed the promise or contract when he was of age, the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy. 1 *T. R.* 648.

2. *On other Contracts.*—As to acts *in pais*, infants are regularly allowed to rescind and break through all contracts *in pais* made during minority, except only for schooling and necessities, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give infants who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing their being imposed upon, or overreached by persons of more years and experience. 39 *Ed.* 3. 20. *b.*: 1 *Roll. Ab.* 729: *Co. Lit.* 172. 381.

And for the better security and protection of infants herein, the law has made some of their contracts absolutely void; *i. e.* all such in which there is no apparent benefit, or semblance of benefit to the infant; but as to those from which the infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them. *Cro. Car.* 502: 1 *Jones*, 405: 3 *Mod.* 310.

If an infant draws a bill of exchange, yet he shall not be liable on the custom of merchant, but he may plead infancy in the same manner that he may to any other contract of his. *Carth.* 160.

But a person is liable on a bill of exchange accepted after he was of age, though drawn while he was an infant. *Stevens v. Jackson*, 4 *Camp.* 164.

A person gave a note, a few days after he was of age, for things had during his infancy; on extraordinary circumstances equity set it aside: though it is true, if an infant takes up goods, or borrows money, and, after he comes to age, gives his note or promise for the money, that is good at law; but to prevent the ruin of infants, it may be convenient to give relief. *Barn. C.* 4. 6.

The protection of the Court of Chancery is continued after infants have attained twenty-one until they have acquired all the information which might have been had in adult years. 3 *Swanst.* 69.

In trespass, wherefore with force and arms the defendant made an assault, and cut off all the hair of the plaintiff, the defendant as to all the trespass, except cutting the hair, pleaded not guilty, and as to that, pleaded that the plaintiff was of the age of sixteen years, and

for a certain sum of money gave licence to the defendant to cut off two ounces of hair; upon demurrer to this plea the court held that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff. 3 *Keb.* 369.

But although all his contracts, except for necessities, are void, an infant who has paid money with his own hand, though without a valuable consideration, cannot, it seems, recover it back. Where an infant paid money as a premium for a lease, and enjoyed it for a short time during his minority, but avoided it on attaining twenty-one, it was held he could not recover the money. 1 *Moore*, 466: 2 *Moore*, 552: 8 *Taunt.* 508: 3 *Bro. P. C.* 492.

Payments made to a servant, an infant, for the purpose of purchasing things, not necessities, are not valid payment as wages. 4 *C. & P.* 104.

If goods are delivered by a vendor to a carrier while the latter is under age, but they do not reach him till he has attained twenty-one, infancy is a good defence to an action for the price, for the goods vested in him immediately on delivery to the carrier, and he might have been sued immediately. *Griffin v. Langfield*, 3 *Camp.* 254.

But a warranty of a horse sold by an infant is not such a contract for his benefit that he can be sued upon it. *Howlett v. Haswell*, 4 *Camp.* 118.

VII. *Of an Infant's Power to enforce Contracts, &c.*—Though a promise by an infant will not bind him unless for necessities, yet he shall take advantage of any promise made to him, though the consideration were his promise when an infant. And an infant plaintiff has been allowed to recover on mutual promises of marriage. *Stva.* 937.

The infant sells goods to another; he may make the sale void, or have debt, &c. for the money. *Hob.* 77: 18 *Ed.* 4. 2.

The trading contract of an infant is not void; but he may enforce it at his election. 6 *Thun-ton*, 118.

So he may sue on a contract for a purchase of potatoes. 2 *M. & S.* 205.

VIII. *How an Infant must be sued, and must sue.*—An infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks as well by law as otherwise; but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. *Co. Lit.* 135. This *prochein amy* may be any person who will undertake the infant's cause: and it frequently happens that an infant, by his *pro-*

*chein amy*, institutes a suit against a fraudulent guardian.

If an infant defendant appear by attorney, the court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian. 7 *Taunton*, 488.

An infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*, i. e. next friend; but he cannot defend by such next friend, but must defend only by guardian, because the law supposes that where he demands or sues for any thing, it is for his benefit. The power for infants to sue by *prochein amy* was first introduced by the statute *Westm.* 2.

If an infant be joined with others, in suing in the right of another, the action may be brought by attorney, for they all make but one person in law. 3 *Cro.* 377.

But in all cases where an infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. 2 *Cro.* 289: 1 *Lev.* 294.

In all actions, real, personal, or mixed, against an infant, if he appears by attorney, it is error. 8 *Co.* 6: 9 *Co.* 30. b.: and see 7 *Taunton*, 488.

If an attorney undertakes to appear for an infant, and enters it *per attornatum*, it may be amended, and made *per guardianum*. *Str.* 114, 445.

The plaintiff's attorney should apply to the defendant to name a guardian; and if he does not, in six days, the plaintiff may apply to the court, who will oblige him to do it. 2 *Wils.* 50.

The infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable. *Str.* 548: *James v. Hatfield, Barnes*, 128. And if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But an infant defendant (although he names a guardian) is liable to costs if the verdict be against him. *Dyer*, 104: 1 *Bulst.* 109: *Str.* 708.

The Court of K. B. refused a motion to discharge an infant who had sued without *prochein amy* or guardian, and was in execution for the costs. 13 *East*, 6.

If an infant appearing by guardian comes of age pending the suit, he may then plead by attorney. *Moor*, 665.

If baron and feme, where the feme is an infant, appear by attorney, it is error. 5 *Mod.* 209. See further, tit. *Guardian*.

As to the time within which actions must be brought by or against infants, see tit. *Limitation of Action*.

infant is liable in respect of torts committed by him, as for slander, or battery; 8 *T. R.* 336: 7 *Bac. Arb. Infancy*, (H.); and in detinue for goods delivered to him for a particular purpose, and which he has failed to return. 1 *N. R.* 104.

If an infant, being master of a ship at St. Christopher's beyond sea, by contract with another, undertakes to carry certain goods from St. Christopher's to England, and there to deliver them; but does not afterwards deliver them according to agreement, but wastes and consumes them, he may be sued for the goods in the Court of Admiralty, though he be an infant; for this suit is but in nature of a detinue, or trover and conversion at the common law. 1 *Rol. Ab.* 530.

But if an infant keeps a common inn, an action on the case upon the custom of inns will not lie against him. 1 *Rol. Ab.* 2. cited *Carth.* 161.

As an infant is not bound by his contract to deliver a thing; so if one deliver goods to an infant upon a contract, &c. knowing him to be an infant, he shall not be chargeable in trover and conversion, or any other action, for them; for the infant is not capable of any contract but necessities, therefore such delivery is a gift to the infant; but if an infant without any contract wilfully takes away the goods of another, trover lies against him; also it is said, that if he takes the goods under pretence that he is of full age, trover lies, because it is a wilful and fraudulent trespass. 1 *Sid.* 129: 1 *Lev.* 169: 1 *Keb.* 905. 913.

But a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant defendant: therefore, where the plaintiff declared at defendant's request he had delivered a mare to defendant to be moderately ridden, and that defendant maliciously, &c. rode the said mare so that she was damaged, &c., the Court of K. B. held that defendant might plead his infancy in bar, the action being founded on a contract. 8 *T. R.* 352.

So where the plaintiff declared that having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c. it was held that the defendant might plead his infancy in bar. 2 *Marsh.* 485.

Also it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, &c. he make any contract or agreement with an intent afterwards to elude it, by reason of his privilege of infancy, that a court of equity will decree it good against him according to the circum-



stances of the fraud; but in what cases in particular a court of equity will thus exert itself is not easy to determine. See 1 *Vern.* 132: 2 *Vern.* 224, 225.

See further, as connected with this subject of infancy, *tits. Age, Children, Guardian, Heir, Trial, Will, &c.*

**INFANTICIDE.** Any person may without a warrant apprehend and carry before a magistrate, a party about to expose an infant, or leave it to perish. See *tits. Bastard Children, Homocide, III. Miscarriage.*

**INFECTIONS.** By casting garbage and dung into ditches, &c. how punished. See stat. 12 *R. 2. c. 13.* and this Dict. *tit. Nuisance.*

**INEFFMENT.** The act or instrument of *feoffment*. See that *tit.* In modern language in Scotland, this term is synonymous with *sasine*, meaning the instrument of possession; but it had anciently a more extended meaning, and was synonymous with investiture. *Bell's Scotch Law Dict.*

**INFEOICATION OF TITHES.** The granting of tithes to mere laymen. See 2 *Comm.* 27. and this Dict. *tit. Tithes.*

**INFERIOR COURTS.** The courts of judicature of this kingdom are classed in general division of superior and inferior. The courts at Westminster are the superior, and in general have (especially the Court of King's Bench and Common Pleas) superintendence over the inferior.

Lords or their bailiffs not to arrest on foreign pleas, on pain of double damages. *Stat. West. 1: 3 Ed. 1 c. 35.*

By stat. 19 *G. 3. c. 70.* where final judgment is obtained in any inferior courts of record, and the defendant cannot be found in their jurisdiction, the superior courts at Westminster may remove the record, and issue execution as in judgments in such superior court; and similar provisions are made by stat. 33 *G. 3. c. 68.* as to the courts of great sessions in Wales, and the courts for the counties palatine of Chester, Lancaster, and Durham.

By the 1 *W. 4. c. 70.* the courts of great sessions in Wales, and of the county palatine of Chester, have been abolished, and their jurisdiction transferred to the courts at Westminster.

See further, *tits. Abatement, County Court, Courts, Error, Execution, False Judgment, Jurisdiction, &c.*

**INFIDELS, infideles.]** Heathens; who may not be witnesses by the laws of this kingdom, because they believe neither the Old or New Testament to be the word of God, on one of which oaths must be taken. 1 *Inst.* 6.

The evidence of a Gentoo has, however, been admitted, sanctioned according to the ceremonies of his own religion. 1 *Atk.* 21.

And it may now be considered an established rule, that infidels of any other country who believe in a God, the avenger of falsehood, ought to be received here as witnesses; but infidels who believe not that there is a God, or a future state of rewards and punishments, cannot be admitted in any case. *Wiles*, 549: 1 *Atk.* 45: *Str.* 1104: 1 *Leach, Cr. C.* 64: 1 *Phill. on Ev.* 22.

See further *tit. Evidence.*

**INFIRMARY, infirmarius.]** In monasteries there was an apartment allowed for infirm or sick persons; and he who had the care of the infirmary was called *infirmarius*. *Mat. Paris anno 1252.*

There are now, to the honour of the nation, many hospitals for the relief of diseased persons in various parts of the kingdom, called infirmaries. See *tit. Hospitals.*

**IN FORMA PAUPERIS.** See *tits. Costs, Forma Hauperis,*

## INFORMATION FOR THE KING.

*Informatio pro Rege.]* An accusation or complaint exhibited against a person for some criminal offence, either immediately against the king, or against a private person; which, from its enormity or dangerous tendency, the public good requires should be restrained and punished. It differs from an indictment principally in this, that an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it. 3 *New Abr.* 164.

I. Of the various kinds of Informations, and the Antiquity of the Practice.

II. In what Cases Informations will be granted.

III. Of the Practice as to filing and compounding Informations.

IV. How to be laid; the Proceedings and Provisions by Statute Law; and herein of quashing and amending Informations; and of Costs.

I. Informations are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer, and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process; upon which, therefore, it is sufficient in this place to observe, that by stat. 31 *Eliz. c. 5.* no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king

and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence. *Cro. Jack.* 366. See *Indictment*, I.

The informations that are exhibited, in the name of the king alone, are also of two kinds; first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general; or, during a vacancy of that office, by the solicitor general, *Wilkes's case*, *Bro. P. C.* 460; 4 *Burr.* 2576. Secondly, those in which, though the king is the nominal prosecutor, yet is at the relation of some private person, or common informer, and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the master of the Crown Office, who is for this purpose the standing officer of the public. The object of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without any previous application to any other tribunal; which power, thus necessary, not only to the ease and safety, but even to the very existence, of the executive magistrate, was originally reserved in the great plan of the English constitution; wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown Office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of a notorious kind, not particularly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most animadversion. 2 *Hawk. P. C. c.* 26. And when an information is filed, either thus, or by the attorney general *ex officio*, it must be tried by a petit jury of the county where the offence arises; after which, if the defendant be found guilty, the court must be resorted to for his punishment. See *post*, II. III.

This mode of prosecution, by information (or suggestion) filed on record by the king's attorney general, or by his coroner, or master of the Crown Office in the Court of King's Bench, seems to be as ancient as the common law itself. 1 *Show.* 118. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, when ever a grand jury informed upon their oaths, that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record, and to carry on the prosecution in his Majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only; for wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And as to those offences in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the 3 *H. 7. c. 1.* had extended the jurisdiction of the court of Star Chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the 11 *H. 7. c. 3.* had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes, or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the Court of King's Bench fell into disuse and oblivion; and Empson and Dudley, the wicked instruments of King Henry VII., by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harrassed the subject, and shamefully enriched the crown. 1 *And.* 157. The latter of these acts was soon indeed repealed by the 1 *H. 8. c. 6.*; but the court of Star Chamber continued in high vigour, and daily increasing its authority, till finally abolished by the 16 *Car. 1. c. 10.*

Upon this dissolution, the old common law authority of the Court of King's Bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again

revived in practice. 5 *Mod.* 464: *Styl. Rep.* 217. 245: *Styl. Prac. Reg.* tit. *Information*, p. 187. (edit. 1657): 2 *Sid.* 71: 1 *Sid.* 152. And it is observable that, in the same act of parliament which abolished the court of Star Chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute. 16 *Car.* 1. c. 10. § 6. Sir Matthew Hale, who presided in this court soon after the time of such revival, is said to have been no friend to this mode of prosecution; most probably because the power of filing informations without any control then resided in the breast of the master; and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. 5 *Mod.* 460; 1 *Saund.* 301: 1 *Sid.* 174. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King William, to procure a declaration of their illegality by the judgment of the Court of King's Bench; but Sir John Holt, who then presided there, and all the judges, were clearly of opinion that this proceeding was grounded on the common law, and could not then be impeached. 5 *Mod.* 459: *Comb.* 141: 7 *Mod.* 361: 1 *Show.* 106. In a few years afterwards a more temperate remedy was applied in parliament, by the 4 and 5 *W. & M.* c. 18. which enacts, that the clerk of the crown shall not file any information without express direction from the Court of King's Bench; and that every prosecutor permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum to prosecute the same with effect); and to pay costs to the defendant, in case he be acquitted thereon, unless the judge who tries the information shall certify there was a reasonable cause for filing it; and at all events to pay costs, unless the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the Crown Office; and, consequently, informations at the king's own suit, filed by his attorney general, are no way restrained thereby. See *post*, IV.

There is one species of information, still further regulated by stat. 2 *Anne*, c. 20. *viz.* those in the nature of a writ of *quo warranto*, which are a remedy given to the crown against such as may have usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights to such franchises; though

it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general; being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding. See this Dict. tit. *Quo Warranto*, and 4 *Comm.* 308. 312; and *post*, IV.

An information on behalf of the crown filed in the exchequer by the king's attorney general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. *Moor.* 375. It differs from an information filed in the Court of King's Bench, in that this is instituted to redress a private wrong, by which the property of the crown is affected; that is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney general, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of intrusion and debt. Intrusion for any trespass committed on the lands of the crown, as by entering thereon without title; holding over after a lease is determined; taking the profits; cutting down timber; or the like. *Cro. Jac.* 212: 1 *Leon.* 48: *Savil.* 49. See tit. *Intrusion*. Debt upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This latter is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others, which regard mere matters of police and public convenience, being usually left to be enforced by common informers, in *qui tam* informations or actions. But after the attorney general has informed upon the breach of a penal law, no other information can be received. *Hurd.* 201.

There is also an information *in rem*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king; as anciently in the case of treasure-trove, wrecks, waifs, and estrays seized by the king's officer for his use. Upon such seizure an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands; after the re-



turn of which, and a second proclamation had, (as in not repairing highways, or obstructing if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown. And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by the act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice. 3 *Comm.* 261, 262.

Informations *qui tam* will not lie on any statute which prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it, because otherwise it goes to the king, and nothing can be demanded by the party. 2 *Hawk. P. C. c.* 26.

When a statute creates a penalty, and gives one moiety to the use of the king and the other to the informer, the king may sue for the whole by information filed in B. R. by the attorney general, unless a common informer have commenced a *qui tam* suit for the penalty. 7 *T. R.* 536.

It has been said, that the king shall put no one to answer for a wrong done principally to another, without indictment or presentment; but this does not seem a principle adhered to; and of common right, informations, or actions in the nature thereof, may be brought for offences against statutes, whether mentioned or not in such statutes, where other methods of proceeding are not particularly appointed. 2 *Hawk. P. C. c.* 26. § 1, 2. And wherever a matter concerns the public government, and no particular person is entitled to an action, there an action will lie. 1 *Salk.* 374.

II. It is every day's practice, agreeable to numberless precedents, either in the name of the king's attorney general, or master of the Crown Office, to exhibit informations for batteries, cheats, seducing a young man or woman from their parents, in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subordinations thereof, forgeries, conspiracies (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, &c., or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*); and other such like crimes, done principally to a private person; as also for offences done principally to the king; as for libels, seditious words, riots, false news, extortions, nuisances

(as in not repairing highways, or obstructing them, or stopping a common river, &c.); contempt, as in departing from the parliament without the king's licence, disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for contempt, neglecting to keep watch and ward, abusing the king's commission to the oppression of the subject, making a return to a *mandamus* of matters known to be false; and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty. 2 *Hawk. P. C. c.* 26. § 1. and the several authorities there cited; and see *Finch, L.* 240: *Show.* 109.

The court granted an information against a person refusing to take on him the office of sheriff; because the vacancy of the office occasioned a stop of public justice, and the year in which he was to exercise his office would expire, or nearly so, before an indictment could be brought to trial. 2 *T. R.* 371.

The court will grant an information for reproaching the office of magistracy, or defaming the character of magistrates. *Carth.* 14, 15: 1 *Wils.* 22. See 12 *Mod.* 514.

For libels reflecting on the conduct of members of parliament in the execution of their duties; 1 *Doug.* 387; or of persons high in office under government in the execution of their several duties of a public body; 5 *B. & A.* 595; and the like. See 7 *Mod.* 400: 1 *W. Bl.* 294. They will grant an information also for libels on private individuals, if attended with circumstances of aggravation. 2 *Bur.* 983: 1 *Doug.* 283: *Id.* 387. And according to modern practice, for any description of libel. See *Law Magazine*, vol. 9. 368.

The court will grant a criminal information against a magistrate for any illegal act committed by him from corrupt or vindictive motives: as—

For not examining evidence upon oath under a reference and a rule of court. 1 *Wils.* 7. Or for demanding a shilling by a justice to discharge his warrant, and committing the party for not paying it. 1 *Wils.* 7. For convicting a person unheard, and sending him to the house of correction. *Hard.* 124: 8 *Mod.* 45. For voluntary absenting by a justice, from sessions. *Stra.* 21. For refusing to put a statute in execution. *Stra.* 413. For making order of removal, and not summoning the party. *Andr.* 233. 273. For endeavouring to procure the appointment of certain persons to be overseers of poor for the private advantage of the party so endeavouring. *R. v. Jolliffe*, 32 *G.* 3. cited 1 *East*, 154.

A criminal information having been granted against a magistrate defendant, he, before the

trial at the assizes, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's. This matter being disclosed to the judge by affidavit, was held sufficient to put off the trial; and that affidavit being returned to the Court of K. B., that court granted a further information against the defendant for such criminal conduct; considering the affidavit taken at Nisi Prius as taken under the authority of the court. 4 T. R. 285.

Also an information will be granted against ministerial officers for acts of oppression, or other illegal acts in the execution of their duties, committed from corrupt, vindictive, or other improper motives; but not where they act from ignorance or mistake merely. 1 Chitty R. 702. Thus informations have been granted against overseers for forcing a pauper to marry another pauper repugnant with a bastard. 4 Burr. 2106. And see 2 Cald. 246. But the court has now resolved to refuse an information in such cases, and leave the applicant to his remedy by indictment. Cald. 247. n. (a): 2 Nolan, 262.

An information will also be granted for taking away a young woman from her guardian, although Chancery had committed the offender for a contempt. Stra. 1107: Andr. 310. Or from her putative father. Stra. 1162. For seducing a man to marry a pauper, who is an idiot, in order to exonerate the parish. 1 Wils. 41. For seducing a woman habituated to drinking, to make her will. 2 Burr. 1099. For bribing persons to vote at corporation elections. *Ld. Raym.* 1377. For publishing an obscene book. Stra. 788. For blasphemy. Stra. 834. For unduly discharging a debtor by judges of an inferior court. Hard. 135. For refusing, by the captain, to let the coroner come on board a man of war lying within the body of the county. Andr. 231: Stra. 1097. For keeping great quantities of gunpowder. Stra. 1167. For impressing a captain as a common seaman maliciously. 1 Black. 19. For illegally impressing and confining a recruit. See Stra. 404. For speaking treasonable words, although the offender has been previously punished; viz. in an academical way, by the vice chancellor. 1 Black. 37. For contriving the escape of French prisoners. 1 Black. 286. For giving a ludicrous account of a marriage between an actress and a married man. 1 Black. 294. For contriving pretended conversations with a ghost, with intention to accuse another of having murdered the body of the disturbed spirit. 1 Black. 392. 401. For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution. 1 Black. 439.

Information was granted against an attorney for examining persons on oath upon an arbitration, without putting the same in writing. Against one for practising as an attorney, while he was under-sheriff. 1 Wils. 93. Against a gaoler, for suffering one taken upon an *excom. capiend.* to go at large. 12 Mod. 434. Against certain persons for that they as enemies, &c. to the government, hired a boat during a war with France, in order to go thither, intending to aid and assist the king's enemies, though they did not actually go thither, but only intended it. Skin. 637: Pasch. 8 W. 3. B. R. the King v. Cooper and al. Against one for building of locks in the river Thames to the obstruction of navigation. 12 Mod. 615.

An information was exhibited by the attorney general for conspiring to destroy the king's revenue of the excise; that the defendants and others *ignot', &c. illicitè, factiosè, et seditiosè, consultaverunt et conspiraverunt ad destruend' et depauperand' fermarios excisæ predict', &c.* and many other facts were laid in the information tending to destroying the excisemen, depauperating them, destroying the king's revenue of excise, pulling down the excise house, raising a tumult amongst the poor people, &c. But the jury that were to try the issue were unwilling to find this matter, though expressly proved, fearing it might be construed no less than treason: and so would only find that such and such of the defendants *illicitè, factiosè, et seditiosè se assemblaverunt, et illicitè, factiosè, et seditiosè consultaverunt et conspiraverunt ad depauperand' fermarios Dow Regis excisæ predict', prout predict' attornat' gen' Dom. Regis, &c. Et quod totum aliam materiam in informatione contentam, find them not guilty, and find J. S. not guilty of the whole. It was moved in arrest of judgment, that here is no offence found. The court unanimously concurred, that judgment ought to be given for the king, though as to the offence found there was some variety of opinion; Twissden held, that *vi et armis* was not necessary, and that they were found guilty of an unlawful assembly, and in that the Lord Chief Justice Hale concurred; as also that the intention of defrauding and depriving the king of his said rent is implicitly found within the *modo et forma prout, &c.* for so shall the *machinantes* be applied. Twissden and Kneeling concurred, that for a conspiracy alone, without any prosecution, information lay; and they all agreed that the king's revenue being concerned, did highly aggravate the offence. 26 Ass. 44. was cited to prove, that whatever concerns the king's revenue is public; and for this reason (2 H. 4. 7. pl. 26,) it is determined that a monk by being farmer is made capable,*

to sue. The Lord Chief Justice cited old *Magna Charta*, where there is an article to inquire of such as seek to diminish the king's revenue of wards and marriages, which shows it is a public treasure. Judgment was therefore given for the king. 1 *Lev.* 125: 1 *Sid.* 174: 1 *Keb.* 650. 665. 675. 682.

A coroner having sworn the jury to inquire of the death of one supposed a *felo de se*, and finding the evidence very strong, took off some of the inquest; and though it was said, that this coroner was a weak silly man, yet *Holt* said there was no reason why an information should not be against him. 12 *Mod.* 493.

Information for a scandalous narrative licensed by the defendant, speaker of the House of Commons, being *Dangerfield's* narrative reflecting on a nobleman (the Earl of Peterborough); the defendant pleaded, that he did it by order of the House of Commons, and demanded judgment if this court will take cognisance of it. The attorney general demurred, and afterwards the defendant pleaded the common plea, *quod non vult contendere cum Domino Rege*, and was fined 10,000*l.* *Comb.* 18.

Leave was given to file an information against the defendant, by whom the plaintiff's wife was inveigled away, and who procured merchants and tradesmen to sell goods to her, in order to saddle the husband with the debt, he agreeing with the sellers to deliver the goods back again. 12 *Mod.* 454. For words spoken of a deceased king, which advance pernicious doctrines and evil tenets, and have an influence on the present government, &c. an information lies, on which the offender may be fined, and also corporally punished. 2 *Lord Raym.* 879. If the marshal of B. R. misdemeanors himself in his office, he who is prejudiced by it may prefer an information against him in that court, where he shall be fined and ordered to make satisfaction. *Hil.* 23 *Car. B. R.* If a person exhibits his information only for vexation, the defendant may bring information against the informer, upon the stat. 18 *Eliz. c. 5*: 2 *Bulst.* 18.

A criminal information will not be granted against magistrates acting improperly in their public capacity, when they appear to have acted from ignorance or mistake. *Stra.* 1181: *Bur.* 785. 1162: *Black.* 432: *Douglas*, 589: 3 *B. & A.* 432. Nor will they grant it against justices in sessions, except in flagrant cases. 1 *W. Bl.* 432.

The court will not grant an information against a private person for reading a pretended proclamation. *Black.* 2. Nor against a husband for endeavouring to retake his wife contrary to the articles of separation. *Black.* 18. Nor against persons who assemble with

a lawful design, notwithstanding some unlawful and irregular acts ensue. *Black.* 48. Nor against ministers for converting brief money. *Stra.* 1130: *Black.* 443. Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal. *Stra.* 70: *Barnard, K. B.* 11. Nor for a libel, if it appears to be true. *Stra.* 498: *Dough.* 284. 387. Nor for offences committed upon the high seas. *Sir.* 918: 2 *Keble*, 190. Nor against a dissenter for refusing the office of sheriff. *Stra.* 1193: 1 *Wils.* 18. Nor against an offender, although the penalty for the offence is vested in the crown. *Stra.* 1234. Nor for words spoken of a justice in his public character. *Stra.* 1157. Nor for attempting subordination of perjury. *Hardw.* 24. Nor for sending a challenge, if the informant had previously imparted a challenge. *Bur.* 316. 402. Nor on a general charge of extortion. *Stra.* 999. Nor for striking a magistrate in the execution of his office, if the magistrate strike first. *Hard.* 240. Nor for an offence against a private statute. *Bur.* 385. Nor if a civil suit is depending upon the same subject. *Hardw.* 241. Nor for returning to a writ of certiorari, a conviction, in a more formal shape than first drawn up, if warranted by the facts. *R. v. Barker*, 1 *East's Rep.* 186. And in general the discretion of the court in granting informations is guided by the merits of the person applying; by the time of the application; by the nature of the case; and by the consequences which may possibly result from the granting it. *Per Lord Mansfield, Black.* 542. Vide, also, *Com. Dig.* tit. *Information*.

Although in the *King v. Peach*, 1 *Burr.* 548. the court refused to grant an information in favour of one cheat against another cheat, yet a rule for a criminal information for bribery in the election of an alderman of Norwich (who is *ex officio* a magistrate), was granted on the sole testimony of a *particeps criminis*. The court drew a distinction between private frauds and offences against public policy. 2 *B. & Adol.* 68.

III. It seems to be an established practice, not to admit the filing of an information (except those exhibited in the name of his Majesty's attorney general), without first making a rule on the persons complained of, to show cause to the contrary; which rule is never granted but upon motion made in open court, and grounded upon affidavit of some misdemeanor, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution; and if the person, on whom such rule is made, having been personally served with it, do not, at the day given



him for that purpose, give the court good satisfaction by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely absent themselves, &c. 2 *Hawk. P. C. c.* 26.

Where only circumstances of strong suspicion are stated in affidavits on which a rule for a criminal information is moved, it is not sufficient, unless the deponents also add their belief that the party against whom the application is made acted from corrupt motives. 3 *B. & A.* 582.

The application must be made within a reasonable time, or a satisfactory reason given for the delay. The only exception is in the case of bribery at parliamentary elections, a criminal information for which cannot be moved for until after the two years have elapsed, within which an action may be brought for the penalties. See 1 *W. Bl.* 541.

Where the application is against a magistrate for any thing done by him in the execution of his office, if the offence were committed in vacation, the motion must be made in the next term, if an issuable term, or otherwise in the second term. 1 *East*, 270: 5 *B. & A.* 612.

The Court of K. B. will grant a rule nisi, at the end of a term, for a criminal information against a magistrate for malpractices, during the term, but not for any misconduct before the term in which the motion might have been made. *Rex v. Smith*, 7 *T. R.* 80.

The affidavit on which the application is founded must contain the material facts of the case; for if any fact of importance be suppressed or misrepresented, the court will discharge the rule, and in all probability with costs.

Also, as the court is in a manner submitted for a grand jury, the facts so disclosed in any affidavit should be sufficient to satisfy such grand jury, were an indictment preferred for the offence. 6 *T. R.* 294: 3 *B. & A.* 583.

It is likewise a rule, if the subject of the application be a libel on an individual, charging him with some particular offence, that the affidavit must deny the charge. 1 *Doug.* 283, 284. 387.

It will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit denying the charge. 3 *T. R.* 383.

But if the charge be general, or against a public body of men; 5 *B. & A.* 595; or if it relate to any thing said by the prosecutor as a member of parliament; 1 *Doug.* 387; the court will not require a denial upon oath of the charge.

If a defendant show good cause to the contrary, as that he has been indicted for the same cause, and acquitted, or that the intent is to try a civil right, which has not yet been determined, or that the complaint is trifling, or vexatious, &c.; or, where the motion is for an information in the nature of a *quo warranto*, if he can show that his right hath been already determined on a *mandamus*, or that it hath been acquiesced in many years, or that it depends upon the right of his voters which hath not been tried, or that it doth not concern the public, but is wholly of a private nature, the court will not grant the information without some particular circumstances, the judgment whereof lies in discretion. 2 *Hawk. P. C. c.* 26.

A party applying for an information must waive his right of action. But if the court, on hearing the whole matter, are of opinion it is a proper subject for an action, they will give the party leave to bring it. 2 *T. R.* 198.

The compounding of informations upon penal statutes is an offence, in criminal cases, equivalent to maintenance of barretry in civil cases; and is, besides, an additional misdemeanor against public justice, by contributing to make the law odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be prosecuted, it is enacted by stat. 18 *Eliz. cap.* 5, that if any person informing under pretence of any penal law, make any composition without leave of the court, or take any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not the public good), he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be for ever disabled to sue on any popular or penal statute. 4 *Comm.* 136.

IV. An information is, in many respects, the same as what, for a common person, is called a declaration. It ought to be certain, that the party may perfectly know what he is to answer to, and the court what they are to give judgment on. *Plowd.* 329.

Regularly, the same certainty that is required in an indictment is required in an information; but it has been held not to be necessary to repeat the words, "gives the court here to understand, and be informed," in the beginning of every distinct clause, if the want of them may be supplied by a natural and easy construction. See tit. *Indictment*. 1 *Salk.* 375: *Raym.* 34: 2 *Hawk. P. C. c.* 26.

In an information against Roberts the ferryman over the river Mersey, which parts Anglesey from Caernarvonshire in Wales, it

was moved in arrest of judgment, that the information was too general and uncertain, because it did not allege that any particular person, or any certain number of cattle, were ferried over within the time laid in the information; neither did it mention any particular person from whom the extorted rates were taken, which it ought to do, that the single offence might certainly appear to the court; after great deliberation, the whole court was of that opinion; and *per Holt*, Chief Justice, in every such information a single offence ought to be laid and ascertained, because every extortion from every particular person is a separate and distinct offence; therefore they ought not to be accumulated under a general charge, as in this case, because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the court to proportion the fine or other punishment, unless it is singly and certainly laid. *Carth. 226.*

An information upon a penal statute must be sued in one of the superior courts, and cannot be brought in any inferior court, because the king's attorney cannot be there to acknowledge or deny, as he can in a superior court. *Cro. Juck. 538.* All informations on penal statutes, brought by an informer, where a sum certain is given to the prosecutor, must be brought in the proper county where the offence was committed; and within a year after the same; but a party grieved, who is not a common informer, is not obliged to bring his information in the proper county, but may inform in what county he pleases. *31 Eliz. c. 5: Cro. Eliz. 645.*

Where an information is given by statute, to be prosecuted at the assizes, &c. the informer, on filing his information, must make oath before a judge, that the offence laid in the information was not committed in any other county than that mentioned in the information; and that he believes the offence was committed within a year next before the filing of the information. *21 Jac. 1. c. 4.* And when an information is ordered to be filed, upon an affidavit made, the court will not suffer the prosecutor to put any more or other matter into the information than what only is in his affidavit. *Mich. 9 W. 3. B. R.*

It has been resolved, that the *21 Jac. 1. c. 4.* restrains the jurisdiction of B. R. in actions of debt by common informers, and that they cannot bring debt upon the statute in that court unless the cause of action arise in the county where the King's Bench sits; but must in other cases prosecute by information before justices of assizes, &c. as the statute directs. *1 Salk. 373.* *Sed qu.* as to this doctrine, as the jurisdiction of the King's Bench extends

over the greatest part of the kingdom in all cases where an action may be brought? *J. M.*

Offences created since the *21 Jac. 1. cap. 4.* are not within that statute, to be prosecuted in the county where the fact was done; so that informations on subsequent penal statutes are not restrained thereby. *1 Salk. 373.*

The *18 Eliz. c. 5.* and *21 Jac. 1. c. 4.* do not extend to informations of officers, nor on the statutes of maintenance, champerty, concerning concealments of customs, &c., nor to parties grieved, and those to whom any forfeiture is given in certain. *1 Salk. 373.*

If an informer dies, the attorney general may proceed in the information for the king; nonsuit of an informer, is no bar against the king; and if the king's attorney enter *nolle prosequi*, it is not any bar *quoad* the informer. *Cro. El. 583: Leon. 119.* If two informations are had on the same day, they mutually abate one another; because there is no priority to attach the right of the suit in one informer, more than in the other. *Hob. 138.*

If an information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the informer may have judgment for such as are well laid. *Hob. 266.*

When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him; he then either pleads to it, or applies to quash it, and on issue joined, the proceedings are brought to trial. *3 Chitty's Burn, 368.*

An information for penalties under the game laws is not an information within the meaning of the *48 G. 3. c. 58.* whereby if the defendant neglect to appear and plead, the prosecutor may enter an appearance, and plea of not guilty against the defendant. *3 B. & C. 586.*

After a plea pleaded to an information for any crime, the defendant, by favour of the court, may appear by attorney; also the court may dispense with the personal appearance before plea pleaded, except in such cases where a personal appearance is required by some statute; and it is the same of indictments for crimes under the degrees of capital. *Hob. 273.*

If a defendant plead *nil debet* to an information *qui tam*, &c. it is safest to say he owes nothing to the informer, nor the king, which is answer to the whole. On breach of a statute alleged for a matter *in pais*, the defendant may plead that he owes nothing, or not guilty, &c. And if there be more than one defendant, they ought to plead severally, and not jointly, not guilty; but if it be alleged from a matter of record, the record not being triable by the country, but by itself, such plea is

not good. 2 *Hawk. P. C. c.* 26. § 66. &c.: *Bro. Issues*, 23.

A replication to an information on a special plea in the courts at Westminster, is to be made by the attorney general, and before justices of assise, by the clerk of the assise: though the replication to the general issue in an information *qui tam* in the courts at Westminster, may be made in the name of the attorney general only; and in actions *qui tam*, most of the precedents are, that the replication is to be made by the plaintiff. A demurrer may be to an information *qui tam*, without the attorney general. 2 *Hawk. P. C. c.* 26. § 72.

By stat. 60 *G. 3. c.* 4. defendants are to plead to informations in the superior courts for misdemeanors within four days after their appearance, and are not to be allowed any imparlance. By the same act, in all prosecutions for misdemeanors, by the attorney (or solicitor) general, the court if applied to shall order a copy of the information (or indictment) to be delivered to the defendant free of expense. If the prosecution is not brought to trial within a year, after plea of not guilty, the court may, on application of the defendant, and twelve days' notice to the attorney general, make an order to authorise the defendant to bring on his trial, which he may do unless a *nolle prosequi* be entered. The act does not extend to informations *quo warranto*, or for repairing highways or bridges.

Evidence to a defendant's character is not admissible on the trial of an information in the exchequer. 2 *B. & P.* 532. *n.*

Fines assessed in court by judgment on an information cannot afterwards be qualified or mitigated. *Cro. Car.* 251.

*Of quashing Informations.*—The court will not quash an information *ex officio* at the instance of the prosecutor, because the attorney general may, if he will, enter a *nolle prosequi*. 1 *Doug.* 239, 240. And they will seldom quash it on the motion of the defendant, but generally put him to demurrer. 2 *Lill.* 59: 1 *Salk.* 372. Also, they will rarely quash an information filed by the master of the Crown Office; and will only do so under particular circumstances. 2 *Str.* 1072: 1 *Burr.* 385. If quashed on the motion of the plaintiff, it must be on payment of costs, at least to the extent of the recognizance. *Arch. Cr. Plead.* 77.

*Of amending Informations.* An amendment of an information will be allowed after demurrer. 4 *T. R.* 457.

As to the amendment of informations under the 7 *G. 4. c.* 64. § 19. in cases of pleas in abatement, see tit. *Indictment*.

And as to amending in cases of variance, see tit. *Amendment*.

For the cases in which defects in informa-

tions are cured by verdict, see tits. *Indictment* VI., *Judgment*, IV.

*As to Costs.*—If the defendant be acquitted on an *ex officio* information, or a *nolle prosequi* be entered, he has all his own expenses to pay, as it is beneath the dignity of the crown to receive or to pay them. *Hullock on Costs*, 557.

An informer upon a popular statute shall never have costs, if not given by the statute; but the party grieved in action on the statute shall, where a certain penalty is given. 2 *Hawk. P. C.* 26.

In an action *qui tam* on the 5 *Eliz. c.* 4. the plaintiff shall pay costs. *Ld. Raym.* 1333. But it seems unsettled whether an informer shall be obliged to give security for the payment of costs on account of his poverty. *Cowp.* 24. It has been refused, for the statute having given him a power to sue, it is a debt due to him; *Bull. N. P.* 197; but an informer who has gone abroad must give security; *Str.* 697; and it seems that a foreign informer must do the same. *Str.* 1206: *vide* 1 *Wils.* 116. Also, if a prosecution is brought in a feigned name, the court will oblige the real prosecutor to give security. *Shinler v. Roberts, Easter, 12 G. 2. C. B.* The defendant, on motion, may pay the costs and penalty into court. *Rez v. Walker, Trin. 31 G. 2. B. N. P.* *Vide Cowper*, 367.

If a prosecutor does not go on to trial, he shall pay costs. *Hardw.* 159. But if he gives notice of trial, and neither goes to trial, or countermands in time, unless the defendant draws him in to give notice, the defendant shall pay costs. 3 *Bur.* 1304. So where a *qui tam* informer, in debt on the 21 *H. 8. c.* 13. is nonsuited, the defendant is entitled to costs. *Cowp.* 366. where 3 *Bur.* 1723, is denied to be law. But the court will not stay proceedings in a *qui tam* action, till costs in a *non pros.* in a former action, by a different plaintiff against the same defendant, be paid. *Cowp.* 322. If prosecutor *qui tam*, for killing game, &c. does not reply, defendant shall have costs, for the 18 *Eliz. c.* 5. extends to informers on all penal statutes. 1 *Wils.* 177.

In the construction of stat. 4 and 5 *W. & M. c.* 18. (see ante, I.) it hath been holden,

1. That if process be issued on such information before such recognizance is given as the statute directs, the same may be set aside and discharged on motion. 2 *Hawk. P. C. c.* 26.

2. That this statute extends to all informations, except those exhibited in the name of his Majesty's attorney general; so that an information in nature of a *quo warranto*, though a proper remedy to try a right, in respect of which it may not in strictness come within the word trespasses, &c.; yet being also intended to punish a misdemeanor, and also as



the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which, being a remedial law, shall receive as large a construction as the words will bear. *Carth.* 503: 1 *Salk.* 376. *S. C.*

3. That no costs can be had on this statute on an acquittal by a trial at bar; not only because the clause that gives costs, unless the judge certify a reasonable cause, seems only to have a view to trials at *nisi prius*, but also because a cause, which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute; which was chiefly designed against trifling and vexatious prosecutions. 2 *Hawk. P. C. c.* 26.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs. 1 *Salk.* 194.

5. That wherever a defendant's case is such as authorizes the court to award him costs, he has a right to the *ex debito justiciæ*; for it seems a general rule, that where judges are empowered by statute to do a matter of justice, they ought to do it of course. 2 *Chan. Chas.* 191: 2 *Hawk. P. C. c.* 26.

6. The defendant on his acquittal is not entitled to any costs beyond the extent of the recognizance required by the statute. 2 *T. R.* 145. See *Ibid.* 190.

INFORMATION, in the Scotch law, is a written pleading ordered by the lord ordinary when he takes a cause to report to the junior house. See *tit. Session, Court of.*

INFORMATUS NON SUM, or, more properly, *non sum informatus*. A formal answer made of course by an attorney who is authorized by his client to let judgment pass in that form against him. It is commonly used in warrants of attorney, given for the express purpose of confessing judgment.

INFORMER, *informer*.] The person who informs against, or prosecutes in any of the king's courts, those who offend against any law or penal statute. No man may be an informer who is disabled by any misdemeanor. *Stat.* 31 *Eliz. c.* 5. See *tit. Information, Penal Actions.*

INGUGARE. To put to flight. *Leg. Canuti, c.* 32.

INFULA. Was anciently the garment of a priest, like that which we now call a cassock; sometimes it is taken for a coif.

INGE. This syllable, in the names of places, denotes meadow or pasture; and in the north, meadows are called the inges; from the Saxon *ing*, i. e. *pratium*.

INGENIUM. Any instrument used in war, *arte et ingenio confectum*; from whence it is said we derive the word engine.

INGENUITAS. Liberty given to a servant by manumission. *Leg. H. 1. c.* 89.

INGENUITAS REGNI, *ingenui, liberi et legales homines*; freeholders, and the commonalty of the kingdom; sometimes this title was given to the barons and lords of the king's council. *Eadmer, Hist.* 1. *Nov. fol.* 70.

INGRESS, EGRESS, and REGRESS. Words in leases of lands to signify a free entry into, going forth of, and returning from some part of, the lands let; as to get in a crop of corn, &c. after the term expired. They are also used in the grant of a right of way.

INGRESSU. A writ of entry, whereby a man seeks entry into lands or tenements; and lies in many cases, having many different forms: this writ is also called *præcipe quod reddat*, because these are formal words inserted in all writs of entry. All writs of entry are abolished after the 31st December, 1834. See *tit. Entry.*

INGRESSUS. The relief which the heir at full age paid to the head lord, for entering upon the fee, or lands fallen by the death or forfeiture of the tenant, &c. *Blount.*

INGROSSATOR MAGNI ROTULI. See *Clerk of the Pipe.*

IN GROSS. Advowson in gross, villain in gross, &c. See *tit. Advowson, Gross, Villain.*

INGROSSER. By *stat.* 7, 8. *G. 4. c.* 38. no constable shall be required to make presentment of ingrossers at any general gaol delivery, great or general quarter sessions. See *tit. Forestaller.*

INGROSSING OF A FINE. The making of the indentures by the chirographer, for delivery of them to the party to whom the fine is levied. *F. N. B.* 147. See *tit. Fine of Lands.*

INHABITANT. A dweller or household in any place; as inhabitants in a vill, are the householders in the vill. 2 *Inst.* 702.

The word inhabitants includes tenants in fee-simple, tenant for life, years, by *elegit*, &c., tenant at will, and he who has no interest but only his habitation and dwelling. 6 *Rep.* 60. a. He who hath a house in his hands in a town, may be said to be an inhabitant. *Carth.* 119. Inhabitants have not capacity to take an inheritance, as in 11 *Ed.* 4. to have common. 12 *Rep.* 120. See *tit. Poor.*

INHERITANCE, *hereditas*.] An estate in lands or tenements to a man and his heirs: and the word inheritance is not only intended where a man hath lands or tenements by descent of heritage; but also every fee-simple or fee-tail, which a person hath by purchase, may be said to be an inheritance, because his heirs may inherit it. *Lit.* § 9. And one may have inheritance by creation; as in case of the king's grant of peerage, by letters patent, &c.

**INHERITANCES;** are **CORPOREAL** or **INCORPOREAL**. Corporeal inheritances relate to houses, lands, &c. which may be touched or handled; and incorporeal inheritances are rights issuing out of, annexed to, or exercised with, corporeal inheritances; as advowsons, tithes, annuities, offices, commons, franchises, privileges, services, &c. 1 *Inst.* 9. 49. See tit. *Herediments*.

There is also several inheritance, which is where two or more hold lands severally; if two men have lands given to them and the heirs of their two bodies, these have a joint estate during their lives; but their heirs have several inheritances. *Kitch.* 155. Goods and chattels cannot be turned into an inheritance. 3 *Inst.* 19. 126. See tits. *Descent, Estate*.

**INHIBITION, inhibitiō.]** A writ to forbid a judge from further proceeding in a cause depending before him, being in nature of a prohibition. See stats. 9 *Ed.* 2. c. 1: 24 *H.* 8. c. 12: *F. N. B.* 39. An inhibition is most commonly issued out of a higher court christian, to an inferior, upon an appeal. Inhibitions are likewise on the visitations of archbishops, and bishops, &c. This inhibition is either *hominis* or *juris*; it is *ne visitationem facies, vel aliquam jurisdictionem ecclesiasticam vel contentionem voluntariam habeas*: thus when the archbishop visits, he inhibits the bishop; and when a bishop visits, he inhibits the archdeacon; this is to prevent confusion, and continues till the last parish is visited. Now after such inhibition by an archbishop, if a lapse happens, the bishop cannot institute, because his power is suspended; but the archbishop is to do it, &c. 2 *Inst.* 601: 3 *Salk.* 201. See tit. *Prohibition*.

**INHIBITION [Scotch Law.]** A process to restrain the party inhibited from disposing of his real estate, in prejudice of a debt insisted on. See *Bell's Scotch Law Dict.*

The term is also used in the Scotch law for a writ, whereby, on the application of a husband, all persons are prohibited from giving credit to his wife. It is also applied to a proceeding by the owner of tithes against a lessee.

**INHOC, or INHOKE,** from *in*, within, and *hoks*, a corner or nook.] Any corner or part of a common field ploughed up and sowed with oats, &c., and sometimes fenced in with a dry hedge, in that year wherein the rest of the same field lies fallow and common. It is called in the north of England an *intock*, and in Oxfordshire a *kitchen*; and no such inhope is now made without the joint consent of all the commoners, who in most places have their share by lot in the benefit of it, except in some manors, where the lord has a special privilege of so doing. *Kennett's Paroch. Antiq.* 297. &c. and his *Glossary*.

VOL. II

**INITIALIA TESTIMONII.** Before a witness in Scotland is allowed to be examined in chief, he is first examined with regard to his disposition, whether he bear ill will to either of the parties; whether he has been prompted what to say, or has received any bribe. It is in the nature of the *voire dire* in the English law. See that tit.

**INITIALS.** By the 3 and 4 *W.* 4. c. 42. § 12. in actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter, &c.

**INJUNCTION, injunctio.]** An injunction is a writ, issuing by the order and under the seal of a court of equity, and is of two kinds. The one is a writ remedial, amongst the most ordinary objects of which the following may be enumerated: to stay proceedings in courts of law, in the spiritual courts, the courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation.

These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if relief consists in restraining the commission, or the continuance of some act of the defendant, a court of equity administers it by means of the *writ of injunction*.

The other species of injunction is called the *judicial writ*, and issues subsequent to a decree. It is a direction to yield up, to quit, or to continue the possession of lands, and is properly

described as being in the nature of an execution. *Eden on Injunctions*, 1.

An injunction to stay proceedings at law has been frequently stated to be in the nature of a prohibition, but it differs so essentially from it, that there seems considerable disproportion in the comparison. A prohibition is a remedy against an encroachment of jurisdiction, as is only from a superior court, is granted on the suggestion that the court to which it is directed has not the legal cognizance of the cause; and is directed to the judge of the inferior court, as well as to the parties in the cause. An injunction, on the other hand, where its object is to restrain proceeding in another court, is directed only to the parties, neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction, but is granted on the sole ground that, from certain equitable circumstances of which the court that issues it has cognizance, it is against conscience for the party to proceed in the cause. *Ibid.* 3.

An injunction is usually granted for the purpose of preserving property in dispute pending a suit; as to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act. *Mitford's Treatise on Chancery Pleadings*.

A court of equity will prevent the assertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the court entertained a bill at the suit of the lord of the manor to restrain this assertion of it, and, indeed, the commission of waste of every kind, as the cutting of timber, pulling down of houses, ploughing of ancient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copyright of printed books, and of patentees of alleged inventions; in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees. But in both these cases the bill usually seeks an account, in one, of the books printed, and the other of the profits arisen from the use of the invention; and in all the cases alluded to, it is frequently, if not constantly, made a part of the prayer of the bill, that the right, if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final

object of the bill being a perpetual injunction to restrain the infringement of the right claimed by the plaintiff. *Mitford's Treatise*.

A bill of interpleader generally prays an injunction to restrain the proceedings of the claimants in some other court: and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money into court. *Mitford's Treatise*.

And on payment of the money into court the plaintiff may move at once for a special injunction without first obtaining the common injunction. 1 *Sim. R.* 15.

Now under the interpleader act, 1 and 2 W. 4. c. 58. a party may in many cases obtain relief in a court of law. See tit. *Interpleader*.

In some instances, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and after repeated trials, and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation; and have thus, in some degree, imposed that restraint in personal, which is the policy of the common law in real actions. *Bath (E.) v. Sherwin: Leighton v. Leighton*, 2 Bro. P. C. 217: 1 P. Wms. 671: *Mitf.* 127. See tit. *Ejectment*, VII.

Injunctions were in former times frequently granted by the Court of Chancery to stay proceedings in the Exchequer. *Toth.* 113: 3 Ch. Rep. 1: 2 *Freem.* 161: 1 *Vern.* 220. And there are several old cases in which persons conceiving themselves privileged as being officers or accountants of the Court of Exchequer have obtained injunctions to restrain plaintiffs from proceeding against them in the Court of Chancery. *Cary*, 96. 136. S. C.: *Cases in Ch.* 143: *Nels.* 19.

This practice, however, was very soon exploded, and the necessary comity between the two courts has long been established.

Thus in *Coysgarne v. Jones*, *Amh.* 613. the cause, after a decree in the Exchequer, was heard in Chancery, but only because that decree had not been complete. And in a more recent case, the Court of Exchequer having refused an injunction, a bill was filed in Chancery, and an application made for an injunction. Lord Eldon, after reprobating the proceeding, observed, that unless some precedent could be produced, the court would not interfere until the hearing; and that he must take



the decision of the Court of Exchequer to be right, and accordingly refused the application. 19 Ves. 138.

A court of equity will also interfere by injunction to restrain a party from proceeding at law to recover penalties contained in deeds, agreements, &c. 1 Fonb. 153. 5th ed.

The doctrine upon the subject of relief from penalties has been thus stated by Lord Thurlow: "Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessional, and to secure the damage really incurred. 1 Bro. C. C. 419. But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the nonperformance of the agreement, a court of equity (except in certain cases of waste) refuses to interfere in restraining the recovery of such damages.

A common instance of this species of relief is that which is given against a clause of re-entry for nonpayment of rent. But where the covenant is of that nature that a court of equity cannot make a compensation for a breach of it, as for a breach of a covenant not to assign without licence; 1 Salk. 156; 2 Vern. 594; relief will not be given against the penalty.

Injunctions in the nature of a *specific performance* are usually of two kinds. 1st. Where granted on the application of a landlord to restrain a tenant from the violation of some covenant contained in his lease. 2d. Where granted on the application of a tenant holding under an agreement for a lease to restrain the landlord from proceeding against him in ejectment. See further, tit. *Lease*.

When a bill in Chancery is filed in the office of the Six Clerks, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay an execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by affidavits, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it: and when the answer comes in, whether it shall then be dissolved, or continued till the hearing of the cause, is determined by the court upon argu-

ment, drawn from considering the answer and affidavits together. 3 Comm. 443.

The writ of injunction is directed to the party proceeding, and to all and singular their counsellors, attorneys, and solicitors whatsoever; and concludes, enjoining, "We command that you, and each of you, desist from all further prosecution whatever at common law, for or concerning any matters in the complaint contained, under pain, &c." See 3 New Ab. 14: Vin. Ab. tit. *Injunction: Com. Dig.* tit. *Chancery*, D. (8).

If an attorney proceeds at law, after he is served with an injunction to stay proceedings, on affidavit made thereof, interrogatories are to be exhibited against him, to which he must answer on oath; and if it appears that he was duly served with the injunction, and hath proceeded afterwards contrary thereto, the Court of Chancery will commit the attorney to the Fleet for the contempt. 2 Lill. Ab. 64. But if an injunction be granted by the Court of Chancery in a criminal matter, the Court of B. R. may break it, and protect any that proceed in contempt of it. Mod. Cas. 16. But a court of law will take such notice of an injunction, that the defendant shall have no advantage against the plaintiff for not proceeding within the time allowed by the rules of the court, if the delay was occasioned by the defendant's obtaining an injunction. 2 Burr. 660.

However, a judge at Nisi Prius will not take a cause out of its regular course to avoid the effects of an injunction about to be granted, though the injunction is not upon the merits. 1 Camp. 559.

The common injunction to stay proceedings at law does not extend to a distress for rent. *Hughes v. Ring*, 1 Jac. & W. 392. Giving notice of trial is a breach of an injunction to stay trial. *Bird v. Brancker*, 2 Sim. & Stu. 186. Assistance rendered to magistrates making restitution after a forcible entry is a breach of an injunction for quieting possession. 3 Swanst. 626.

Where, after notice of motion for breach of an injunction, the parties privately came to an agreement, which was afterwards disregarded, the court held they had no jurisdiction to enforce such an agreement, which was no part of the suit, and not made a rule of court. 5 Mud. 78.

As to injunctions from committing waste, see that title; and with respect to the infringement of copyrights and patents, see tit. *Literary Property, Monopoly, Patents*.

**INJURY, injuria.]** A wrong or damage to a man's person or goods. The law punisheth injuries; and so abhors them, that, in certain cases, it grants writs of anticipation for

their prevention. But the law will suffer a private injury rather than a public evil; and the act of God, or of the law, doth injury to none. 4 Rep. 124: 10 Rep. 148. See *Malicious Injuries*, and other appropriate titles.

**INLAGARE.** To admit or restore to the benefit of the law. *Annal. Waverl. sub anno 1074.*

**INLAGARY** or **INLAGATION**, *inlagatio*, from the Saxon *in lagian*, i. e. *inlagare*.] A restitution of one outlawed, to the protection of the law and benefit of a subject. *Bract. lib. 3. tract. 2. c. 14: Leg. Canut. par. 1. c. 2.*

**INLAGH**, *inlagatus, vel homo sub lege*.] He who was of some frank pledge, and not outlawed. It seems to be the contrary to *utlagh*. *Bract. tract. 2. lib. 3. c. 11.*

**INLAND.** Is said to be *terra dominicalis, pars manerii, dominica, terra interior vel inclusa*; for that which was let to tenants was called outland. In an ancient will there are these words: "To Wulfee I give the inlands or demeans, and to Elfey the *utlands*, or tenancy." *Testam. Britheroico*. This word was in great use among the Saxons, and often occurs in *Domesday-book*. See *Inlantal*.

**INLAND BILLS.** See *Bills of Exchange*.

**INLAND TRADE.** A trade wholly managed at home, in one country. *Merc. Dict.* It is properly used in contradistinction to commerce, and so is the word trade generally; though the words trade and commerce are frequently confounded, especially with respect to the former being used for the latter.

**INLANTAL**, **INLANTALE.** Demesne or inland, to which was opposed *delantal*, land tenanted or outlawed. *Cowell*.

**INLEACED**, from Fr. *enlacs*.] Intangled or innared; the word we may read in the champion's oath. 2 *Inst.* 247.

**INLEGIARE.** When a delinquent has satisfied the law and is again *rectus in curia*, he is said *se inlegiare*. *Leg. H. 1. c. 11.* See *Inlagare*.

**INMATES.** Persons who are admitted to dwell with and in the house of another, and not able to maintain themselves. *Kitch. 45.* These inmates are generally idle persons harboured in cottages; wherein it hath been common for several families to inhabit, by which the poor of parishes have been increased; but suffering this was made an offence by the 31 *Eliz. c. 7.* (repealed by 15 *G. 3. c. 32.*) liable to a forfeiture of 10s. a month, inquirable of in the court leet, &c. If one have a house wherein he dwells, and lets part of it, so that there are several doors into the street, it is as two houses, and the under-tenant shall not be accounted an inmate. But it is otherwise if there be but one outer door for both families. 2 *Co. Inst.* A man keeps his daughter that is

married, and her husband, &c. by covenant, and they have some rooms in his house, they are not inmates; though if they live in one cottage, and part the house between them, and diet themselves severally, they will be inmates within the statute. If a person take another to table with him; or let certain rooms to one to dwell in, if he be of ability, and not poor, he is no inmate. *Kitch. 45.*

By stat. 7, 8 *G. 4. c. 38.* no constable shall be required to make presentment of inmates at any general gaol delivery, great or quarter sessions. See *tit. Poor, Vagrants*.

**INNAMIUM** for **NAMIUM.** A pledge. *Du Cange*.

**INNATURALITAS.** Unnatural usage. *Hen. de Knyghton, in Ed. 3. p. 2572.*

**INNINGS.** Lands recovered from the sea in Romney Marsh, by draining: ancient records mention the innings of archbishops Becket, Boniface, and others; and at this day there is Elderton's innings, &c. Where they are rendered profitable, they are termed *gainage lands*. *Law of Sewers, 31.*

**INNOCENCE.** The law always presumes that a man's character is good until the contrary is shown, or that he is innocent of an imputed offence until his guilt is proved. Where a woman married again within twelve months after her husband (who had not been heard of since) left the country, the presumption of innocence was held to predominate over the presumption of the continuance of life. 2 *B. & A. 386.*

**INNONIA.** From Sax. *innan*, i. e. *intus*.] An inclosure. *Spelm. Gloss.*

**INNOTESCIMUS.** The same as *videmus*; it signifies letters patent, so called, which are always of a charter of feoffment, or some other instrument, not of record, concluding *Innotescimimus per presentes*, &c.

**INNOVATION.** A technical expression in the Scotch law, implying the exchange of one obligation for another, so as to make the second come in place of the first. *Bell's Scotch Law Dict.*

As to the objection to any innovation in the English law, see 1 *Inst.* 379. In every inquiry with a view to any such innovation, regard should be had to the nature and extent of such principles of adherence to, or deviation from, the existing state of the law, which may be most beneficially adopted by those, who are under no other influences than such as arise from the wish to preserve or promote the system of judicature and legislation most conducive to the happiness and welfare of the community; to the discovery of a proper and middle course of procedure, avoiding equally the extreme of intemperate reform, or a servile adherence to existing institutions, in cases

where a deviation would be attended with a decided benefit in the whole of its consequences and effects.

**INNOXIARE.** To purge one of a fault, and make him innocent. *Leg. Ethelred*, c. 10.

**INNS AND INNKEEPERS.** The keeper of a common inn, or hostel, was anciently known by the appellation of hostellor or host. Common inns are instituted for passengers; for the proper Latin word is *diversorium*, because he who lodgeth there is *quasi divertens se à viâ*. 8 *Rep. Cayle's case. Conwell.*

The keeping of an inn is no franchise, but a lawful trade, when not exercised to the prejudice of the public, and therefore at common law there was no need of any licence or allowance for such erection; but if an inn use the trade of an alehouse, as almost all innkeepers do, it will be within the statutes concerning alehouses. *Dalt. c. 56: Blacherby, 170: 1 Burn's Just. Alehouses, 1: 3 Bac. Ab. Inns, &c. (A.)*

Every inn is not an alehouse, nor every alehouse an inn; but if an inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an inn. *Burn's J.*

Before the stat. 5, 6 *Ed. 6. c. 25.* it was lawful for any one to keep an alehouse without licence. 1 *Hawk. P. C. c. 78. § 52. in Marg.* See further, tit. *Alehouses.*

If the keeper of an inn harbours thieves, or persons of scandalous reputation, or suffers frequent disorders in his house; or sets up a new inn, in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns; (but this seems to be incorrect, for no institution is entitled to this protection, unless it be of the nature of a franchise, that originated in a grant of the crown; 2 *Rol. Abr. 84. 857*;) or keep it in a situation wholly unfit for such a purpose, he may by the common law be indicted and fined. *H. P. C. 146: Dalt. 33, 34: 1 Hawk. P. C. c. 78: 4 Bl. Comm. 167: 3 Bac. Ab. Inn, &c. (A.)*

I. Of the Liabilities of Innkeepers.

II. Of their Charges.

III. Of their Remedies for their Bills.

**I. Of the Liabilities of Innkeepers.**—It seems to be clear that if one who keeps a common inn refuse either to receive a traveller, or a guest, into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party in an action, but may also be indicted and fined at the suit of the king; and it is also said that he may be compelled by the constable of the town to receive and entertain such person as his guest;

and that it is no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers. 1 *Hawk. P. C. c. 78. § 2: 1 Vent. 383: Dalt. c. 7: Sulk. 388: 5 T. R. 273.*

And the refusal of the innkeeper was an offence which the constable was formerly bound to present at a court leet. 1 *Show, 270: 1 Saund. 312. c.*

He is also under an obligation to receive whatever goods his guests bring with them, but he is not bound to receive the goods of one who proposes to deposit them with him and to go elsewhere; for, as he reaps no profit from the deposit of goods, he is not bound to take them under his charge. *Mo. 876: Orl. Bridg. 227.*

Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journies, and are in a more peculiar manner protected by the law; it is for this reason that the innkeeper shall answer for those things which are stolen within the inn; though not delivered to him to keep, and though he was not acquainted that the guests brought the goods to the inn; for it shall be intended to be through his negligence, or occasioned by the fault of him or his servants. 8 *Rep. Cayley's case.* Soldiers billeted are guests. *Clayt. 97.*

But if an attorney hires a chamber in an inn for a whole term, the host is not chargeable with any robbery in it, because the party is, as it were, a lessee. *Mo. 877.*

So if a guest at an inn deposit his goods in a room which he uses as a warehouse, and of which he has the exclusive possession, the innkeeper is not liable for the loss. 1 *Stark. 249: and see Holt, 211. m.: 4 Maule & S. 306, post.*

If one comes to an inn, and makes a previous contract for lodging for a set time, and doth not eat or drink, he is no guest, but a lodger, and so not under the innkeeper's protection; but if he eats and drinks, or pays for his diet, it is otherwise. 12 *Mod. 255.*

If any theft be committed on a guest that lodgeth in an inn, by the servants of the inn, or by any other persons (not the guest's servant or companion), the innkeeper is answerable in action on the case; but if the guest be not a traveller, but one of the same town, the master of the inn is not chargeable for his servant's theft; and if a man is robbed in a private tavern, the master is not chargeable. 8 *Rep. 32, 33.*

In this action the innkeeper shall answer for any thing that is out of his inn, but only for such things as are *infra hospitium*, the words of the writ being *eorum bona et catalla infra hospitium illa existentia, &c.* But if the



innkeeper put the guest's horse to grass, without orders, and the horse is stolen, he shall make it good. 8 Rep. 34.

One came to an innkeeper and requested him to take charge of goods till a future day, which the innkeeper refused, because his house was full of parcels; the person bringing the goods then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him; when he got up, the goods were missing. Held, that the innkeeper was liable, the goods being lost during the time the plaintiff staid as a guest. 5 Term Rep. 273.

The innkeeper shall not be charged, unless there shall be some default in him or his servant; for, if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable; though if an innkeeper appoint one to lie with another, he shall answer for him. Although the guest deliver not his goods to the innkeeper to keep, &c. if they be stolen, he shall be charged: but not where the hostler require his guest to put them in such a chamber under lock and key, if he suffers them to be in an outward court, &c. 2 Shep. Ab. 334.

An innkeeper was held not to be answerable for the goods of a guest, which were lost through the guest's own negligence, out of a private room in the inn, chosen by himself for the purpose of exhibiting goods for sale; the use of which room was granted by the innkeeper, who at the same time told the guest, that there was a key, and he might lock the door, which he neglected to do. 4 M. & S. 306.

But an innkeeper can only limit his liability by express agreement or notice. Therefore where a package, part of a traveller's luggage, was placed, by his desire, in the commercial room of an inn, from whence it was stolen, the innkeeper was held liable, though it was found to be the custom of the house to deposit all luggage in the bed-room of guests. *Richmond v. Smith*, 8 B. & C. 9.

A guest in a common inn arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, although there was no trespass in the taking of them; which is yet generally required in cases of felony. *Dalt. c. 40*: *Burn's J.*: 1 Hawk. P. C. c. 33. § 18. So a guest who hath a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking away the same. 1 Hawk. P. C. c. 33. § 6.

II. *Of the charges of Innkeepers.*—Innkeepers not selling their hay, oats, beans, &c. and all kinds of victuals for man and beast, at

reasonable prices, having respect to the price sold in the markets adjoining, without taking any thing for litter, shall be fined for the first offence, and for the second be imprisoned for a month, and for the third stand in the pillory. Rates and prices may be set on all the commodities sold by innkeepers; and if they extort any unreasonable rates they may be indicted. 2 Cro. 609: *Carthew*, 150. See also stats. 12 Ed. 2. c. 6: 21 Jac. 1. c. 21: 3 H. 8. c. 8.

The punishment of the pillory, however, is now abolished, except in cases of perjury. See tit. *Pillory*.

But an innkeeper is entitled in his charges to his guests to estimate not only the intrinsic value of that which is furnished to them, but to include a reasonable compensation in respect of the trouble and risk which devolve upon him in the character of innkeeper, in taking charge of the property of his guests. 1 Show. 268.

If an innkeeper make a gross overcharge in his bill, the guest may tender him a reasonable amount, which will entitle him to a verdict in an action, or the innkeeper may be indicted and fined, for it is an extortion. *Carth.* 150: *Cro. Jac.* 609: 6 T. R. 7.

By the 24 G. 2. c. 40. § 12. no person shall recover any debt on account of spirituous liquors, unless *bonâ fide* contracted at one time to the amount of 20s. or upwards.

By reason of this statute an innkeeper cannot recover charges for spirits, unless each item is for spirits furnished at one time to the amount of 20s., although forming items in a bill for a dinner. 1 Selw. N. P. 61: 5 B. & 1211.

Where a bill of exchange is given in part for spirits furnished in small quantities, although the rest of the consideration is good, the plaintiff cannot recover. 3 Taunt. 226: and see 1 D. & R. 359.

If several persons come together in an inn or tavern, and dine there without a special agreement with the innkeeper, each is liable for the whole expense of the dinner, unless it is known to the innkeeper that some came there by invitation of others, in which case, such persons are not liable even for their own share. 3 Camp. 49.

But the officers of a regimental mess are each liable only for his own share of the expenses, for their manner of dining together is notice to him who provides the dinner. 3 Camp. 51. n.

III. *Of the Remedies of Innkeepers for their Bills.*—Action on the case on an implied *assumpsit* will lie against the guests for things had, where the innkeeper is obliged by law to furnish him with meat, drink, &c. And, when

a guest calls for any thing at an inn, the innkeeper may justify detaining the person of the guest, or a horse, or other thing, till he is paid his just reckoning. *Dyer*, 30: *Bac. Ab. tit. Inns*. By the custom of the realm, if a man lies in an inn one night, the innkeeper may detain his horse until he is paid for the expenses; but if he gives the party credit for that time, and lets him depart without payment, he hath waived the benefit of the custom, and must rely on his other agreement, having given credit to the person. 8 *Mod.* 172.

The innkeeper may maintain an action in *assumpsit* for the amount of his bill, notwithstanding he detains the defendant's horse or goods as a security, for such horse or goods are not in general cases available in satisfaction of his account. *Mo.* 896, 7; *Orl. Brig.* 227: *Yelv.* 67: 2 *Lord R.* 866.

By the custom of London and Exeter, if a man commit a horse to an innkeeper, and he eat out his price, the innkeeper may take him as his own, upon reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffic with strangers, that could not be known to charge them with the action; but the innkeeper hath no power to sell the horse by the general custom of the realm. *Bac. Ab. tit. Inns*: 2 *Roll. Abr.* 85: *Str.* 556.

A person brings his horse to an inn, and leaves him in the stable there; the innkeeper may keep him till the owner pay for the keeping; and, it is said if he eat out as much as he is worth, the master of the inn, after a reasonable appraisement, may sell the horse and pay himself. *Yelv.* 66. But if one bring several horses to an inn, and afterwards takes them all away but one, the innkeeper may not sell this horse for payment of the debt for the others, but every horse is to be sold to satisfy what is due for his own meat. 7 *Bulst.* 207. 217.

The innkeeper is entitled to feed the horse during its detention, and to charge the amount in his account, and that notwithstanding an order from the owner not to do so; for otherwise his security would fail. *Mo.* 876, 877: 8 *Mod.* 172. *Str.* 556.

If an innkeeper receives a stage coach, and from time to time suffers the coach and horses to depart without payment, he gives credit to the owners, and cannot afterwards detain the coach and horses for what was formerly due. *Str.* 556.

A person keeping a house of public entertainment in London, where provisions and bed are furnished for all persons applying and paying for the same, but which was merely termed a tavern and coffee house, and not frequented by stage coaches or wagons, and

having no stables attached to it, is to be considered an innkeeper, subject to the privileges and liabilities of such persons, and therefore has a lien on the goods of his guest for the payment of his bill. 3 *B. & A.* 283.

A livery-stable keeper, however, may not detain horses for their feed as an innkeeper, for he is not bound to receive them, and when he does so, it is on a special contract. But if a party agree not to take away horses till they are paid for, and afterwards, under pretence of a ride, take them elsewhere, the stable-keeper may retake and keep them till his charge is paid. *R. & M.* 193: 1 *C. & P.* 575. 577.

But where any part of an innkeeper's bill is for ale or beer, he must furnish an account of the particular items; for by the 11 and 12 *W. 3. c. 15. § 2.* if any innkeeper, &c. retail, utter, or sell any ale or beer in any unmarked vessel to any traveller or other person, or in giving any account or reckoning in writing, or otherwise refuse to state the particular number of quarts or pints, it is not lawful for him, for default of payment, of such reckoning, to detain any goods or things belonging to the person from whom it is due, but he is left to his action at law. See also 9 *G. 4. c. 61 § 19.* whereby licensed persons are required to use the standard measure in the sale of liquors.

See further as to inns, *tit. Action, Alehouses, Bailment, Drunkenness, Gaming*; and 1 *Hawk. P. C. c. 78.* at length.

INNS OF COURT, *hospitia curiæ*.] Are so called, because the students therein do not only study the law to enable them to practice in the courts in Westminster, but also pursue such other studies as may render them better qualified to serve the king in his court. *Forrescue*, c. 49. Of these (says *Sir Edward Coke*) there are four well known, *viz.* the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn; which, with the two Serjeants' Inns, and eight inns of Chancery, *viz.* Clifford's Inn, Symond's Inn, Clement's Inn, Lyon's Inn, Furnival's Inn, Staple's Inn, Bernard's Inn, and Thavei's Inn, (to which is since added New Inn,) make the most famous university for the profession of the law, or of any one human science in the world.

Our inns of court, or societies of the law, which are famed for their production of learned men, are governed by masters, principals, benchers, stewards, and other proper officers; and the chief of them have chapels for divine service, and all of them public halls for exercises, readings, and arguments, which the students are [*were!*] obliged to perform and attend for a competent number of years, before admitted to speak at the bar, &c. The admission and forms for this purpose must be in one of the inns of court, not in the inns of Chan-

cery. These societies or colleges, nevertheless, are no corporation, nor have any judicial power over their members, but have certain orders among themselves, which, by consent, have the force of laws: for light offences, persons are only excommunicated, or put out of commons: for greater, they lose their chambers, and are expelled; and when expelled out of one society, shall never be received by any of the others. All the lesser inns of Chancery are mostly inhabited by attorneys, solicitors, and clerks, and belong to some or other of the principal inns of court, who have been used to send yearly to some of their barristers to read to them. *Fortescue*. Clifford's Inn, Clement's Inn, and Lyon's Inn, belong to The Inner Temple; New Inn to The Middle Temple; Furnival's Inn and Thave's Inn to Lincoln's Inn; and Staples' Inn and Barnard's Inn to Gray's Inn. *Dugd. Orig.* 320.

If these societies refuse to call a member to the bar, the remedy is by appeal to the twelve judges as visitors of the inns of court. *Doug.* 339. But if they refuse to admit a party a member of the society, there is no remedy, for there is no inchoate right in an individual to be a member, and therefore a mandamus does not lie. *Rez. v. Lincoln's Inn*, 4 Barn. & C. 855.

The privileges possessed by the four inns of court with respect to the admission of persons as students, and of calling them to the bar, have recently been much canvassed, in consequence of the refusal of the benchers of the Inner Temple to call Mr. Daniel Whittle Harvey. The common law commissioners, in compliance with the commands of his Majesty, issued upon an address of the House of Commons, have made a report on the subject, of which the following is an extract:—

"The origin of this privilege of the inns of court appears to be involved in considerable obscurity.

"It was observed by Lord Mansfield in the case of the *King v. Gray's Inn*, *Doug.* 354. that the original institution of the inns of court nowhere precisely appears; but it is certain that they are not corporations, and have no charter from the crown. They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning; but all the power they have concerning the admission to the bar is delegated to them from the judges, and in every instance their conduct is subject to their control as visitors.

"In support of these positions, a variety of passages are cited from *Dugdale's Origines Juridicales*, which clearly show that in former times the judges and the benchers made regulations to be observed by the inns of court,

not only respecting the admission to the bar, but generally regarding the conduct of the members of the inn, and the admission of students.

"Many instances will be found in the appendix of such orders, sometimes made by advice of the privy council and judges, and sometimes by the judges only, and sometimes by the benchers, by advice and direction of the judges, and proceeding from the king's suggestion.

"There does not appear to be an instance in modern times in which the judges have interfered with the internal regulations of the different societies, though there are several in which they have acted as visitors upon appeals to them from decisions of the benchers respecting calls to the bar.

"In the late case of *Mr. Wooler*, reported as the case of *The King v. The Benchers of Lincoln's Inn*, 4 B. & C. 855. it was held that the judges had no power, as visitors, to interfere with the regulations of the inns of court respecting the admission of students, and also that the Court of King's Bench ought not, in such case, to interfere by *mandamus*. It was observed by Mr. Justice Littleton, "that the court was called upon to control the society in the admission of their members but that, as far as the admission of members is concerned, those are voluntary societies, not submitting to any government; they may in their discretion admit, or not, as they please: and the Court of King's Bench has no power to compel them to admit any individual." He added, the "interference of the judges at the instance of those members of the societies whom the benchers had refused to call to the bar, was perfectly right; because a member who had been suffered to incur expense with a view of being called to the bar, thereby acquires an inchoate right to be called; and if the benchers refuse to call him, they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member who has acquired such inchoate right is entitled to have that right perfected."

After stating the regulations prevailing in the different inns, and what is at present required of individuals seeking admission as students, or to be called to the bar, the commissioners propose several alterations of the existing practice, and that the irresponsible powers of the inns of court, with respect to admission into their societies, should be subjected to control.

In the first place they recommend that, either by act of parliament or by authority of the king in council, the societies be enjoined to allow, and the judges to receive, an appeal from the act of the benchers of any inn or



court rejecting an application for admission into their society.

They also think it right that in all cases where an application is rejected, whether for admission as a student, or to be called to the bar, that the party applying shall have notice in writing of the cause of rejection; shall be allowed to clear himself from any charge of misconduct it may involve; be at liberty to make his defence, either in person or by counsel, and to produce evidence; and that the evidence and other proceedings before the benchers shall (in the event of an appeal) be laid before the judges.

They further recommend it should be ordained that no general rules in future to be made by any of the societies on the subject of admission of students or calls to the bar, shall be of force until laid before, and approved and subscribed by, the judges.

**INNUENDO**, from *innuo*, to nod or beckon with the head.] A word used in declarations, indictments, and other pleadings, to ascertain a person or thing which was named before; as to say, he (innuendo, i. e. meaning, the plaintiff) did so and so, when there was mention before of another person. 4 Rep. 17. An innuendo is in effect no more than a *prædict*, and cannot make that certain which was uncertain before; and the law will not allow words to be enlarged by an innuendo, so as to support an action on the case for speaking of them. Hob. 2. 6. 45: 5 Mod. 345. An innuendo may not enlarge the sense of words, nor make supply, or alter the case where the words are defective. Hut. Rep. 44. In slander, both the person and scandalous words ought to be certain, and not want an innuendo to make them out; if a plaintiff declares that the defendant said these words, "Thou art a thief, and stolest a mare, &c." (innuendo the plaintiff), without an averment that the words were spoken to the said plaintiff, this is not good; because it doth not certainly appear of whom they were spoken, and the innuendo doth not help it. 1 Danv. Abr. 158. The usual method of declaring is, if the words were spoken to the plaintiff, the defendant said the words to, of, and concerning the plaintiff. If said to a third person, the word *to* is omitted. A man shall not be punished for perjury by the help of an innuendo. 5 Mod. 344. An innuendo will not make an action for a libel good, if the matter precedent imports not scandal, &c. to the damage of the party. Mich. 5 Ann. Where action lies without an innuendo, an innuendo shall be repugnant and void. See 1 Danv. 158.

Where the libellous tendency of words is not apparent on the face of the libel, the extrinsic circumstances must be averred, and the

connection pointed out by innuendo: and an innuendo can only *explain* the meaning of words, not *enlarge* it; thus "he has burnt my barn," innuendo the prosecutor's barn full of corn, is a bad innuendo. 4 Co. 20. a. But if it had been averred in the introduction that the defendant had a barn full of corn, and that, in a conversation respecting that barn, the words were uttered, the innuendo would have been good, and by coupling the libel with the inducement, the sense would have been complete. Cowp. 684: 3 Chitt. C. L. 873, 874.

"The navy," innuendo, "the royal navy of this kingdom," was held good where the libel was alleged to have been written "*of and concerning* the royal navy of this kingdom." 5 St. Tr. 590. See Cowp. 672: 11 St. Tr. 291: 1 Chitt. C. L. 874.

See tits. *Action, Indictment, Libel, Perjury.*

**INOPERATIO**. Of the legal excuses to exempt a man from appearing in court, one is, *inoperationis causa*, viz. on the days in which all pleadings are to cease, or in *diebus non juridicis*. Leg. H. 1. c. 61.

**INORDINATUS**. One who died intestate. Mat. Westm. 1246.

**INPENY AND OUTPENY**. Money paid by the custom of some manors, on the alienations of tenants, &c. Regist. Prior de Cokesford, p. 25.

**INPRISH**. Adherents or accomplices. Clans. 18 H. 3. in Brady, Hist. Engl. Append. p. 180.

**INQUEST, inquisitio**.] An inquisition of jurors, in causes civil and criminal, on proof made of the fact on either side, when it is referred to their trial, being impannelled by the sheriff for that purpose; and as they bring in their verdict, judgment passeth. Staundf. P. C. lib 3. c. 12.

The term *inquest* is used to signify the persons to whom the trial of any question, civil or criminal, is committed.

**AN INQUEST OF OFFICE**, or *Inquisition*, is an inquiry made by the king's officer, his sheriff, coroner, escheator, *virtute officii*, or by writ sent to them for that purpose; or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. Finch, L. 323, 4, 5. This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire, whether the king's tenant for life died seised, wherby the reversion accrues to the king; whether A., who held immediately of the crown, died without heirs, in which case the lands belong to the king by escheat; whether B. be attained of treason, whereby his estate is forfeited to the crown; whether C., who has purchased lands, be an alien, which is another cause of for-

feiture; whether D. be an idiot & *natiuite*, and, therefore, together with his lands, appertains to the custody of the king; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice than at present during the continuance of the military tenures amongst us; when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the court of wards and liveries was instituted by stat. 32 H. 8. c. 46. which was abolished at the restoration, together with the tenures upon which it was founded.

With regard to other matters, the inquest of office still remain in force, and are taken upon proper occasions, being extended not only to lands, but also to goods and chattels personal, as in case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se*, or one killed by chance-medley, is, not only with regard to chattels, but also to real interests, in all respects an inquest of office; and if they find the treason or felony (or formerly even the flight of the party accused, though innocent), the king is thereupon, by virtue of his *office found*, entitled to have his forfeiture; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand, as have moved to the death of the party. See *tit. Deodand, Forfeiture*.

Whether a criminal were a lunatic or not, should, formerly, be tried by an inquest of office, returned by the sheriff of the county; and if it were found by the jury that he only feigned himself lunatic, and he refused to plead, he was to be dealt with as one standing mute. *H. P. C.* 226: 1 *And.* 107. As to the course to be pursued at present, see *Idiots*, VI.

Also, formerly, where a person stood mute without making any answer, the court might take an inquest of office, by the oath of any twelve persons present, if he did so out of malice, from a perverse or obstinate disposition, &c. But after the issue was joined, when the jury were in court, if there was any need for such inquiry, it should be made by them, and not by an inquest of office. 2 *Hawk. P. C. c.* 30. § 5. Now where a person stands mute, the court may order a plea of not guilty to be entered. See further *tit. Mute*.

If a person attained of felony escape, and, being taken, denies he is the same man, inquest is to be made of it by a jury before he is executed. 2 *Hawk. P. C. c.* 51. See 1 *Burr.* 18, 19. Inquisition on an untimely death may be taken by justices of goal-delivery, oyer and terminer, or of the peace, if omitted by the coroner. But it must be done publicly and openly, otherwise it shall be quashed. By *Magna Charta*, nothing is to be taken for inquest of life or member. *Stat.* 9 *H. 3. c.* 26.

It is said there are two sorts of inquisitions, one to inform the king, the other to vest an interest in him; the one need not be certain, but the other must; and where an inquisition finds some parts well, and nothing as to others, it may be helped by *melius inquirendum*. 2 *Salk.* 469.

There is also a judicial writ *ad inquirendum*, to inquire by a jury into any thing touching a cause depending in court: inquisition may also be had upon extents of land, writs of *elegit*, where judgment is had by default, and damages and costs are recovered, &c. *Finch*, 484: 2 *Lil. Abr.* 65. See *tit. Elegit, Extent*.

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take, nor part with any thing. *Finch, L.* 82. For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. *Gilb. Hist. Exch.* 132: *Hob.* 347. It is however particularly enacted by stat. 33 H. 8. c. 20. that, in case of attainder for high treason, the king shall have the forfeiture instantly without any inquisition of office. And, as the king hath (in general) no title at all to any property of this sort before office found, therefore, by stat. 18 H. 6. c. 6. it was enacted, that all letters patent or grants of lands and tenements before office found or returned into the Exchequer, shall be void. And by the Bill of Rights at the revolution (1 *W. & M. stat.* 2. c. 2.) it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office), are illegal and void; which indeed was the law of the land in the reign of Edward the Third. 2 *Inst.* 48. See *tit. Forfeiture*.

With regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided the subject in the like case would have had a right to enter; and the king shall receive all the mesne or interme-

diate profits from the time that his title accrued. *Finch. L.* 325, 326. As, on the other hand, by the *articuli super cartas*; 28 *Ed. 1. st. 3. c. 19*; if the king's escheator or sheriff seize lands into the king's hand again, the party shall have the mesne profits restored to him.

There is not such nicety required in an inquisition as in pleading; because an inquisition is only to inform the court how process shall issue for the king, whose title accrues by the attainder, and not by the inquisition; yet, in the cases of the king, and a common person, inquisitions have been held void for incertainty. *Lane, 39*; 2 *Nels. Abr.* 1008.

In order to avoid the possession of the crown acquired by the finding of such office, the subject may not only have his petition of right, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found, but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common law process of the Court of Chancery; yet still in some special cases, he hath no remedy left but a mere petition of right. *Finch. L.* 324. These traverses, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before-mentioned, and other stats.; 34 *Ed. 3. c. 13*; 36 *Ed. 3. c. 13*. (both now repealed); and the 2 and 3 *Ed. 6. c. 8*. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff. *Law of Nisi Prius*, 201, 202. And must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus Domini Regis amoveantur*, &c. 3 *Comm.* 258. 260.

Some of these inquisitions are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony (but these are not now to be taken, see tit. *Forfeiture, Fugam Fecit*); of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution. 4 *Comm.* 301.

**INQUIRENDO.** An authority given in

general to some person or persons, to inquire into something for the king's advantage. *Reg. 72.*

**INQUIRY, WRIT OF.** See *Writ. tit. Judgment, I.*

**INQUISITION.** See tit. *Inquest*,

**INQUISITION, Ex officio mero.** Is one way of proceeding in ecclesiastical courts. *Wood's Inst.* 596. And formerly the oath *ex officio* was a sort of inquisition.

**INQUISITORS, inquisitores.]** Sheriffs, coroners, *super visum corporis*, or the like, who have power to inquire in certain cases, and by the statute of *Westm. 1.* inquirors or inquisitors are included under the name of *Ministri*. 2 *Inst.* 211.

**INROLLMENT, irrotulatio.]** Tho registering or entering in the rolls of the Chancery, King's Bench, Common Pleas, or Exchequer, or by the clerk of the peace or in the records of the quarter sessions, of any lawful act; as a statute recognizance acknowledged, a deed of bargain and sale of lands, &c.

An inrollment of a deed may be either by the common-law, or according to the statute: and inrollment of deeds ought to be made in parchment, and recorded in court, for perpetuity's sake. *Trin. 23 Car.*; *Pasch. 24 Car.*; 1 *B. R.* But the inrolling a deed doth not make it a record, though it thereby becomes a deed recorded; for there is a difference between matter of record, and a thing recorded to be kept in memory; a record being the entry in parchment of judicial matters controverted in a court of record, and whereof the court takes notice; whereas an inrollment of a deed is a private act of the parties concerned, of which the court takes no cognizance at the time of doing it, although the court permits it. 2 *Lil. Abr.* 69.

Every deed, before it is enrolled, is to be acknowledged to be the deed of the party before a master of the Court of Chancery, or a judge of the court wherein inrolled; which is the officer's warrant for enrolling of the same; and the enrollment of a deed, if it be acknowledged by the grantor, will be good proof of the deed itself upon a trial. A deed may be enrolled without the examination of the party himself; for it is sufficient if oath is made of the execution. If two are parties, and the deed is acknowledged by one, the other is bound by it: and if a man lives in New York, &c. and would pass land in England, a nominal person may be joined with him in the deed, who may acknowledge it here, and it will be binding. 1 *Salk.* 389.

If the party dies before it is enrolled, it may be enrolled afterwards; and inrollments of deeds operate by virtue of the statute of inrollments; but if livery and seisin, &c. be had



before the inrolling, it presents the operation of the inrollment, and the party shall be in by that, as the more worthy ceremony to pass estates. 1 *Leon.* 5: 2 *Nels. Abr.* 1010. Although inrollment, or matter of record, shall not be tried *per pais*, yet the time when the inrollment of a deed was made shall. 2 *Lil.* 68.

Inrollment is ordained in divers cases by statute; of bargain and sales by stat. 27 *H. 8. c.* 16. Deeds in corporations, &c. stat. 34 and 35 *H. 8. c.* 22. Grants from the crown of felon's goods, &c. stats. 4 and 5 *W. & M. c.* 22. As to the general registry of conveyances in Yorkshire and Middlesex, see tit. *Registry of Deeds*, IV.

By stat. 27 *H. 8. c.* 16. no manors, lands, &c. shall pass from one to another whereby any estate of inheritance or freehold shall be made or take effect by reason only of any bargain and sale thereof, unless such bargain and sale be made by deed, indented, and inrolled within six months after the date in one of the Courts of Record at Westminster, or with the clerk of the peace in the county where the lands lie. By 5 *Eliz. c.* 26. this act is extended to counties palatine.

By stat. 10 *Anne. c.* 18. where a bargain and sale inrolled shall be pleaded with a profer, a copy of the enrollment signed by the proper officer, and proved on oath to be a true copy, shall be of the same force as the deed itself.

As to the inrollment of proceedings in bankruptcy, see tit. *Bankrupts*, V.

By the 3 and 4 *W. 4. c.* 74. abolishing fines and recoveries, every assurance by a tenant in tail (except leases not exceeding 21 years at a rack-rent, or not less than five-sixths of a rack-rent), and every disposition by deed by a commissioner of the lands of a bankrupt tenant in tail, are to be inrolled in Chancery within six months, as well as many other of the deeds and proceedings required by the act. See further tit. *Tail*.

An indorsement on the back of the deed by the proper officer is sufficient evidence of the inrollment. *Doug.* 56. 58.

See further tits. *Bargain and Sale*, III.; *Deeds*, IV.

**INSANE OFFENDERS.** By 39 and 40 *G. 3. c.* 94. and 56 *G. 3. c.* 117. provision is made with respect to the trial and safe custody of persons acquitted of any offence on the ground of insanity. See further tit. *Idiots and Lunatics*, VI.

**INSCRIPTIONES.** Written instruments by which any thing was granted. *Blount*.

**INSCRIPTIONS.** Inscriptions upon tombstones; *Vin. Abr. V. T.* 687: *Sty.* 208; and other matters of a like nature, are admissible to prove a pedigree, for they are all in their

nature equivalent to declarations by the family on the subject. *Bull. N. T.* 233: *Comp.* 591: 13 *Ves.* 145: 10 *East*, 120.

**I'SERVIRE.** To reduce persons to servitude. *Du Cange*.

**INSETENA, Sax.]** An inditch. *Ordin. Romm. Maris. p.* 72.

**INSIDIAE.** The same with *Vigiliae* or *Excubiae*. *Fleta, lib. 2. cap. 4. par. 3.*

**INSIDIATOIRES VIARUM.** Way-layers; which words are not to be put in indictments, appeals, &c. by stat. 4 *H. 4. c.* 2. And before this statute, clergy might be denied felons charged generally as *Insidiatores Viarum*, &c. See stat. 23 *Car. 2. c.* 1. and tit. *Clergy, Benefit of*.

**INSIGNIA.** Ensigns or arms. See *Arms* and *Gentry*.

**INSILIUM.** Evil advice or counsel. Hence, *Insiliarius*, an evil counsellor. *Sim. Duncelm.*

**INSIMUL COMPUTASSET.** Is a writ or action of account, which lies not for things certain, but only for things uncertain. *Bro. Acco.* 81. Also, in *assumpsit*, a count is often added to the declaration, called an *insimul computasset*, i. e. setting forth an account stated, wherein the defendant was found indebted to the plaintiff in so much as a consideration for the defendant's promise to pay the sum found in arrear. See this Diet. tit. *Action, Assumpsit, Pleading*.

**INSIMUL TENUIT.** One species of the writ of *formedon* brought against a stranger by a coparcener on the possession of the ancestor, &c. See *Formedon*.

**INSINUATION, insinuatio.]** A creeping into a man's mind or favour covertly; mentioned in the stat. 21 *H. 8. c.* 5. Insinuation of a will is, among the civilians, the first production of it; or leaving it in the hands of the registrar, in order to its probate.

**INSOLVENT.** Till of late the Chancery would not put out an insolvent trustee; for that he was intrusted by the donor: an insolvent person made executor cannot be put out by the ordinary; for he is intrusted by the testator. *Comb.* 185: *Carth.* 457. But Chancery granted an injunction against him, not to intermeddle with the assets, any further than to satisfy the legacy given to himself; for in equity he is but a trustee for the other legatees (who in this case were infants); and where a trustee is insolvent, the court of Chancery will compel him to give security before he shall enter upon the trust. *Carth.* 458. See tits. *Bankrupt, Chancery, Executor, Trustees*.

**INSOLVENT DEBTORS.**—Many acts have been from time to time made for the relief of insolvent debtors.

By the 7 G. 4. c. 56. the statutes then in operation, with the exception of part of the 5 G. 4. c. 61. were repealed, and the laws relative to this subject consolidated and amended. This act was only for a limited time, but it has been continued by the 1 W. 4. c. 38. and the 2 and 3 W. 4. c. 44; the latter of these enacting that it shall remain in force until the 1st of June, 1835, and from thence until the end of the next session of parliament.

The provisions of the 7 G. 4. c. 56. are very numerous, and run to great length. It has therefore been thought advisable not to attempt giving even an outline of them, in the present work, the more especially as it is doubtful whether the Insolvent Courts will not be abolished, or at least very much modified, as soon as the intended alterations in the law of arrest are carried into effect.

As to the act 32 G. 2. c. 28. usually called the Lords' Act, see tit. *Debtors, Execution*.

**INSPECTATOR.** A prosecutor or adversary at law. *Paroch. Antig.* 388.

**INSPECTION.** See *Age, Infancy, III, Trial*.

Trial by inspection, or examination, is, when for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, decide the point in dispute. See 3 *Comm.* 331.

**INSPECTION OF WRITTEN DOCUMENTS.** By the 3 and 4 W. 4. c. 42. § 15. a power is given to the judges to make regulations by general rules or orders, relative to the inspection, &c. of written or printed documents; but no such rules or orders have as yet been made.

As to the cases in which a court will order a plaintiff or defendant to allow the other party to inspect documents in his possession, see *Tidd: Archbold's Practice*, by Chitt. 769: 2 *Starkie on Evidence*, 411.

A person is entitled to inspect and take copies of documents of a public nature, as, court rolls, corporation, Bank, East India, parish, or Custom-house books, in which he has an interest; 7 *Mod.* 129: 1 *Str.* 304: *Barnes*, 236: 2 *Str.* 260. 954. 1005: but not if he be a mere stranger. 8 *T. R.* 390.

Where there is no action pending, the motion is for a mandamus. 4 *M. & S.* 162.

**INSPEXIMUS**, *we have inspected*. A word used in letters patent giving name to them, being the same with exemplification, and called *inspeximus*, because it begins, *Rex omnibus*, &c. *Inspeimus irrotulamentum quarrand., literar., patent., &c.* See *Patents*.

**INSTALMENT.** A settlement, establish-

ing, or sure placing in; as instalment into dignities, &c. See stat. 29 *Car.* 2. c. 2.

In ecclesiastical promotions, where the freehold passes to the persons promoted, corporal possession is required to vest the property completely in the new proprietor; who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. 2 *Com.* 312.

Instalment signifies also either the payment, or the time appointed for payment, of different portions of a sum of money; which, by agreement of the parties, instead of being payable in the gross, at one time, is to be paid in parts, at certain stated times; such as are frequently specified in conditions to bonds, &c. or defeasances, or warrants of attorney to confess judgments.

**INSTANCE.** Is that which may be insisted in at one diet or course of probation. *Scotch. Dict.*

**INSTANCE COURT of Admiralty.** See tit. *Admiralty*.

**INSTANT**, *Lat. instans, instanter.*] An indivisible moment of time; which, though it cannot be actually divided, yet in intendment of law it may, and be applied to several purposes: he who lays violent hands upon himself commits no felony till he is dead, when dead he is not in being so as to be termed a felon; but he is so adjudged in law *eo instante*, at the very instant of this fact done. See tit. *Forfeiture*. And there are many other like cases where the instant of time that is not divisible in nature, in the consideration of the mind is divided. *Plowd.* 258 b.: and vide *Co. Lit.* 185. b.: *Vin. Abr.* tit. *Instant*, A. pl. 2.

A instant is not to be considered in law, as in logic, as a point of time, and no parcel of time; but in our law, things which are to be done in an instant, have in consideration of law a priority of time in them. Vide *Co. Lit.* and *Plowd.* as cited before. And in several cases, a difference is allowed in our law in an instant, as *per mortem et post mortem*, &c. See *Show.* 415.

**INSTANTER**, *Lat.*] Instantly or presently. *Law Lat. Dict.*

Trial shall be had *instanter* where a prisoner, between attainder and execution, pleads that he is not the same that was attainted. In such a case a jury is to be impannelled to try this collateral issue, *viz.* the identity of

his person, and in such collateral issue the trial shall be *instante*. See *Stuundf. P. C.* 163: *Co. Lit.* 157: 3 *Burr.* 1809. 1812; where an issue on the indentivity of the person was joined, and the several points following were determined. 1st. It is to be tried *instante*, unless the court (upon circumstances) give time. 2dly. The award of the execution is to be by the second judge, if the sentence before pronounced was for felony. 3dly. The defendant is not entitled to a copy of the record. 4thly. The court will not name the day of execution, but leave it to the sheriff. See also tits. *Execution of Criminals, Inquisition*.

Where a party is ordered to plead *instante*, he must plead same day. *Tidd.* 9 *Ed.* 567: *Archbold*, by *Chitty*, 211. 507.

**INSTAURUM.** Is used in ancient deeds for a stock of cattle: *staurum* and *instauramentum* signify young beasts, store or breed. *Mon. Angl. tom.* 1. p. 548. *Instaurum* was commonly taken for the whole stock upon a farm, as cattle, wagons, ploughs, and all other implements of husbandry. *Fleta*, lib. 2. cap. 72. *Instaurum ecclesiæ* is applied to the books, vestments, and all other utensils belonging to a church. *Synod. Ezet. ann.* 1287.

**INSTIRPARE.** To plant or establish. *Brompt.* 935.

**INSTITOR.** A person in the Roman law to whom the immediate management of any manufactory, ship, or undertaking was committed. A mercantile *consignee* or *factor* is in this sense an *institor*.

**INSTITUTE.** The Scotch term for the person to whom an estate is first given by destination or limitation.

Certain words of *Lord Chief Justice Coke* are cited as the first, second, and third institute. See tit. *Law Books*.

**INSTITUTION, institutio.** Is when the bishop says to a clerk who is presented to a church living, *instituo te rectorem talis ecclesiæ, cum curâ animarum, et accipo curam tuam et meam*: or it is a faculty made by the ordinary, whereby a parson is approved to be inducted to a rectory or parsonage. If the bishop upon examination finds the clerk presented capable of the benefice, he admits and institutes him; and institution may be granted either by the bishop under his episcopal seal; or it may be done by the bishop's vicar-general, chancellor, or commissary: and if granted by the vicar-general, or any other substitute, their acts are taken to be the acts of the bishop: also the instrument or letters testimonial of institution may be granted by the bishop, though he is not in his diocese: to which some witnesses should subscribe their names, 1 *Inst.* 344. The bishop by institution transfers the cure of

souls to the clerk; and if he refuseth to grant institution, the party may have his remedy in the court of audience of the archbishop, by *duplex querela*, &c., for institution is properly cognizable in the Ecclesiastical Court: where institution is granted and suspected to be void for want of title in the patron, &c. a super-institution hath been sometimes granted to another, to try the title of the present incumbent by ejectment. 2 *Rol. Ab.* 220: 4 *Rep.* 79.

Taking a reward for institution incurs a forfeiture of double value of one year's profit of the benefice, and makes the living void. *Stat.* 31 *Eliz.* c. 6. On institution the clerk hath a right to enter on the parsonage-house and glebe, and take the tithes; but he cannot grant, let, or do any act to charge them, till he is inducted into the living: he is complete parson as to the spirituality, by institution; but not as to the temporality, &c. By the institution he is only admitted *ad officium*, to pray and preach; and is not entitled *ad beneficium*, until formal induction. *Plowd.* 528. See *Instalment*. The church is full by institution against all common persons, so that if another person be afterwards inducted, it is void, and he hath but a mere possession; but a church is not full against the king till induction. 2 *Inst.* 358; 1 *Rol. Rep.* 151. When a bishop hath given institution to a clerk, he issues his mandate for induction; and if the archbishop should inhibit the archdeacon to induct the clerk thus instituted, he may do it notwithstanding. The first beginning of institutions to benefices was in a national synod held at Westminster, anno 1124. For patrons did originally fill all churches by collation and livery; till this power was taken from them by canons. *Seldon's Hist. of Tithes*, c. 6 and 9. p. 375. See further tits. *Advowson, Parson, Simony*, &c.

**INSTRUMENT.** A term used for a deed, writ, or other legal proceeding or matter reduced to writing.

**INSUCKEN MULTURES.** Is the quantity of corn paid by those who are thirled to a mill. *Scotch Dict.* See tit. *Thirlage*.

**INSUPER.** Is used by auditors in their accounts in the Exchequer; as when so much is charged upon a person as due upon his account, they say so much remains *insuper* to such an accountant.

#### INSURANCE, OR ASSURANCE.

A contract, by which a person (who thence is termed the *INSURER*, or, from the form of the indictment, which is signed by him alone, the *UNDERWRITER*), in consideration of a sum of money, technically called the *PREMIUM*, be-



comes bound to secure a party against the risk of loss happening from certain events marked out by the contract. The party deriving security from the contract is called the **INSURED**, or more commonly **ASSURED**; and the contract itself is termed a **POLICY OF INSURANCE**.

It has been conceived, from a passage in Suetonius, that Claudius Cæsar was the first who invented this custom of assurance; but with greater probability, Savary, in his *Dictionnaire de Commerce*, tit. *Assurance*, thinks this custom was first introduced by the Jews in the year 1182; but whoever was the first contriver, or original inventor of this useful branch of business, it has been many ages practised in this kingdom, and is supposed to have been introduced here by some Italians from Lombardy, who at the same time came to settle at Antwerp, and among us; and this being prior to the building of the Royal Exchange, they used to meet in a place where Lombard-street now is, at a house they had called the Pawn House, or Lombard, for transacting business; and as they were then the sole negotiators in insurance, the policies made by others in after-times had a clause inserted, that those latter ones should have as much force and effect as those formerly made in Lombard-street.

This latter opinion is adopted by Mr. Park (now Mr. Justice Park) in his "System of the Law of Marine Insurances, &c." a book long wanted by the profession, and containing information the most necessary to the commercial part of the community. It is founded almost solely on the decisions of Lord Mansfield; a name that will ever be dear to all lovers of equity, and to none more than to the merchants of London.

From this excellent digest of the law, the following abridgment was compiled; and it is now continued by reference to such modern determinations as appear to ascertain any principal of the law, without entering too minutely into nice distinctions depending on the complicated facts of particular cases. Other valuable compilations have since appeared upon the subject.

Varying a little from the order in which the above writer has disposed his matter, the subject may for the present purpose be aptly arranged as follows:—

**I. Of MARINE INSURANCES.** *First, considering—*1. *The Policy, its Nature.* 2. *The construction to be put upon it.* 3. *Warranties in Policies.* 4. *The proceedings on Policies.* 5. *Of Re-assurances and Double Insurances.*

**II. Of Losses under such Policies.** 1. *Of total Losses, by Peril of the Sea.* 2. *Of total Losses by Capture.* 3. *Detention.* 4. *Barratry.* 5. *Of general or gross Average; Average or partial Loss; and Adjustment and Stranding.* 6. *Of Salvage.* 7. *Of Abandonment.*

**III. Of Fraud, Illegality, or Irregularity, which either vitiate the Policy, or prevent a Recovery though a Loss happen.** 1. *Of direct Fraud in Policies.* 2. *Of changing the Ship.* 3. *Deviation in the Voyage.* 4. *Sea-worthiness.* 5. *Of Wager Policies and Valued Policies; and of Insurable Interests.* 6. *Of Illegal Voyages, and Enemies' Ships, &c.* 7. *Of Prohibited Goods.* 8. *Of the Return of Premium.*

**IV. Of BOTTOMRY and RESPONDENTIA.**

**V. Of INSURANCES ON LIVES.**

**VI. Of INSURANCES AGAINST FIRE.**

Previous to entering into the above detail, it may be proper to say a few words as to who may be insurers or underwriters; and what property may in general be insured.

Policies of insurance may be entered into either by individuals or by companies, which are either corporate or unincorporated. Individual insurers are usually called underwriters.

At common law, and by the usage of merchants, any person whatever might be an insurer. But by the 6 G. 1. c. 18. all societies or partnerships, except the Royal Exchange and the London Assurance Companies, were prohibited from underwriting policies of insurance. However, this stat. was repealed by the 5 G. 4. c. 114. § 1., and the law restored to its former footing.

The most frequent subjects of insurance are, 1st, ships, goods, merchandizes; the freight or hire of ships, 2d. houses, warehouses, and the goods in them from danger by fire. And 3d. lives. (Of the two latter, see post, V. VI.) *Bottomry* and *respondentia* are also particular species of property which may be insured; but which must be particularly expressed in the policy; 3 Burr. 1394: 1 Black. Rep. 405; unless by the usage of the trade it is understood. Park, 11. See post, IV. Insurance on seamen's wages is prohibited. Park, 12. A governor of a fort may insure it against the attacks of an enemy. 3 Burr. 1905. Insurance on enemies' property is prohibited by stat. 33 G. 3. c. 27. § 4. See post, III. 5. 7. Money lent to the captain payable out of the freight, is not an insurable interest, and

the policy being illegal on the face of it, the insured is not entitled to a return of premium. 2 *Camp.* 626: 1 *Maule & S.* 39. Profits expected on a cargo of goods may be insured, but the insured must show that he could have made a profit if the loss had not happened. 2 *East*, 544: 13 *East*, 274: 8 *Term R.* 13: 2 *Maule & S.* 485.

A trustee or consignee may insure in their own names, &c. while the ships, &c. are *in transitu* to this country. 8 *T. R.* 30. So may a prize agent. *Ib.* So may the captors of a ship seized as prize. *Boem. v. Bell*, *Ib.* 544. See *post*, III. 5.

All insurances on slaves, or relating to the slave trade, are declared void by the 47 *G. 3. st.* 1. c. 36; and by stat. 51 *G. 3. c.* 23. every insurer underwriting a policy for that purpose, is declared guilty of a misdemeanor. See *tit. Slaves*.

I. 1. Of policies there are two kinds, *valued* and *open*; the difference is, that, in the former, property insured is valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned. In the case of an open policy, the real value must be proved; in the other, it is *agreed*, and it is just as if parties had admitted it at the trial. 2 *Burr.* 1117.

In case of an open policy the standard for ascertaining the value of the goods is the invoice price at the loading port, together with premium of insurance and commission. 12 *East*, 639: and see 2 *B. & Adol.* 655.

By 11 *G. 1. c.* 30. when an insurance is effected, a policy must be made out within three days under a penalty of 100*l.*; and by the same statute, promissory notes for insurances are void.

Policies are only simple contracts, but of great credit, and ought not to be altered when once they are signed; unless there be some written document to show that the meaning of the parties was mistaken, or unless they be altered by *consent*. 1 *Ves.* 317: 1 *Atk.* 545: *Salk.* 444.

A policy is a species of property for which *trover* will lie at the instance of the insured, if it be wrongfully withheld from him. *Park*, 4.

The form of the policy now used is two hundred years old, and is very irregular and confused, and often ambiguous. It is partly printed, to serve for general purposes common to all policies, and partly written, for the purpose of inserting the names of the parties, and to express their meaning; and the written clauses shall accordingly control the printed words. See 3 *Burr.* 1555: *Park*, 5. 15.

There are nine requisites of a policy. *First*, the name of the person insured. It was

formerly much the practice to effect policies of insurance *in blank* without naming the persons on whose account they were made; this was found both mischievous and inconvenient: to remedy which, the 25 *G. 3. c.* 34. directed the name of *all* persons interested, or, if they resided abroad, the name of their agents in this kingdom, to be inserted in the policy. The provisions of this act, however, not being without their attendant evils (see 1 *Term. Rep.* 313. 464.) it was repealed by the 28 *G. 3. c.* 56. which enacts, that it shall not be lawful for any person to make assurance on ships or goods, without inserting the name or firm of one or more of the parties interested: or the name or firm of the consignor or consignee; or of the person receiving the order for, or effecting, the policy; or of the person giving directions to effect the same. All policies without one or other of these requisites to be null and void.

For the occasion and reason of passing these acts, see the observations of *Buller, J.* in 1 *B. & P.* 316: *Ibid.* 345. And further, as to the construction of the act, 28 *G. 3. c.* 56. 1 *M. & S.* 485: also 15 *East*, 4.

In a policy the persons interested were denominated "the trustees of Messrs K. F. &c.:" held, that this might be considered their stile and form of dealing within the above statute. 1 *Camp.* 538.

*Secondly.* The names of the ship and master; unless the insurance be general on any ship or ships. *Park*, 19.

*Thirdly.* Whether the insurance be made on ships, goods, or merchandizes. The general description of goods, &c. is sufficient to include a cargo of gold and silver, coined or uncoined, pearls and other jewels, provided their conveyance be lawful. 4 *Burr.* 1966: 1 *Price*,

195. A policy on goods generally does not include goods lashed on deck, the captain's clothes, or the ship's provisions. *Park*, 21. But where the insurance was on forty carboys of vitriol, which were carefully lashed on deck (as it was proved was frequently done), and some of the vitriol having caught fire, it was necessary to throw the whole overboard, *Lord Ellenborough* held, that the underwriters were bound to know the usage, and therefore were liable. 4 *Camp.* 142. A policy on the ship and furniture includes provisions sent out in a ship for the use of the crew. 4 *T. R.* 206. See *post*, II. 1. 5.

Where an insurance is made in respect of lien of a factor, or other like special interest, a policy effected generally on goods will suffice. 1 *Burr.* 489: 3 *Burr.* 1401. But when freight is intended to be insured, it should be described *eo nomine* in the policy. 2 *New R.* 315: 11 *Ves.* 629.

When the policy describes the species of goods intended to be protected, the underwriters will not be liable for a loss of property which does not correspond with the description. 4 *Taunt.* 333.

*Fourthly.* The name of the place at which the goods are laden, and to which they are bound. A policy, therefore, from London to ——— is void. *Moll. b. 2. c. 7. § 14.* It is usual to state at what ports or places the ships may touch or stay; to avoid questions on deviation. *Park, 22.*

*Fifthly.* The time when the risk commences, and when it ends. On the goods it usually begins from the lading on board the ship, and continues till they are safely landed; on the ship from her beginning to lade at A., and continues till she arrives at the port of destination, and be there moored in safety twenty-four hours. See *post*, II.

*Sixthly.* The various perils against which the underwriters insure. The words now used in policies are so comprehensive, that there is scarcely any event unprovided for. The insurer undertakes to bear "perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints, and detentions of kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners; and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or part thereof."

The policy is frequently made with the words *lost or not lost* in it; which are peculiar to English policies, and add greatly to the risk: as though the ship be lost at the time of the insurance made, the underwriter is liable, if there be no fraud. *Park, 24. See 5 Burr.* 2083.

But the retrospective operation of the policy is sometimes controlled by a warranty that the vessel was safe on a particular day. 3 *T. R.* 360.

*Seventhly.* The premium or consideration for the risk, which is always expressed in the policy to be received at the time of underwriting; but policies in general are effected by the intervention of a broker, between whom and the insurers open accounts are kept by the usage of trade; and who are therefore, it seems, liable, in an action, to the insurers, notwithstanding such admission by the words of the policy. *Park, 26. But see 3 East,* 222.

*Eighthly.* The day, month, and year, on which the policy was executed.

*Ninthly.* The policy must be duly stamped. The stamp duties payable on sea insurance policies are regulated by the 55 *G. 3. c. 184;*

and 3 and 4 *W. 4. c. 23;* and vary according to the voyage or risk, the premium paid, and the amount insured.

Where application was made to the underwriters for liberty for a ship to go into port, to discharge part of her cargo, having been overladen, and leave was given, and a loss ensued; held, that the memorandum giving such liberty did not require a new stamp. 2 *B. & A.* 320.

Where several underwriters on the same policy all agree to refer the demand of the assured on that policy, one stamp for the agreement to refer, and one stamp for the award, are sufficient; for the several underwriters have a community of interest in the subject insured. 6 *Taunt.* 171.

The 55 *G. 3. c. 63.* contains a provision to legalise in certain cases alterations in the terms and conditions of a policy without a fresh stamp.

It is stated above, that policies are generally effected by the intervention of a broker, and that the name of the agent of an insurer residing abroad must be mentioned in the policy. It seems, therefore, the proper place here to mention, that such agent or correspondent is liable to an action for *not insuring*, which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the underwriter might take advantage. The whole law on this subject is laid down in *Smith v. Lascelles*, where *Buller, J.* mentioned three instances in which such order to insure must be obeyed. 1. Where a merchant abroad has effects in the hands of his correspondent here. 2. Where, though the merchant has no effects in the hands of his correspondent, yet the course of dealing has been such, that the one has been used to send orders for insurance, and the other to comply with them. 3. If the merchant abroad send bills of lading to his correspondents here, and ingrafts on them an order to insure, as the implied condition on which the bills of lading shall be accepted. 2 *T. R.* 187. and *note.*

A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy. 4 *Camp.* 166.

2. A policy being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. And, in question on such construction, no rule has been more frequently followed, than the usage of trade, with respect to the voyage insured. 1 *Burr.* 347, 348. See also 2 *Salk.* 443. 445: 2 *Str.* 1265: and *post*, III. 3.



The policy is to be construed liberally for the benefit of the insured, and with a due regard to its design and object as a contract of indemnity. *Cowp.* 585: 3 *East*, 579: 9 *East*, 81: 10 *East*, 344.

Although, as in the case of other written instruments, proof of usage is not admissible to contradict its express tenor (7 *T. R.* 421: and see 1 *Taunt.* 455); yet parol evidence is admissible to explain doubtful phrases, or to ascertain the usual practice of the trade. 4 *T. R.* 208: 7 *T. R.* 210: 8 *Taunt.* 261: 2 *B. & A.* 113.

The usage of trade with respect to East India voyages has been more notorious than in any other, the question having more frequently occurred. The charter-parties of the India Company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship might be sent while in India, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship *Winchelsea*, East Indiaman; the nine verdicts in which were ultimately uniform, for the plaintiffs the insured, against the underwriters. 3 *Burr.* 1707. *et seq.* They have been since recognized and allowed in subsequent cases. See *Park*, 49. 51.

However, the parties may by their own agreement prevent such latitude of construction: nor need this be done by express words of exclusion; but if, *from the term used*, it can be collected, that the parties meant so, that construction shall prevail. *Dougl.* 27. And the equitable principles of construction shall never be carried so far as that when a man has insured one species of property, he shall recover a damage which he has suffered by the loss of a different species. Thus, one who has insured a cargo of goods, cannot, under that insurance, recover the freight paid for the carriage; nor can an owner who insures *the ship merely*, demand satisfaction for the loss of merchandize laden thereon, and extraordinary wages paid to seamen, or the value of provisions by reason of *detention* of the ship at any port. *Park*, 52—61. See also 1 *Term Rep.* 127. 130: and *post*, II.

Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. 4 *East*, 410.

A policy on a ship generally from A. to B. was construed to mean till the ship was unladen. *Skinn.* 243. But if it contain the usual words *till moored twenty four hours in safety*, the insurers shall be answerable for no loss that does not actually happen before the expiration of the time. Even though the loss was occasioned by an act (of barratry by the master) committed during the voyage insured. 1 *Term Rep.* 252.

Under a policy containing those words, the underwriters were held liable for a subsequent loss; because the captain, the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine; and therefore the ship could not be said to have moored *twenty-four hours in safety*, although she did not go back for some days. 2 *Stra.* 1243.

Where the insurance is upon goods to London, and till the same be safely landed there, and the insured receive the goods *in his own lighter* on arrival, and before they reach land an accident happen, and the goods are damaged, the insurer is discharged. 2 *Stra.* 1236. But it is otherwise if the goods are put into a public lighter. *Bac. Abr. Merchant*, I. (ed. by *Gwillim & Dodd.*) But if the insured take charge of the goods himself, though they are in a public lighter, the insurers are discharged. 1 *New R.* 16. And if they be once landed in the usual course of business, the risk is at an end, even though the goods have never been in the possession of the consignees. 3 *Camp.* 161.

In a policy upon freight, if an accident prevent the ship from sailing, the insured cannot recover the freight which he would have earned if she had completed her voyage. 2 *Stra.* 1251. But if the policy be a valued policy, and part of the cargo be on board, when such accident happens, the insured may recover to the whole amount. 3 *T. R.* 362.

When an insurance is *at and from* any place, the ship is protected, from her first arrival during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the insurer is discharged. 1 *Atk.* 548: 2 *Atk.* 359: and see 1 *Bl. Rep.* 417, 418.

The great and leading cases on questions of construction are two:—*Tiernay v. Etherington*, and *Pelly v. Royal Exchange Company*. See 1 *Burr.* 341. 348. In these cases, the principles to be observed in the construction of policies are fully considered; and in the latter of them *Lord Mansfield* observed, that “the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be re-

ferred to by every policy." The same principles were adhered to in a subsequent case, where the same learned judge remarked that every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself. *Dougl.* 510—513. So in the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. *Dougl.* 527—531.

Policy on ship for four months, at and from a place to any port or ports whatsoever: held, that an open roadstead (being the usual place of lading and unlading) was a port, within the meaning of this policy. 2 *B. & A.* 460.

Where goods insured were warranted free from seizure in the port of discharge, the vessel having arrived within about two miles and a half from the harbour of the place to which she was destined, the captain cast anchor, and made the signal for a pilot; a pilot boat in consequence came out, with douaniers on board, who carried the vessel into the harbour, where the cargo was seized and condemned. This was held to be a seizure in her port of discharge within the meaning of the warranty. 3 *Camp.* 204.

In an insurance upon a voyage to the southern whale fishery, during the ship's stay and fishing, and at and from thence, back to London, *semble*, that if the ship send home by another vessel a part of what she has taken, and continue her fishing, the advantage is not ended by her shipping such part for England. And it clearly is not thereby terminated, if the part sent home consisted of damaged skins, which would, if kept on board, have damaged the residue of the cargo. 6 *Taunt.* 3.

A vessel chartered to an American port, laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her upon the notification of the embargo, to return with her cargo on board, or to discharge her cargo and return in ballast; discharged her cargo, remained eighteen months there till the embargo ceased, then shipped her homeward cargo, and was lost: held, that she was not bound, with relation to the underwriters on ship, to have returned with their cargo of salt, or to have sailed in ballast, and that the underwriters on ship were still liable. 7 *Taunt.* 462.

Insurances on goods from A. to B. "until they should be there discharged and safely landed;" on their arrival at B. the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. 2 *Bos. & Pul.* 430. 432. n.

Under a policy at and from an island, a ship is protected in moving from port to port in the same island. 2 *Taunt.* 301. And where the policy was on freight at and from Grenada to London, and it appeared there was only one custom house for the whole island of Grenada, and the vessel arrived safely at Grenada, and discharged part of her outward cargo at three different bays, and on proceeding to a fourth to discharge the residue and take in part of her homeward cargo, when she was lost by perils of the sea, it was held that the vessel was proceeding to the fourth bay for a purpose of the voyage, and that the insurer was liable. *Warre v. Miller*, 4 *Barn. & Cres.* 538. Policies at and from A. to B. include all preparations for the commencement of the voyage from A. to B. *Ibid.*

A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government. 4 *East*, 396.

Every insurance on alien property by a British subject must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer. 4 *East*, 410.

A policy at and from A. to B. is not vitiated by inserting without the consent of the underwriters the words "both or either." 3 *Camp.* 382.

3. Warranties in a policy of assurance are either express or implied. An express warranty must form part of the policy itself (*see post*); an implied warranty results by operation of law from the relative situations of the insured and underwriters; as for instance, that the ship is seaworthy, which is annexed to every policy by implication of law, without any stipulation.

Where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss, was no breach of the implied warranty that the ship should be properly manned. 2 *B. & A.* 73.

A warranty, in a policy of assurance, is a condition, or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. 1 *T. R.* 345. It is immaterial for what end, if any, the warranty is inserted in the contract; but, being inserted, it becomes a binding condition upon the insured, and he must show a literal compliance with it. *Park*, 318. So on the contrary warranties shall be strictly construed in favour of the insured. As where a ship is warranted well on any day certain, though she be lost by eight in the morning of the day when the policy was effected at noon, the underwriter shall be liable. 3 *T. R.* 360. It is

no matter whether the loss happened in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all inquiry about its materiality. 1 T. R. 346. It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to the merest accident, or to the most wise and prudential reasons, the policy is avoided. *Cowp.* 607.

And a warranty to sail on or before a certain day is not complied with, if the ship be prevented from unmooring by stress of weather, though she may be quite ready to sail. 1 M. & M. 309. And see 3 B. & Ad. 514.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and a representation; the latter of which need only be performed in substance, while a warranty must always be complied with strictly. In a warranty the person making it takes the risk of its truth or falsehood on himself; in a representation, if the insured assert that to be true which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud; but a representation, made without fraud, if not false in a material point, does not vitiate the policy. *Cowp.* 787: *Park*, c. 18. See *post*, III. 1.

In order to make written instructions binding as a warranty they must appear on the face of, and make a part of, the policy. *Cowp.* 790. For though a written paper be wrapt up in the policy, and shown to the underwriters at the time of subscribing, or even if it be referred to the policy, it is not a warranty, but a representation. *Doug.* p. 12. in *n.* But a warranty written in the margin (transversely, or otherwise) of the policy is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy. *Dougl.* 11, 12. *n.* 4. 13. *n.* And see 3 B. & P. 515. If the underwriter pay the loss on a policy, and after find that such warranty was not strictly complied with, he may recover back the money again by action; 1 T. R. 343; which was also a case arising on a warranty in the margin of a policy.

The various kinds of warranties are too numerous to be mentioned; depending generally upon the particular circumstances of each case. The three cases of warranty, on which most questions have arisen, are, as to the time of sailing, *convoy*, and *neutrality* of property.

As to the first of these; if a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable. *Park.* 325. c. 18. And a detention by government, previous to the proposed day of sailing, is no excuse for not complying with the warranty, nor a peril

within the terms of the policy. *Cowp.* 784. So, if the warranty be to sail after a specific day, and the ship sail before, the policy is equally avoided as in the former case. *Park.* 326. c. 18. But when a ship leaves her port of lading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she touches at any particular place of rendezvous for convoy, &c., her voyage must be said to commence from her departure from that port, and though she be detained at such place of rendezvous by an embargo, she has complied with the warranty. *Cowp.* 601—608: and see *Thelusson v. Ferguson*, *Dougl.* 361. *acc.* What shall be a departure from the port of London, or rather what is the port of London, remains yet undecided. It seems, however, that Gravesend is the limit of that port, where vessels receive the custom-house cocket, their final clearance on board, and from whence they must depart on the day mentioned in the warranty. *Park.* c. 18.

The warranty "to depart," before a certain day, which is used by the *Royal Exchange Assurance Company* in their policies, does not mean merely to break ground, but fairly to set forward upon the voyage. 6 *Taunton*, 241.

A licence to export to a hostile country was to continue in force for exporting until the 10th of September. The ship cleared at the custom-house in London, on the 9th of September, and on the 12th received her clearing note at Gravesend. No evidence being given by the assured to account for the delay, held, that the ship had not exported her cargo before the 10th, and that the insurance was void. 6 *Taunt.* 390.

A policy of assurance on freight and goods per ship named, at and from Portneuf to London, warranted to sail on or before the 28th of October, and on the 26th the ship dropped down from Portneuf, with an incomplete crew for the voyage, and on the 28th reached Quebec, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day; held, that the dropping down from Portneuf to Quebec on the 26th was not a compliance with the warranty. 3 M. & S. 456.

Policy of assurance on ship at and from Memel to the ship's port of discharge in England, warranted to depart on or before a particular day; held, that this warranty required not only that the ship should set sail on the voyage, but that she should be out of port on or before the day; and therefore where she set sail on the voyage before the day, but was detained within the harbour by adverse winds



until after the day, this was not a compliance with the warranty. 4 *Camp.* 84: 3 *M. & S.* 461.

The obligation to sail with a *convoy* is imposed on the insured either by the act of parliament, or by the express terms of warranty.

If the insured warrant that the vessel shall depart with convoy, and it do not, the policy is defeated, and the underwriter is not responsible.

A *convoy* means a naval force under the command of that person whom government, or any authorized by them, may happen to appoint. *Park*, c. 18.

The duty of officers appointed for convoy to merchant ships is prescribed by stat. 13 *Car.* 2. st. 1. c. 9. art. 17. confirmed by stat. 22. *G.* 2. c. 33. § 2. art. 17: *Park*, 350. n. See *post*, II. 4.

Ships not to set sail without convoy, 38 *G.* 3. c. 76: 43 *G.* 3. c. 57.

But see 39 *G.* 3. c. 32. which permits vessels laden with the produce of the fishery, &c. of Newfoundland or Labrador to sail without convoy or licence, notwithstanding the 38 *G.* 3. c. 76. § 1. &c.

To vacate the insurance it is not enough to show that the ship sailed without convoy by the instrumentality of an agent of the insured, unless it is shown that the agent had the authority from the insured for that purpose. 3 *Camp.* 497: 4 *Taunt.* 493. And as the law requires the ship to sail with convoy, the presumption is that she did so till the contrary is shown. 4 *Camp.* 231. Every person who ships goods in a vessel sailing without a convoy, does so at his peril of her having a licence for that purpose for the voyage. 4 *Taunt.* 187: 15 *East*, 517.

A sailing with convoy from the usual place of rendezvous, as Spithead for the port of London, is a departure with convoy within the meaning of such warranty. 2 *Stalk.* 443: 2 *Str.* 1263. 5. And although the words used are generally to depart with convoy, or to sail with convoy, yet they extend to sailing with convoy throughout the voyage. 3 *Lev.* 320. And this point was unanimously confirmed by the whole court in more modern times. *Doughl.* 72. *Lilly v. Ewer*.

Ships sailing from foreign ports are not within the convoy act, unless there are persons at those ports authorized to grant convoy or licences. *Holt*, 185.

Sailing orders are necessary to the performance of a warranty to depart with convoy, unless particular circumstances exempt the insured from the general rule. 1 *B. & P.* 5: 2 *B. & P.* 164.

But an unforeseen separation from convoy is a peril to which the underwriter is liable. 3

*Lev.* 320: 2 *Stalk.* 443: *Carth.* 216: 1 *Show.* 320: 4 *Mod.* 58. *S. C.* And even where the ship has without any neglect, by tempestuous weather, been prevented from joining the convoy at all; at least, so as to receive the orders of the commander of the ships of war; if she do every thing in her power to effect it, it shall be deemed a satisfaction of the warranty to sail with convoy. 2 *Str.* 1250.

The last species of warranty above mentioned is that of *neutrality*; or that the ship and goods insured are neutral property. This is different from the two former; for if this warranty be not complied with, the contract is not merely voided as for a breach, but is absolutely void *ab initio*, on account of fraud, being a fact at the time of insuring within the knowledge of the insurer; an error in which must therefore arise from a deliberate falsehood on his part. 4 *Burr.* 1419: *Black. Rep.* 427. And see *post*, III. But if the ship, &c. is neutral at the time the risk commences, the insurer takes upon himself the chance of war and peace during the continuance of the policy. *Doughl.* 732.

A warranty in a policy of insurance that the ship is American property, means that the ship is entitled to all the privileges of an American flag; and if she have no passport on board (which is required by treaty between France and America) the warranty is not complied with, and the assured cannot recover against the underwriter, though in fact the ship suffer no inconvenience in the voyage from the want of the passport 7 *T. R.* 705.

Any forfeiture of neutrality by the wilful act of the assured, or of the mater, &c. after the commencement of the voyage insured, is a breach of warranty of such neutrality. 8 *T. R.* 230.

A warranty of neutrality in a policy of insurance is not falsified by a sentence in a foreign Court of Admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented. 8 *T. R.* 434.

Nor does the seizure and sale of a vessel by a neutral state, (no sentence of condemnation being shown,) change the property. 6 *Taunt.* 25.

Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of an infraction of treaty, in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our courts against a warranty of neutrality of such ship and cargo in an action upon a policy of insurance against the underwriters, although inferences were drawn in such sentence from *ex parte* ordinances in aid

of the conclusion of such infraction of treaty. 5 *East*. 99.

4. The oldest case in the books on a marine policy of insurance is in 7 *Rep.* 47. *b.* which only serves, however, to show that this contract was at that time very little understood. In the reign of Queen Elizabeth, a statute was passed (43 *Eliz. c.* 12., to erect a particular court for the trial of insurance causes in a summary way, by a commission to the Judge of the Admiralty, the Recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, with an appeal by bill to the Court of Chancery. This statute was explained, and the number of commissioners requisite to form a *quorum* reduced, by the 13 and 14 *Car. 2. c.* 23; but the court erected under these acts has long been disused; for this among other reasons, that its jurisdiction is not sufficiently extensive. See *Str.* 106: 1 *Show*, 396; 2 *Sid.* 121. Insurance causes are now therefore decided, like all other questions of property, by a trial by jury in a court of common law; and which, on due consideration, will appear the most safe, eligible, and (as now regulated) expeditious mode that could be adopted. *Park, Introd.*

Some excellent suggestions, however, have been made as to the benefit of reviving, under proper modifications, an institution similar in its principles to that of the court established by the statute of Elizabeth. Unquestionable and unquestioned as the rectitude and justice of the decisions of the existing tribunals assuredly are, it cannot be denied that in the previous machinery of litigation there are great opportunities for chicanery and vexation; and there is perhaps no class of cases coming under the public examination of courts of judicature, furnishing so many instances of contest, in opposition to the plain and manifest dictates of common integrity. When the great increase which has taken place in the matters of inquiry submitted to courts of justice is recollected, together with the number of arrangements and expedients resorted to for dispatch, and the probability of a still continuing increase is contemplated, the arrival of a period may be anticipated, when it will be beyond the power of mere arrangement, with all possible exertion of assiduity and ability, to meet the exigencies of public justice, with the existing judicial establishment; and some alteration of system must take place; and in such cases the revival of the court of policies of assurance will be found an object worthy of regard. See *Evans's Statutes*, Pt. III. Class III. nu. 2. and the notes there.

Courts of equity have no jurisdiction over such questions, because the demand is plainly

a demand at law, and the damage as much the object of proof by witnesses, as any other species of damage whatever. 3 *Bro. P. C.* 525. When, however, a mistake is made in drawing up a policy, a court of equity will direct it to be rectified according to the intention of the parties. 1 *Ves.* 318. If the trustee in a policy of insurance refuse his name to the *cestui que trus.* in an action, or a commission is necessary to examine witnesses residing abroad; (but this may be now issued by a court of law; see tit. *Depositions*;) or where fraud is suspected, and a disclosure of circumstances is to be procured upon the oath of the insured; application may be to a court of equity. But, in all other cases, a court of common law is the proper forum. See 1 *Atk.* 547: 2 *Atk.* 359: *Park, c.* 20. And even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not be a sufficient bar to an action at law, unless a reference is in fact made, or is depending. 1 *Wils.* 129.

To recover upon a policy against either of the insurance companies (the Royal Exchange, or London Assurance), the action must be debt, or covenant, as their policies are under seal; from hence formerly arose an inconvenience, as under the plea of a general issue in those actions the true merits of the case could seldom come in question. To remedy this, the 11 *G. 1. c.* 30. § 43. enabled the jury to give such part only of the sum demanded in debt, or so much damages in covenant, as on the evidence the plaintiff in justice ought to have had. See now as to the general issue, *post*.

In order to recover against a private underwriter upon the policy, who merely subscribes his name without any seal, the form of action is a special *indebitatus assumpsit*, founded upon the express contract, which action may be brought in the name of the broker effecting the policy; and by stat. 19 *G. 2. c.* 37. § 6. within fifteen days after action brought, the plaintiff, on request in writing, must declare the amount of all insurances on the same ship. *Park, c.* 20.

The 19 *G. 2. c.* 37. § 7. also enables defendants to pay money into court in all such actions; after which, if the plaintiff proceeds, and has not a verdict for more than the money paid in, he shall pay costs to the defendant.

It was formerly usual for the insured to bring separate actions against each of the underwriters (how many soever) on a policy, and proceed to trial on all. This was found to be expensive, and, in fact, unjust; and the Court of King's Bench intimated, that in such a case they would grant imparlances in all the actions but one, till that could be tried. 2 *Barn.*

**B. R. 103.** At length Lord Mansfield introduced the present consolidation rule, which is now admitted in general practice, by which the proceedings in all the actions but one are stayed; and in consequence of this convenience the defendant undertakes not to file any bill in equity, or bring a writ of error for delay, and to produce all books and papers material to the point in issue. *Park, Introd.*

When money has been paid by mistake to the insured, or where the insured wishes to recover back the premium, the proper remedy is by action for money had and received to the plaintiff's use. 1 *Salk.* 22; *Skinn.* 412; 1 *Shaw.* 156.

Where an insurance broker debits the underwriter with a loss, and takes his acceptance for the balance of account between broker and underwriter, payable at a later date than the time when the loss would be payable in cash, the assured may maintain an action against the broker for money had and received, though the acceptance was dishonoured, and the broker never received any money. 6 *Taunton*, 110.

The declaration on a policy of insurance must set out the policy, and aver that it was signed by the defendant, and that, in consideration of the premium, he undertook to indemnify the insured; it must then state the interest of the insured, and show the loss to have happened by one of the perils mentioned in the policy, which must always be stated according to the truth of the fact. *Park, c. 20.*

But a declaration on a policy of insurance on a foreign ship need not aver any interest in the assured, though there be no such words as "interest or no interest" in the policy. 2 *East*, 385.

In a declaration on a policy of insurance, the plaintiff averred that Messrs. H. at the time of effecting the policy, and at the time of the loss, were interested in the cargo, which was the subject of the insurance, "to a large amount, to wit, to the amount of all the money insured thereon:" at the trial it appeared, that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured; held, that the averment was supported by the evidence. 2 *Bos. and Pul.* 240.

By the rules of H. T. 4 W. 4. two counts upon the same policy of insurance are not to be allowed; but a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

By the same rules, in actions on policies of assurance the interest of the assured may be averred thus:

"That A., B., C., and D., or some or one of

them, were or was interested, &c.;" and it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

More particularly as to the manner of alleging the loss to have happened within the perils of the policy. To aver that the loss happened by the fraud and negligence of the master, has been held a sufficient averment of barratry; 2 *Ld. Raym.* 1349; 1 *Str.* 581; though it is now usual to aver precisely, in terms, that the loss happened by the barratry of the master or mariners. *Park, c. 20.*—Though the declaration allege a total loss, the insured may recover for a partial one; for in actions for damages merely, the plaintiff may always recover less, but not more, than the sum laid in the declaration. 2 *Burr.* 904; 1 *Black. Rep.* 198. So though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover to the amount alleged. *Park*, 402. *c. 20.*

But under an averment that after lading the cargo the ship sailed on the voyage and was lost, the plaintiff cannot recover on proof that the ship before she had half her cargo on board, was driven from her moorings and lost. *Abithol v. Bristow*, 6 *W. P. Taunton*, 464.

In order to entitle the insured to recover expenses of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. They may be given in evidence, because an insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy. *Hardw.* 304.

The general issue, *non assumpsit*, was the usual plea to a declaration upon a policy against private persons; and under this plea and the general issue, pleadable by corporations, the defendant had a right to take advantage of all those circumstances which either rendered the policy void, or made it of no effect; such as fraud, want of interest, not being sea-worthy, deviation, non-performance of warranties, &c. *Park*, 404, *c. 20.*

But by the rules of H. T. 4 W. 4. the plea of *non assumpsit* only operates as a denial of the subscription to the policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the compliance with warranties.

The evidence to be given, and the proof necessary in actions on policies of insurance, may be collected from the statement of the allegations requisite in the plaintiff's declaration. It may, in addition, be observed, that the first piece of evidence is proof of the defendant's hand-writing to the policy, which, however, is most generally admitted. See now tit. *Evi-*



dence, I. Though the general usage of in most parts of Europe, and which was admitted in England till it was found productive of glaring and enormous frauds, which rendered it destructive of the benefits it was originally intended to promote. The legislature, therefore, found it necessary to interpose, by an act which permitted only such contracts of re-assurance as tended to the advancement of commerce, or the real benefit of an individual. For this purpose the stat. 19 G. 2. c. 37. § 4. declares it to be unlawful to make re-assurance, "unless the assurer or underwriter should be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance;" which statute extends to re-assurances on foreign ships previously insured by foreign underwriters. 2 T. R. 161.

In France, as in other countries, it was formerly allowed to the insured to insure the solvency of the underwriter; but this practice is not allowed in England; and, though no express notice is taken of it in the above statute, it seems that such a policy would be looked on as a wager policy, and treated accordingly. See post 111, 5.

Sentences of foreign Courts of Admiralty are frequently brought forward in insurance causes. It may be requisite, therefore, to remark, that wherever the ground of such sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding; and the courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum having competent jurisdiction of the subject matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned, or if there be colour to suppose, that the court abroad proceeded upon matter not relevant to the matter in issue, there evidence will be allowed in order to explain; and if the sentence upon the face of it be manifestly against law and justice, or be contradictory, the insured shall not be deprived of his indemnity; because any detention, by condemnation under particular ordinances or decrees which contravene or do not form a part of the law of nations, is a risk within a policy of insurance. *Park, c. 18. ad fin.* And see *Dougl. 554. (574.) Bernuidi v. Motteux.* See post, 11, 3.

5. *Re-assurance* is a contract, which the first underwriter enters into, in order to relieve himself from those risks which he has previously undertaken; by throwing them upon other underwriters, who are called re-assurers. It is a species of contract still countenanced

*Double insurance* is totally different from re-assurance. It is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same property. 1 Burr. 496. It makes no difference whether such insurances are both or either made in the name of the insurer, or of another person, if actually made on his account. *Park, 285.*

These double insurances are not void, but are considered as being made by the assured, to increase his security; the assured, therefore, shall receive only one satisfaction to the real amount of his loss, and no more, which he may recover against which set of underwriters he pleases. And when one set of underwriters pay the loss, they may call upon the other underwriters to contribute in proportion to the sums they have insured. 1 Black. Rep. 416: 1 Burr. 492. But though a double insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value, as the master for wages, the owner for freight, one person for goods, and another for bottomry, &c. See 1 Burr. 489: 1 Black. Rep. 103. In which case the defendants were expressly apprised that there might probably be another insurance than that which they underwrote.

In an action on a valued policy it is no de-

fence to prove that the assured have received the amount of the valuation in this policy from the underwriters on another policy, if the subject-matter insured be proved to be of a value equal to the sum received, and that sought to be recovered. 4 *Camp*. 228.

II. 1. The loss must always be a direct and immediate consequence of the peril insured, and not a remote one, in order to entitle the insured to recover. 1 *T. R.* 130. *n. a.*

Questions as to losses by perils of the sea have very seldom arisen. The general rule is, that every accident happening by the force of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, or any other violence that human prudence could not foresee, nor human strength resist, is to be considered as a peril of the sea; and for such losses the underwriter is answerable. *Park*, 61: 1 *Show*. 323: 2 *Roll*. 248. *p.* 10: *Conn*. 56.

The underwriters are liable for a loss arising immediately from perils of the sea, such as winds and waves; although remotely from the mismanagement and negligence of the master and mariners. 5 *B. & A.* 171. Where a merchant vessel was taken in tow by a ship of war, and was thereby exposed to a tempestuous sea, which injured the goods, this was held a peril of the sea. 1 *Stark. Ca.* 157. And see 4 *Cump*. 289. But a ship driven on an enemy's coast by the wind, and there captured, shall be said to be lost by capture, and not by perils of the sea. *Peake*, 212: *S. V.* 2 *Bing*. 203. And if a ship hove down on the beach within the tideway to repair be thereby bilged and damaged, it is not a loss occasioned by perils of the sea. 3 *Taunt*. 227. And see 4 *M. & S.* 88: 5 *B. & A.* 161. A loss occasioned by another ship running down the ship insured through negligence, is a loss by the perils of the sea. 4 *Taunt*. 126.

A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her, she received damage by taking the ground: held, that this was a loss by a peril of the sea. *Fletcher v. Inglis*, 2 *B. & A.* 315.

Where an American ship, insured from New York to London, warranted free from American condemnation, having for the purpose of eluding her natural embargo, slipped away in the night, was by force of the ice, wind, and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards with great difficulty and expense got off, and finally condemned by the American government for breach of the

embargo; it was held, that as there was ultimately a loss by a peril excepted out of the policy, the assured could neither recover for a total loss nor for any previous partial loss arising from the stranding, &c., which in the event became wholly immaterial to the assured. 12 *Eust*, *R.* 648.

In a total loss, properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the underwriter, according to his proportion of the insurance. See *ante*, I. 4. Where the policy is a valued one, it is only necessary to prove that the goods were on board at the time of the loss; unless the defendant can show that the plaintiff had only a colourable interest, or has greatly overvalued the goods; but where it is an open policy, the value must also be proved. *Park*, 103, 111.

A total loss in insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the insured, and to justify him in abandoning his right to the insurer, and calling upon him to pay the whole of his insurance. *Park*, 98, 143.

On an insurance on ship and goods, valued at so much on a voyage to Africa and the West Indies, the insured is entitled to recover the whole sum on a total loss, which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. 2 *East*, 109.

And where a ship insured, arrived in a port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore, a few days afterwards she sunk; held, that the assured might recover as for a total loss, though her cargo was saved, and brought to a profitable market. *Ibid*.

On a policy on horses warranted "free from mortality," when in consequence of a storm the animals broke down the partitions between them, and by kicking bruised each other so much that they died; held, that this was loss by perils of the sea. 5 *D. & R.* 641: *S. C.* 3 *B. & C.* 793.

The like also upon a policy upon mules warranted "free from mortality and jettison," where the deaths of the animals arose from the vibration of the ship in a storm. 5 *B. & C.* 107.

Where a ship is so much injured by perils of the sea as not to be repaired at all, or not

repaired without an expence exceeding her value when repaired, the assured may recover for a total loss, without notice of abandonment. 2 *B. & C.* 691.

If a ship has been once necessarily abandoned, the owners may recover for a total loss, though she is afterwards recovered and brought into port. 7 *B. & C.* 794.

Where a ship having received considerable damage from tempestuous weather, was deserted by the crew, who were completely exhausted, on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port; held, that such desertion of the crew did not amount to a total loss. 2 *B. & A.* 513.

So upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, though less than three per cent. on the cargo, it was held that this could not be a total loss. 7 *Taunton*, 154.

The insured may call upon the underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing; if the salvage be high, as half the value; or if further expence be necessary, and the underwriter will not engage at all events to bear that expence. 2 *Burr.* 1198: 1 *Black. Rep.* 276: and *post*, 7.

But where a ship having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, held that they had no right to abandon, and that there was no more than a partial loss. 2 *B. & A.* 513.

When a master on a loss taking place, sells the ship and cargo, and thereby puts an end to the adventure, the underwriters are liable for a total loss, provided the sale was a matter of necessity and for the benefit of all concerned. 8 *Taunt.* 755: 3 *Moore*, 115: *S. C.* 3 *Bro. & B.* 151. (n.)

Where a vessel was so much injured by the perils of the sea that in order to render her sea-worthy it would cost as much to repair her as she was originally worth, or as much as would build a new ship, and the captain sold her to a purchaser, who repaired her and sent her on a voyage which she never completed, in consequence of her infirmity; held, that the underwriters were liable as for a total loss, although the vessel remained in specie at the time she was sold. 4 *D. & R.* 203: 1 *C. & P.* 213.

And where a ship was so shattered in a storm that it was found on survey that the expenses of repairing her would far exceed her original value, and the captain sold her *bonâ fide* for the benefit of all concerned, and

the purchaser shortly afterwards broke her up; held, that this was such an urgent necessity as justified the sale. 8 *Moore*, 622: 1 *Bing.* 445.

The question being whether the loss was total or partial; held, it ought to have been left to the jury to say whether the particular injuries could not have been repaired so as to render the ship seaworthy for the voyage, and not whether she was generally not worth repairing thoroughly, 1 *L. & W.* 140. And as to what is a total loss, see 8 *B. & C.* 561.

A ship which is never heard of after her departure, shall be presumed to have perished at sea. See 2 *Str.* 1199: *Park*, 63. In England no time is fixed within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. But a practice prevails among merchants that a ship shall be deemed lost if not heard of within six months after her departure for any port of Europe, or within twelve, if for a greater distance. This latter term, however, seems too short with respect to India voyages, and is extended in Spain to a year and a half, and formerly in France to two years; and in case of an adjustment on such supposed loss, if the ship arrives, the underwriter may recover back the money paid by him. *Park*, 63—65.

2. *Capture*, as applied to the subject of marine insurances, is a taking of the ships or goods belonging to the subjects of one country, by those of another, when in a state of public war. *Park*, c. 4. As between the underwriter and the insured, a ship is considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the underwriter must pay the loss actually sustained. If, therefore, either before or after condemnation, she be retaken, and the owner have paid salvage, the insurer must pay the loss sustained in consequence. 2 *Burr.* 694. 696.

No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time he will be entitled; and by stat. 29 *G. 2. c.* 34. § 24. if an English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution on stated salvage. See *post*, 6. In all such cases, if the loss be paid by the underwriter before the recovery, he stands in the place of the insured, and will be entitled to the benefits of the restitution. *Park*, 66: 2 *Burr.* 683.

Before the stat. 19 *G. 2. c.* 37. which abolished wager-policies, the recapture had a considerable effect upon the contract of insurance, and several cases were determined on that question. See 10 *Mod.* 77: 2 *Burr.* 695: *Com.* 360: 1 *Wils.* 191: 2 *Str.* 1250: *Park*,



73. 77. But now the contract is not at all altered between the underwriter and the insured by such event. 2 *Burr.* 695. 1198.

In a case of capture, when a recapture takes place before the notice of abandonment is given (10 *East*, 329: 1 *Camp.* 564: 2 *Taunt.* 363.), or even after such notice, but before an action is brought (4 *M. & S.* 393: 5 *M. & S.* 418. 426: 10 *East*, 345.), and the loss is thereby changed from a total into a partial one; the insured can only recover for such partial loss.

Thus an abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was held not to entitle the assured to recover as for a total loss, where, before action brought, the goods were recaptured, and arrived at the place of destination, by which a partial loss only was sustained, for the assured can only recover an indemnity for such loss as he has sustained at the time of action brought. 4 *M. & S.* 393.

So where a master had re-purchased the vessel (a seizure and sale having been made by a neutral state, and no condemnation being shown), he having acted without the authority from the assured, who refused to accept the ship, or repay him the price, the assured, who had not abandoned, were not permitted to recover for a total loss, for the property is not changed. 6 *Tuunton*, 25.

Where a ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers, and instruments, taken away, and the voyage lost, and was carried to Fayal, where proceedings were instituted in the Admiralty Court, and sentence was pronounced in favour of the assured: but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept, and afterwards the remainder of her cargo was sold at Fayal, and the law expenses paid thereout, and the rest left as a deposit to answer the event of the appeal in order to obtain the release of the ship, and afterwards the ship returned to Liverpool: held, that the assured might recover for a total loss in an action brought after the ship's return to Liverpool. 4 *M. & S.* 576.

By the marine law of England, as practised in the court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or re-captor, till there had been a sentence of condemnation. 2 *Burr.* 694. And now, by stat. 29 *G. 2. c.* 34. already mentioned, this right of the original owner, in case of a recapture, is preserved to him for ever, upon payment of certain salvage, from one-eighth to half the value to the re-captors. See *post.* 6.

A capture having been illegal, but the charges and delay being great, the insured made a compromise *bonâ fide* for the liberation of the ship; the underwriters were held to be answerable for the charges of that compromise. *Berens v. Rucker*, 1 *Black. Rep.* 313: *Park.* 67. See *Ransom*.

On this head it may also be proper to state the following act of parliament, against ransoming captured ships. Previous to its passing, it seems, from the above case, that the insurers would have been liable to make good sums paid by the master for ransom and that the insurers were liable for the charges of such compromise made, *bonâ fide*, whether the capture was legal or not. And in the case of *Yates v. Hall*, the circumstances of which took place before the passing of the act, the Court of B. R. determined, that a promise made by a captain of a ship on behalf of his owners to pay monthly wages to a sailor, in order to induce him to become a hostage, was binding on the owners, although they abandoned the ship and cargo. 1 *Term Rep.* 73. 80.

By stat. 22 *G. 3. c.* 25. it is made unlawful for any subject to ransom, or to enter into any contract for ransoming, any ship belonging to any subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his subjects. § 1.

All contracts which shall be entered into, and all bills, notes, and other securities, which shall be given by any person for ransom of any ship, or of any goods on board the same, shall be absolutely void. § 2.

If any person shall ransom, or enter into any contract for ransoming, any such ship, or any goods on board the same, such person shall forfeit 500*l.*, which may be sued for by any one. § 3.

Clauses exactly similar to those were inserted in the Prize Act 33 *G. 3. c.* 66. the continuance of which was limited by the duration of the then war with France. Commanders of British privateers were also by that act prohibited from ransoming prizes taken by them from the enemy, under forfeiture of their letter of marque, and imprisonment in the discretion of the Court of Admiralty. Continued by 43 *G. 3. c.* 160. § 33. (during the then war), and by 45 *G. 3. c.* 72. § 19. continued to the end of the war.

3. On questions of *detention* not much difficulty has arisen. The underwriter, by express words, undertakes to indemnify against, all damages arising from the arrests, restraints, and detentions of kings, princes, or people. *Park.* 78.

Under these terms, in a policy, detention is said to be an arrest or embargo in time of war

or peace, laid on by the public authority of a state. And, therefore, in case of an arrest, or embargo by a prince, though not an enemy, the insured is entitled to recover against the underwriter. 2 *Burr.* 696. See this Dict. tit. *Embargo*.

In case of detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the costs and charges consequent thereon must be borne by the underwriter. *Salvoe v. Johnson, B. R. Hill.* 25 *G. 3. Park,* 79. But a detention for non-payment of customs, or for navigating against the laws of those countries where the ship happens to be, shall not fall upon the underwriter. 23 *en. 176*.

A detention by pirates or robbers which do not form a part of the general law of nations, is a risk within a policy of insurance. *Per Butler, J., Park,* 305.

It is an undecided question, whether a detention by the governing power of the country to which the ship belongs, is a peril within the policy, though it seems that it is. See 2 *Ld. Raym.* 840; 2 *Salk.* 114; *Park,* 80. A policy of assurance on a ship and stores, "at and from a port" in a foreign country, in the common form against arrest of princes, people, &c., extends to an embargo laid on by the government of that country, in the loading port. 6 *T. R.* 413. And if the embargo continue, the assured may abandon, and recover as for a total loss. *Ibid. Sed. Qd.* The effect of an embargo by this country laid on a ship insured here? *Ib.* 422.

But if an armed force board a ship, and take part of the cargo, the underwriters are not liable, on a count stating the loss to be by *people* to the plaintiff's unknown; for *people*, in the policy, means the governing power of the country. 4 *T. R.* 783.

In all cases of losses by detention, before the insured can recover, he must abandon to the underwriter whatever claims he may have to the property insured. *Park,* 82. See *post*, 7.

In 6 *T. R.* 259, it was held by the Court of K. B. that an embargo only suspends, but does not dissolve, the contract between the parties.

A British ship, insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull. Held, that this loss of the voyage was not attributable

to the arrest or detainment of kings, &c., but immediately to the fear of the hostile embargo in the policy; though, if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo. 11 *East*, 293.

4. The underwriters, by express words, undertake generally for the barratry of the master and mariners, even though the master is appointed by the insured himself; a circumstance peculiar to the insurance law of England. *Park,* 85.

The derivation of the word *barratry* is very doubtful; it comes, most probably, from the Italian *barratrare*, to cheat. *Cowp.* 154. It may be thus defined: any act of the master or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent or privity. See 1 *Str.* 541, 2 *Str.* 1173; *Cowp.* 143; 1 *Term Rep.* 323.

Barratry, in English policies, means only *willful misconduct*. 2 *Barn. & A.* 82; 8 *East*, 136; 3 *Cowp.* 620.

It is barratry in the master to smuggle on his own account. *Cowp.* 143. 1 *Term Rep.* 252; 3 *Term Rep.* 277. And in *Robertson v. Luer* (1 *Term Rep.* 127), *Butler, J.* seemed to think the breach of an embargo was an act of barratry in the master. But if the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not barratry. Some question has been made, in certain cases, who shall be considered as owner; and it has been determined, that if the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without his privity, though with the knowledge of the original owner, it is barratry. *Cowp.* 143, 154.

But pending an insurance on freight and a cargo shipped, the vessel becomes incapable of bringing the cargo home, the master is bound or not bound to repair her, and earn what he can on the homeward voyage, as a salvage for the underwriters on freight according as a prudent owner having regard to the state of the ship. 6 *Taunton*, 68.

An act of the captain, with the knowledge of the owners of the ship, though without the privity of the owner of the goods who happened to be the person insured, is not barratry, as that crime can only be committed against the owner of the ship, and without his consent. 1 *Term Rep.* 323. And if the master of the ship be also the owner, he cannot be guilty of barratry; *Park,* 94; unless

he has chartered the ship; 7 *Taunt.* 627. The master being supercargo does not prevent the underwriter from being liable for his barratry. 8 *East*, 139. And see further as to barratry, *Bacon's Abr. Merchant*, I. vol. 5. edit. by *Gwillim & Dodd*.

Where the master of a vessel condemned for breach of blockade, swore he was bound for another destination: held, that this did not so disaffirm his owner's privity and consent to the breach of blockade, as to enable the plaintiff to recover as for loss by barratry. 6 *Tuanton*, 375.

In an action by the assured of goods, against the underwriters for a loss by the barratry of the master, proof that the person described in the policy as master, and who was treated with, and acted as such, carried the ship out of her course, for fraudulent purposes of his own, is *prima facie* sufficient to entitle the plaintiff to recover, without showing negatively that he was not the owner, or affirmatively that any other person was. 4 *T. R.* 33.

It is not necessary, in order to make the underwriters liable, that the loss should happen in the very act of barratry, for, in case of a deceitful deviation, the moment the ship is carried from its tract with an evil intent, barratry is committed; but the loss, in consequence of the act of barratry, must happen during the voyage insured, and within the time limited for the expiration of the policy. 1 *Term Rep.* 252: 4 *T. R.* 33: *Cowp.* 143: *Park*, 84. 90.

In an action on policy on ship, by which, amongst other risks, the underwriters insured against fire and barratry of the master and mariners; they are liable for a loss by fire occasioned by neglect of the master and mariners. 2 *B. & A.* 73.

But though they are responsible for the misconduct or negligence of the captain and crew, the owner is bound, as a condition precedent, to provide a crew of competent skill. 7 *B. & C.* 798. note b.

If a ship take a prize, and, instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity, and it is not barratry, because not done to defraud the owners. 2 *Stra.* 1264.

Barratry in the master is severely punished by the laws of foreign nations; and several statutes have been passed to prevent these crimes in our own country.

The 7 and 8 *G. 4. c.* 30. which repealed the former acts, by § 9. makes it felony, punishable with death, maliciously to set fire to, or to destroy, any ship or vessel, whether complete or in an unfinished state; or maliciously to set fire to, or destroy, any ship or vessel, with intent

to prejudice any owner or part owner thereof, or of any goods on board the same, or any person who has underwritten a policy of insurance on such ship, or the freight, or the goods on board the same.

By § 43. felonies and misdemeanors under the act committed within the Admiralty jurisdiction, shall be dealt with, inquired of, tried, and determined, in the same manner as any other felony or misdemeanor committed within that jurisdiction. And by § 12. of the 7 and 8 *G. 4. c.* 28. all offences prosecuted in the Court of Admiralty shall be subject to the same punishments of death or otherwise, as if committed on the land.

To this head may also be referred the provision in stat. 33 *G. 3. c.* 66. § 8. which subjects the captain of any merchant-ship under convoy, who shall wilfully disobey the signals or instructions of the commander of the convoy, or desert the convoy without notice or leave, to prosecution in the Admiralty Court, there to be sentenced to a fine not exceeding 500*l.*, and imprisonment for not more than one year. See *ante*, I. 3.

5. The word *average* is applied in various senses in policies of insurance, which in this, above all other particulars, are indistinct and confused. It is used as well for a contribution to a general loss as for a particular partial loss. On the present occasion we shall consider the term of *general* or *gross average*, in the former sense, and *average loss* in the latter. *Park*, 99: 3 *Burr.* 1555.

*Small, or petty average*, consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. The term is also used for a small duty paid by merchants, who send goods in the ships of other men, to the master, over and above the freight, for his care and attention: none of these charges ever fall upon the underwriter. *Park*, 100. See this *Dict. tit. Average*.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of goods saved are to contribute for the relief of those whose goods are ejected: this is called contribution, or general average, and was first used by the Rhodians, and introduced into England by William the Conqueror. Against all losses arising from hence, the underwriter, by his contract, expressly undertakes to indemnify the insured. *Park*, 99. 121. 129: 3 *Burr.* 1555: 8 *T. R.* 513: *Lex. Merc.*

Three things, it has been said, must concur to make the act of throwing goods overboard legal. 1st. That what is so condemned to destruction, be in consequence of a deliberate and voluntary consultation, between the master and



men. 4 M. & S. 146. 2d. That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d. That the saving of the ship and cargo be owing to the means used with that view. But the second seems to be the only material one. If, therefore, this jettison (the throwing over of the goods) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; but if the ship, being once preserved by such means, be afterwards lost, the property, if any, saved from the second accident, shall contribute to the loss occasioned by the former jettison. *Park*, 123. And see 12 Co. 63.

The various accidents and charges which will entitle the suffering party to call for a contribution, cannot easily be enumerated; but it may be laid down as a general principle, that all losses sustained, and expenses incurred, voluntarily and deliberately, with a view to prevent the total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. See *Park*, 124. 126: *Lex. Merc.*: 2 T. R. 407.

The French ordinance, *Liv. 3. tit. Du Jet. art. 13.* in express terms excludes from the benefit of general average goods stowed upon deck; and the same rule prevails in practice in this country; *Myer v. Vander Deyl, coram Lord Ellenborough*, sittings after Michaelmas, 1803: *Blackhouse v. Ripley, coram Chambre, J. Abbot, on Merchant Ships, &c. part iii. c. viii.* 323; for goods so stowed inay, in many cases, obstruct the management of the vessel; and, except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and remaining cargo are to contribute; but if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute; the lightening of the ship being an act of deliberation for the general benefit, but the saving the lighter being accidental, and no way proceeding from a regard for the whole. *Park*, 121.

An action upon promissory lies by a shipowner to recover from the owner of the cargo his proportion of general average loss, incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or an extraordinary occasion of danger, for the benefit of the whole concern. 1 *East*, 220.

Diamonds and jewels, when a part of the cargo, must contribute according to their value; but ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, bottomry or *respondentia* bonds, and the wages of the sailors, shall

not any of them contribute. *Park*, 126, 127. 129. 422. See also this Dict. tit. *Carrier*.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight, and cargo, would have produced net, if no jettison had been made; and then the ship, freight, and cargo, are to bear an equal and proportionable part of the loss. According to the custom of merchants in England, the goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight, and all other charges, being first deducted. *Park*, 127, 128.

The general rules as to a *partial loss*, and its consequences, were settled in the case of *Lewis v. Rucker*, 2 Burr. 1167. *et seq.* from whence much of the subsequent information is drawn; but the whole of the law on this part of the subject is more intricate and perplexed than on any other question of insurance.

*Partial loss*, then, when applied to the ship, means a damage, which she may have sustained in the course of her voyage, from some of the perils mentioned in the policy. When to the cargo, it means the damage which the goods have suffered from storm, &c., though the whole or greater part thereof may arrive in port. By express stipulation in the terms of the London policies, these losses do not fall upon the underwriters, unless they amount to 3l. *per cent.*; but if a loss, arising from a general average (*i. e.* a contribution to a general loss), should be under 3l. *per cent.*, the underwriter is liable. And in all cases of a partial loss, the value in the policy can be no guide to ascertain the damage; but it becomes the subject of proof as in case of an open policy. *Park*, 101. 110.

When goods are partially damaged, the underwriter must pay the owner such proportion of the prime cost or value, in the policy (or if no value is stated in the policy, then of the invoice price, with all charges and premium of insurance), as corresponds to the proportion of diminution in value occasioned by the damage. Where an entire thing, as one hogshhead of sugar, happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained; but this can only be done at the port of delivery, where the whole damage is known, and the voyage is completed; and whether the price of the commodity be high or low, it equally ascertains the proportion of damage, though no regard is to be paid to the rise or fall of the market, as to the sum to be paid by the insurer, which is, in either case, to be regulated only by the prime cost or invoice price. *Park*, 103. &c.: 2 Burr. 1167.

The rule by which to calculate a partial loss

on a policy on goods by reason of sea damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds; it being settled, that the underwriter is not to bear any loss from fluctuation of market or port duties or charges after the arrival of goods at their port of destination. 2 *East*, 581.

These rules can only apply to cases where there is a specific description of goods; but where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *Park*, 111.

Some goods are of a perishable nature, and against the losses arising from the principle of corruption inherent in such, the underwriters of London have exempted themselves, by declaring in a memorandum contained in all their policies, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, or seed, unless it arise by way of general average, or in consequence of the ship being stranded; against a loss by which latter event, however, in cases of these perishable commodities, the two insurance companies already mentioned do not undertake to be answerable. See 3 *Burr*. 1553.

On this clause it has in several cases been uniformly held that no loss shall be deemed total so as to charge the insurers in case of such perishable commodities, as long as the commodity specifically remains, though perhaps wholly unfit for use. 3 *Burr*. 1550. The case in 2 *Str.* 1065. to the contrary, has been since over-ruled by that of *Mason v. Skurray*, *Park*, 116. in which it was also held, that the term corn included peas and beans, and other particulars. See *Park*, 112. 117.

Underwriters are not entitled to notice of the part of the ship where goods are stowed, whether on deck or otherwise. 2 *Chitty*, 227: 4 *Camp*. 142.

Where, after seizure by an armed mob, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered as for a general average; but for such part as, in consequence of the stranding, was damaged and thrown overboard, the insured may recover, on a count, stating the loss to be by stranding. 4 *T. R.* 783.

The usual memorandum "corn, fruit, &c. warranted free from average, unless general or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding. 7 *T. R.* 210.

And in a case of a ship running on some

wooden piles four feet under water erected in the Wisbeach river about nine yards from the shore, and lying on such piles till they were cut away, was a stranding within the meaning of the memorandum in the policy so as to subject the underwriters to an average loss on corn, and the jury found accordingly. *Dolson v. Bolton*, sittings after *Easter T.* 1799. *Park*, 4th edit. 111. a. See also *Bowring v. Elmshe*, *Park*, 5th. edit. p. 115. b.

So where a ship being under conduct of a pilot in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over her side and bilged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged; held, that this was a stranding to entitle the assured to recover for an average loss upon the goods. 4 *M. & S.* 77.

But the striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends, was held not to constitute a stranding within the meaning of that term in a policy of assurance. 4 *M. & S.* 503.

Stranding, according to its legal signification, is, when a ship by accident is on the ground or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, and is injured thereby; and the underwriters are liable, though such stranding be occasioned by the negligence of the master or mariners. *Bishop v. Pentland*, 7 *B. & C.* 219: 1 *R. & M.* 49.

Where a ship grounds in the ordinary course of navigation, as from the flux or reflux of the tide, without any external force, it is not a stranding; but where it arises from an accident, it is. 2 *B. & Ad.* 20: and see also 2 *B. & A.* 315: 5 *B. & A.* 225: 8 *Bing.* 456.

The salvage to ships of war or privateers for re-capture from the enemy, and the charges thereon (see prize acts, 29 *G. 2. c.* 34: 43 *G. 3. c.* 160. § 39), and the charges incurred in obtaining the release of a ship unjustly detained, and reclaiming it in the Court of Admiralty, have been enumerated among the subjects of general average. 1 *Emerig.* 629. 631.

The wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair, nor the wages and provision of the crew during her detention in port to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle by standing out to sea

with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded. 4 *M. & S.* 141.

The insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country), who is obliged by the decree of a court there to pay contribution to a general average, which, by the law of this country, could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants obtaining in the foreign country, to be at the same as general average, but such usage is to be collected merely from the recitals and assumption made in the decree. *Ibid.*

When the quantity of damage sustained in the course of the voyage is known, and the amount which each insurer is to pay is settled, it is usual for the underwriter to indorse on the policy, "Adjusted this loss at so much *per cent.*" This is called an adjustment; after which, if the underwriter refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances, the adjustment being considered as a note of hand. *Park*, 117, 118. So after judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. *Dougl.* 315, *The Hellusson v. Fletcher*. And if a loss be total at the time of the adjustment, and the insurer pay for a total loss, the insured is not obliged to refund, if it should afterwards turn out to be partial, but the insurer will stand in the place of the insured.

6. *Salvage* is an allowance made for saving a ship or goods, or both, from the danger of the seas, fire, pirates, or enemies; in which sense it is there used, though it is also sometimes incorrectly applied to signify the thing itself which is saved. *Park*, 131. And the saver has such a property in the goods, saved by his own exertions and danger, that in an action of trover it has been held the defendants might retain the goods till payment of the salvage. 1 *Lord Raym.* 393: 2 *Salk.* 654.

Cases of salvage may be divided into two classes; cases of loss by the perils of the sea, and cases of capture.

Where goods at sea are preserved in time of danger, there is no rate of salvage fixed.

But when a ship has been wrecked, the law of England, by various statutes, declares, that reasonable salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three justices of the peace. See 12 *Anne, st.* 2. c. 18. (made perpetual by 4 *G.* 1. c. 12.): 26 *G.* 2. c. 19: and 1 and 2 *G.*

4. c. 76. which has made further provisions as to the adjustment of salvage under the 12 *Anne, st.* 2. c. 18.

As to the salvage on goods liable to the payment of duty, see the last general act for the management of the customs, 3 and 4 *W.* 4. c. 52. § 49, 50, 51.

The right of owners on re-capture has been already noticed (*ante*, 2.). The salvage in this case is regulated by stats. 13 *G.* 2. c. 4. § 18: 29 *G.* 2. c. 34. § 24: which enact, that if any prize taken from the enemy shall appear to have belonged to any of his Majesty's subjects, it shall be restored to the former owner, upon his paying, in lieu of salvage, one-eighth of the value, if retaken at any time by one of his Majesty's ships. If retaken by a privateer, before it has been twenty-four hours in the possession of the enemy, the salvage paid to be one-eighth of the value; if above twenty-four and under forty-eight hours, one fifth; if above forty-eight and under ninety-six hours, one-third part thereof; and if above ninety-six hours, a moiety or one-half part thereof; or, if the ship so retaken have been fitted out by the enemy as a ship of war, the salvage is in all cases settled at a moiety. See 43 *G.* 3. c. 160. § 39: and 45 *G.* 3. c. 72. § 7.

Wearing apparel of the master and seamen is always excepted from the allowance of salvage. The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively, if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c. *Park*, 140: *Lex Merc.*

Underwriters, by their policy, expressly undertake to bear all expences of salvage. It is therefore not necessary to state them in a declaration as a special breach of the policy. *Hard.* 304. See *ante*, I. 4. But if the insurer pay to the insured such expences, and from particular circumstances the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. 1 *Ves.* 98.

Salvage, payable under a decree of the Court of Admiralty, must be proved by regular evidence of the judgment of the court. *The Hellusson v. Sheddon*, 2 *New. Rep.* 229.

Where the salvage is high, and the other expences are great, and the object of the voyage is defeated, the insured is allowed to abandon to the insurer, and to call upon him to contribute for a total loss, which brings us to the subject of,

7. *Abandonment*.—Before a person insured can demand from the underwriter a recompence for a total loss, he must (except in the



cases after mentioned) abandon to him whatever claims he may have to the property insured; and when the underwriter has discharged his insurance, and the abandonment is made, he stands in the place of the insured, and is entitled to all the advantages resulting from that situation, in case the ship or property, &c. is not totally lost, or is afterwards restored by re-capture, &c. See *Park, c. 9: 1 Ves. 98.*

Abandonment is as ancient as the contract of insurance itself: the time within which it must be made was not, however, fixed in England till lately. It is now held, that as soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not; and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never after recover for a total loss. 1 *T. R. 608.*

An assured, however, is entitled to a reasonable time for acquiring a full knowledge of the state of a damaged cargo before he is bound to elect, whether he shall abandon to the underwriters as for a total loss. 6 *Taunton, 383:* and see 15 *East, 13: 5 M. & S. 17.*

On the other hand, if the insurer rejects the abandonment, he must do so in a reasonable time. 2 *Bro. & B. 97. 147.*

If the insured, hearing that the ship is disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. 2 *T. R. 407.*

When an abandonment is made, it must be total and not partial. And though the insured may in all cases choose not to abandon, yet he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 2 *Burr. 677.*

We have already seen (*ante, II. 1.*) that the insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost, or not worth pursuing; if further expense be necessary, and the insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success. But he cannot abandon unless at some period or other of the voyage there has been a total loss. 1 *T. R. 187; Park, c. 9. p. 166.* Also, if neither the thing insured, nor the voyage, be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon. See 2 *Burr. 1211: 3 Atk. 195: and Goss v. Withers, 2 Burr. 683.*

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Which latter was the first case in which the doctrine of abandonment was gone into at large, and the above principles fully settled, which have ever since been strictly adhered to, and were particularly recognized in *Milles v. Fletcher, Dougl. 219. 231.*—And in *Hamilton v. Mendes*, it was solemnly determined that the right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon: in that case, therefore, where there was a capture and re-capture, and it was stated, that at the time of the offer to abandon, the peril was over, as the ship was safe in port, and had suffered no damage, the court held that the insured had no right to abandon. 2 *Burr. 1198: 1 Black. Rep. 276.* See also, *Park, c. 9.*

A loss of voyage for the season by perils of the sea is not a ground of abandonment upon a policy on goods with a clause of warranty, free from average, &c. where the cargo is in safety, and not of a perishable nature as to make the loss of a voyage a loss of the commodity, although the ship is rendered incapable of proceeding in the voyage.—The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss was held too late. If one of several jointly interested in the cargo effects an insurance for the benefit of all, he may give notice of abandonment for all. 5 *M. & S. 47.*

But where ship and freight were insured by separate sets of underwriters, and the ship being a general ship was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss; and the ship being recaptured, performed her voyage and earned freight; which was received by the defendant for the use of those who were legally entitled thereto; held, that the underwriter on the ship was entitled to recover. 5 *M. & S. 79: 2 Brod. & B. 379.*

An abandonment made after capture under circumstances which would entitle the assured at the time to recover as for a total loss is not defeated so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution be under such condition as to make it uncertain whether the assured may not have to pay more than its worth. 4 *Maule & S. 576.*

A ship having been sold under a decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, held, they had no right to abandon. 2 *B. & A. 513.*

An abandonment is not necessary unless the thing insured exist in specie in the hands,

or, at least, for the benefit of the insured, and it must exist in such a state of integrity as to be fit for some useful and available purpose. 13 East, 304: 2 Barn. & Cres. 691. Where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover as for a total loss, without giving notice of abandonment. And Abbott, C. J. said, "If the subject matter of insurance remained a ship, it was not a total loss: but if it were reduced to a mere congeries of planks, the vessel was a mere wreck. The name which you may think fit to apply to it cannot alter the nature of the thing." 2 Barn. & C. 691: 1 Ry. & Moo. 60: 8 Barn. & C. 561: and see Bac. Ab. Merchant, 1. vol. 5. 471. (edit. by Gwillim & Dodd.) It seems that in case of an insurance on freight, abandonment is unnecessary. 6 Taunt. 68: 8 Taunt. 755: 4 Bing. 368: 1 Camp. 541.

**III. 1. Policies are annulled by the least shadow of fraud, or undue concealment of facts; both parties are therefore equally bound to disclose circumstances within their knowledge. And if the underwriter, at the time he underwrote, knew that the ship was so injured, the contract will be void, as if the insured had concealed any material fact that had falsified the ship.** Park, c. 10: 3 Comm. 100: 3 Black. Rep. 541: 3 Port. 90.

A person insuring a vessel is to communicate every material fact which may affect the mind of the underwriter; other is to whether he will accept or not, and at what premium he will insure. 1 Jero. & W. 30.

The opinion of underwriters as to the materiality of communicating a particular fact is not admissible in evidence, and the materiality of such communication is a question for the jury, not for the court. 2 N. & M. 542.

Cases of fraud upon this subject are held to a two-fold division: 1st. The fraud is false; 2d. The suppression true; 3d. Misrepresentation. The latter is made a separate branch as though, if it were, it is a distinct head; and it happens by misstatement of facts, which the policy, should it be in a material point. Park, c. 10. See Foulth 217-260.

As to the first case, several cases have determined that the goods sold, or sold, when goods, &c. are insured as for property of an ally, or as neutral property, when in fact they are the goods of an enemy; and such cases as sections in a policy will vitiate the contract, though the loss happen in a mode not affected by that falsity. Park, c. 10: 8 Ann. 517: 3 Burr. 1119: 1 Black. Rep. 427.

The second species of fraud, concealment of

circumstances, vitiates all contracts of insurance. The facts upon which the risk is to be computed lie, for the most part, within the knowledge of the insured only. The underwriter relies upon him for all necessary information: and must trust to him that he will conceal nothing, so as to make him form a wrong estimate: on this ground, where one giving an account that a ship, described like this, was taken, insured his own ship, without giving any notice to the insurers of what he had heard, the policy was decreed in equity to be delivered up. 2 P. Wms. 173. See 1 Black. Rep. 463. 594: 2 Stra. 1183: Park, c. 10. But there are many matters as to which the insured may be innocently silent: 1st. As to what the insurer knows, however he came by that knowledge; 2d. As to what he ought to know: 3d. As to what lessens the risk. And it may here be remarked, that an underwriter is bound to know political perils as to the state of war or peace. He also ought to be acquainted with the nature and danger of every voyage, which may be called natural perils: if he insure a privateer, it is understood that he is not to be informed of its destination; and, as men reason differently from different facts, he needs not be told another's conclusion from his own facts. In short, the question, in cases of concealment, must always lay, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement or concealment; fraudulent, if designed, or, if not designed, varying materially the object of the policy, and changing the risk understood to be run." The above rules, and the whole doctrine of concealment, were laid down in *Carter v. Boehm*, which was an insurance by the governor of Fort Marlborough in Bencoolen, against the event of the fort being taken by the Dutch, or power in the course of a year. 3 Burr. 1905: 1 Black. 593. And the rules there advanced and illustrated have been reiterated in subsequent cases. *Plouche v. Fletcher*, Dougl. 288. 251: and see *Park*, c. 10.

Where a ship had sailed from Elmscur on her voyage home six hours before the owner, who had followed in another vessel on the same day, and having met with rough weather in his passage, arrived first, and then caused an insurance to be effected on his own ship: held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state, merely, that the ship insured was "advent at L. on the 26th July," the day of her sailing. 1 B. & A. 672.

But where a vessel having sailed, put back to the Downs, and then sailed again, and laboured and strained much from being over-

laden, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of her cargo, it was only communicated to them that the ship was too deep in the water: held that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was immaterial, and that the communication made was quite sufficient. 2 B. & A. 320.

The concealment of material intelligence vitiates a policy, although the account which the insured conceals turns out afterwards to be false (3 Taunt. 37: 14 East, 494); or although a loss afterwards happens which has no reference to the intelligence withheld (2 Str. 1183); or although the concealment was without a fraudulent design. 3 Burr. 1905: 1 T. R. 12.

The policy is void if the broker conceal any material circumstances, though the only ground for not mentioning them should be that the facts concealed appeared immaterial to him. Dougl. (293.) 306. n. But the thing concealed must be some fact, not a mere speculation or expectation of the insured. Dougl. (292.) 305.

A representation is a state of the case, not forming a part of the written instrument or policy, as a warranty does. Therefore, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement, as in the case of the warranty. And if a representation be false in any material point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist. Park, c. 10. In the case of *Parson v. Watson*, Lord Mansfield stated, that "there cannot be a clearer distinction than that which exists between a warranty, which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material it can hardly ever be fraudulent. Cowp. 785. And in *Macdowel v. Frazer*, the same learned judge laid down that "a representation must be fair and true. It should be true as to all the insured knows; and if he represents facts to the underwriter, without knowing the truth, he takes the risk upon himself." But the difference between the fact, as it turns out, and as represented, must be material. Dougl. (247.) 260. See also *Bize v. Fletcher*, or *Lavabre v. Wilson*, Dougl. (271.) 284: 9 B. & C. 693: and ante, l. 3. And such a representation made to the underwriter, who first signs a policy, enures for the benefit of any who may sign it after him. Cowp. 789: Dougl. 11. note 3.

Insuring a ship by an English name does not amount to a representation that she is an English ship. 3 Camp. 382.

A representation made by an insurance broker, when the names of the underwriters are written upon a slip, is binding on the assured, unless qualified or withdrawn by some communication upon the subject between that time and the execution of the policy. 1 Camp. 538.

Where a trader shipped goods for Cagliari, on board a general ship, represented as sailing with licence and without convoy, and bound for Gibraltar, Cagliari, and Majorca, which had a licence to sail without convoy to Gibraltar only, and sailed from Gibraltar without convoy or licence, an officer being appointed to grant licences under certain circumstances, held that an insurance of such goods by the shipper was void. 6 Taunton, 544.

If the assured, after subscription by the underwriter, strike out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, he destroys the policy, and the underwriter is discharged from the original contract. *Fairlie v. Christie*, 7 Taunton, 412.

In all these cases of fraud, wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, or of his agent; for in either place the contract is founded in deception, and the policy is consequently void. And this rule prevails, even though the act cannot be at all traced to the owner of the property insured. *Stewart v. Dunlop*, in *Dom. Proc.* 1785: 1 T. R. 12: *Park*, c. 10.

A policy will not, however, be set aside on the ground of fraud unless it be fully and satisfactorily proved; and the burden of proof lies on the person wishing to take advantage of the fraud. At the same time, positive and direct proof of fraud is not to be expected, and from the nature of the thing circumstantial evidence is all that can be given. *Park*, 214. As to the return of premium in cases of fraud, see post, 8.

2. It being necessary, except in some special cases, to insert the name of the ship on which the risk is to be run in the policy, it follows, as an implied condition, that the insured shall neither substitute another ship for that mentioned in the policy before the voyage commences, in which case there would be no contract at all; nor, during the voyage, remove the property insured from one ship to another without consent of the insurer, or



without an unavoidable necessity, under which every thing possible must be done for the benefit of all concerned; if he do, the implied condition is broken, and he cannot, in case of loss, recover against the underwriter. *Park, c. 16. See 2 Stra. 1248: 1 Burr. 351: 1 Term Rep. 611. note.*

3. *Deviation* is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever this happens, the voyage is determined; and the insurers are discharged from any responsibility; because the ship goes upon a different voyage from that against which the insurer undertook to indemnify. And it is not material in this case whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation. *Park, c. 17. p. 294: and see Elliot v. Wilson, Bro. P. C.* If therefore the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation. And if the deviation be but for a single night, or for an hour, it is fatal. But if a merchant ship carry letters of marque she may chase an enemy, though she may not cruize, without being deemed guilty of a deviation. *Park, 295—299.*

Wherever the deviation is occasioned by absolute necessity, as where the crew force the captain to deviate, the underwriters continue liable. *2 Stra. 1264.* And the general justifications for a deviation seem to be these: to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek for convoy.

If therefore a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned. *1 Atk. 545: Park, c. 17.* So, whenever a ship, in order to escape a storm, goes out of the direct course, or, when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. And if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from whence she was driven. *1 T. R. 22: Park, c. 17.*

A deviation may also be justified, if done to avoid any enemy, or seek for convoy, because it is in truth no deviation to go out of the course of a voyage, in order to avoid a danger, or to obtain a protection against it; if in all cases the master of a ship act fairly and *bonâ fide* according to the best of his judgment. *2*

*Salk. 445: 2 Stra. 1265: Holt. 185: Marsh, 265: Park, c. 17.*

Thus, where the policy contains no warranty against seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. *4 Camp. 249.* Otherwise, where there is a warranty against such seizure, *4 Camp. 246.*

If part of the crew, who are necessary to the navigation of the ship, be arrested by a press-gang, and the captain go ashore to procure their release, a delay so occasioned arises *ex justâ causâ*, and the underwriters will not be discharged by it; *aliter*, if they are unnecessary. *4 Camp. 62.*

A deviation may be justified, if done to succour a ship in distress, *per Lawrence, J. 6. East, 54.*

In all cases of deviation, it may be laid down as a general rule, that, wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and, in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequences of the act as the true ground of judgment. *Onup. 601.* But to avoid as much as possible any additional risk, in case of a deviation from necessity, the ship must pursue such voyage of necessity in the direct course, and in the shortest time possible, as nothing more must be done than the necessity requires, otherwise the underwriters will be discharged. *Dougl. (271.) 284.*

If the voyage described in the policy be from "A. to B. and C." and the ship go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, if it be not the regular and settled course of the voyage to go to C. first. *6 T. R. 551.*

If a ship mean to go to more than one of the places named in a policy, she must visit them in the order in which they stand in such policy. *3 East, 572.* And in the same succession in which they occur in the course of voyage insured; *3 Taunt. 16;* and for purposes only connected with the voyage. *4 Barn. & A. 72: 15 East, 278.*

A ship was permitted by licence to proceed from D. to L., and thence to B., there to lade, to the destination of the port from which she departed. The vessel proceeded on her voyage from D. to L. and from L. to B.: held, that she was not protected by the licence on a further voyage, from B. to L. *1 B. & A. 142.*

A deviation of a vessel from the voyage insured through the ignorance of the captain,

or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. 7 *T. R.* 505.

Policy on goods, on board a particular ship, from A. to B. "against sea risk and fire only;" in the course of the voyage from A. to B. the ship was carried out of the course of the voyage insured, and while so proceeding, the goods insured sustained sea damage: held, the underwriters were liable for this loss. 1 *Boss & Pull. N. R.* 181.

A policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing the enemy, who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him after the capture, and in the course of the further prosecution of the voyage, in shortening sail and laying-to in order to let the prize keep up with him for the purpose of protecting her as a convoy into port in order to have her condemned, though such port were within the voyage insured. 6 *East*, 45.

The words in a policy of insurance "with or without letter of marque," do not appear to authorize direct cruising out of the course of the voyage insured in search of prize. *Ib.* 202.

The assured upon a trading voyage taking out a letter of marque (but without a certificate, which is necessary to its validity) unknown to the underwriters, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. 6 *T. R.* 379.

And if a captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel be afterwards lost in consequence of it, it is an act of barratry, although the captain libelled for the benefit of the owner as well as himself. *Ib.*

It is a deviation if the master leaves a port for a particular purpose by the command of the captain of a king's ship, laying there without any remonstrance. 2 *Campb.* 350.

A deviation merely intended, but never carried into effect, does not discharge the insurers; and whatever loss happens before actual deviation, or the dividing point of the voyage, falls upon the underwriters. 2 *Str.* 1249: *Dougl.* (346.) 361. See also 2 *Ld. Raym.* 840: 2 *Sulk.* 444. But if it can be shown that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out from a different place from that described in

the policy, the insurer is discharged, though the loss should happen before the dividing point of the two voyages. *Dougl.* 16. As an intention to deviate does not vacate the policy, it follows that whatever damage may be sustained before an actual deviation will fall upon the underwriters. 2 *Sulk.* 444: 1 *Maule & S.* 46: 7 *Barn. & C.* 14. And, in all cases, deviation or not is a question of fact to be decided, subject to the above rules, according to the circumstances of the case. *Dougl.* 781. As to changing the voyage by a memorandum on the policy, see *Laird v. Robertson*, 4 *Bro. P. C.* 488.

It has already been mentioned, that if a master remain an unusual time in a port it is a deviation; and many cases have been decided in which it has been held that the insurers were discharged by an unreasonable delay. See 4 *Esq.* 25: 1 *Camp.* 305: 14 *East*, 475: 8 *Bing.* 79, 81. n. 108, 124.

4. Every ship insured must, by a strict and implied warranty at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. But though the insured ought to know whether she was seaworthy or not at the time she set out upon her voyage, yet he cannot tell how long she will remain so; and if it can be shown that the decay, to which the loss is attributable, did not commence till a period subsequent to the insurance, the underwriter will be liable though she should even be lost a few days after her departure. *Park, c. 11*: 5 *Burr.* 2804: *Dougl.* (708.) 735.

The whole doctrine of sea-worthiness was settled in the case of the *Mills* frigate, where the insurance was upon a ship which had a latent defect totally unknown to the parties: and it was held, that the insurers were not liable, because the ship was not seaworthy; and that however innocent or unfortunate the insured might be, yet if the ship be not seaworthy at the time of insurance, there is no contract at all between the parties; because the very foundation of the contract, the ship, was in the same condition as if it did not exist; and the doctrine is the same in insurance upon goods, as when it is upon the ship itself. See *Park, c. 11*.

It is a clear and established principle, that if a ship is seaworthy at the commencement of the risk, though she becomes otherwise in one hour afterwards, the warranty is complied with, and the underwriter is liable. 1 *Dow.* 344.

As an assured impliedly warrants the ship insured to be seaworthy; whatever forms an

ingredient in sea-worthiness is not necessary to be disclosed by the assured to the underwriter in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required: therefore, where the assured of a ship had received a letter from the captain, informing him that he had been obliged to have a survey on the ship at Trinidad on account of her bad character, but the survey, which accompanied the letter, gave the ship a good character; held, that the nondisclosure of such letter and survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance. *Hayward and another v. Rodgers*, 4 East, 590.

A ship insured at and from a port, sailed on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect was discovered before any loss occurred, and part of the cargo was discharged; but a loss subsequently accrued, in no degree attributable to her having been overladen in the early part of her voyage: held, that the underwriters were liable for such loss. 3 B. & A. 320.

The assured cannot recover upon a policy of assurance unless they equip the ship with every thing necessary in her navigation during the voyage, and therefore they cannot recover if there be no pilot on board. 7 T. & R. 160.

But if a captain is a person of competent skill, and on arriving off a port, use proper diligence to procure a pilot without success, and then enter without one, and the ship is lost, the assurers are liable, though the captain might act wrong in entering, for he exercised his discretion *bona fide*. 2 Barn. & Adol. 380.

As to what is required of masters with respect to pilots in entering ports and rivers in this country, see 6 G. 4. c. 125.

Where a vessel engaged in the southern whale and seal fishery, and with liberty to chase and capture prizes, is insured in August, 1807, with a retrospect to August, 1806, although at the time of her insurance she was not competent to pursue all the purposes of voyage, the crew being reduced by death and casualties, if she had a competent force to pursue any part of her adventure, and could be safely navigated home, she is to be deemed seaworthy. *Holt*, 50: and see 2 B. & A. 73.

Where a vessel's best bower anchor and the cable of a small bower-anchor are defective; this deficiency in her ground tackling will prevent her from being sea-worthy. 3 Dow. 57.

5. In *wager-policies*, or policies upon interest or no interest, the performance of the voyage in a reasonable time and manner, and not

bare existence of the ship or cargo, is the object of insurance. But such policies being contradictory to the real nature of an insurance, which is a contract of indemnity, seem to have been originally had, because insurances were invented for the benefit of trade, and not that persons unconcerned or uninterested should profit by them. Indeed, these wager-policies were not introduced into England till after the Revolution, and the courts of law looked upon them with a jealous eye, while the courts of equity considered them as absolutely void. *Park, c. 14*. See 10 Mod. 77: *Com. Rep.* 360: 2 Vern. 269. 716.

The great distinction between interest and wager-policies was, that in the former the insured recovered for the loss actually sustained, whether it was a total or partial loss; in the latter he never could recover but for a total loss. 2 Burr. 683. At length it was found that the indulgence given to these fictitious, or, to speak more plainly, gambling policies, had increased to such an alarming degree, as to threaten the very annihilation of that security, which it was the original intent of insurances to introduce. It was, therefore, enacted by stat. 19 G. 2. c. 37. that insurances made on ships or goods, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, should be null and void. The statute, however, contains an exception for insurances on private ships of war fitted out solely to cruise against his majesty's enemies, (see 4 Bro. P. C. 439); and also provides that any merchandizes or effects from any ports or places in Europe or America, in the possession of the crown of Spain or Portugal, may be insured in such way or manner, as if the statute had not been made. And it has been decided, that the statute does not extend to insurances of property, on foreign ships. *Dougl.* (301.) 315.

The above provision of the statute relative to insurances from any ports or places in Europe or America, in the possession of Spain or Portugal, is founded on the regulations of those states to prohibit illicit trade; it is loosely worded, and admits of some latitude of interpretation, perhaps more than the legislature meant to allow. See *Park, c. 14. ad fin.*

A valued policy is not a wager-policy; it originates from the circumstances of its being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss: he therefore gives the insurer a higher premium to agree to estimate his interest at a sum certain. In this case the plaintiff must prove some interest, although he need not prove the value of his



interest. But if a valued policy were used merely as a cover to a wager in order to evade the statute, it would be void. 2 *Burr.* 1167; 4 *Burr.* 1966: *Park, c. 14.* The valuation does not raise a mere presumption which may be repelled by evidence, but the insurers are liable to the full amount, in a case not being actually a colourable wager, although they may prove an over valuation.

A policy dispensing with all proof of interest is within the act 19 *G. 2. c. 37. § 1.* forbidding assurances, "interest or no interest, or without farther proof of interest than the policy," and void. If the words of the policy do not dispense with the proof of interest, but merely fix the amount, it is a valued policy, and good. Where the policy, after stating that the goods should be valued at so much, contained the words, "that the policy be deemed sufficient proof of interest," it was held in effect an insurance, "interest or no interest." 4 *Bingh.* 567.

In 11 *East*, 428. an armed ship having taken into Lisbon a Danish vessel, after a proclamation requiring such vessel to be brought into port, and having taken a freight to England, with which the vessel captured sailed on the day of issuing letters of marque, it was held that an insurance made on behalf of the captors could not be sustained.

All contracts of insurance made by persons having no interest in the event about which they insure or without reference to any property on board, are merely wagers, and as such, void. *Cowp.* 583. And wherever the court can see upon the face of the policy that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such policy void. *Doughl.* (451.) 468. See 4 *Bro P. C.* 476.

It is observed in *Miller's Treatise on Insurance*, that the object of insurance, strictly speaking, is, not to make positive gain, but to avoid actual damage and harm from the event provided against. The assured must not only have an interest in the subject, but he must be seeking indemnification in case that subject should be lost or impaired: but although an insurance, actually speaking, seems to relate to positive loss merely in opposition to expected profit, yet this distinction is not generally attended to. The failure of an advantage, of which we have formed a strong expectation, does not appear very different from actual damage sustained; between a wager therefore, and a legal insurance, the material difference seems to be the circumstance of the assured having a pecuniary interest in the subject.

Great discussion respecting the nature of

insurable interest took place in respect of insurances effected by the commissioners for disposing of Dutch ships seized and detained by the crown; these commissioners were appointed by stat. 35 *G. 3. c. 80. § 21*; and it was determined that the commissioners had such an interest as entitled them to insure. See 8 *T. R. K. B.* 13. and more fully *Lucena v. Crawford* (in error), 3 *Bos. & Pull.* 75, &c: *Dom. Proc. 2 New Rep.* 313. In this latter case it was admitted that a mere expectation without interest cannot be the subject of insurance.

Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize-act, which usually passes at the commencement of a war. *Park, c. 14.* cites *Le Cras v. Hughes.* See also 11 *East*, 619.

The profits of a cargo, employed in trade on the coast of Africa, are an insurable interest. 2 *East*, 544. So is an insurance on imaginary profit. *Hendrickson v. Margetson*, *B. R.* 1776. cited in the above case, 2 *N. R.* 314.

In *Eyre v. Glover*, 16 *East*, 318. the insurance was on profits, without farther description, and held good. A mariner cannot insure his wages or commissions. 7 *T. R. K. B.* 157. But the master may insure his commission, privileges, and, as it seems, his wages. 1 *New Rep. C. P.* 206.

A ship-owner may effect an insurance on freight on his own goods by his own ship, and recover from the underwriter, in case of loss, the benefit he would have derived from carrying them on the voyage insured. The risk in freight does not attach until goods are actually shipped, or there is a binding contract for shipping them. 1 *B. & Ad.* 45: *S. C. 1 Ll. & W.* 257.

With respect to the degree and kind of interest which are requisite when the subject is in its nature insurable, see 1 *T. R.* 745: 1 *Bos. & Pull.* 315, 316.

The master of a ship drew a bill on his owners for supplies for the ship, and wrote on the bill "if this be not honoured the holder will insure the amount, and place the premium to the drawer's account." The bill being dishonoured, the holder insured the ship for three months, and averred interest in the bill which was to be sufficient proof of interest. The ship was lost after the three months: held, that the holder of the bill was authorised to insure for his own benefit, and was warranted in insuring for three months, and that he might recover the premium again of the drawer. 6 *Taunton*, 234.

A person who has several interests in a cargo, viz. as partner in 7-16ths, as a consignee of the whole, and as having a lien on the whole for advances, may protect them all by one insurance, without expressing in the policy the number or nature of his interests. 6 *Taunton*, 14.

Where it is stipulated in a charter-party that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money, which is estimated as the value of the ship, the owner has still an insurable interest in the voyage. 3 *Camp*. 93.

The property of a neutral may be insured on a voyage to a neutral or friendly port, although the neutral owner is himself resident in a place occupied by the enemy. 1 *Camp*. 75; and see 9 *East*, 283.

It is no defence under the general issue in an action on a policy of insurance that the persons interested, who were neutrals when the policy was effected and the loss happened, had become alien enemies before action brought. 3 *Camp*. 152.

As to insuring an enemy's ship see the following division.

6. Whenever an insurance is made on a voyage expressly prohibited by the common statute, or maritime law of this country, the policy is void. And in such a case it is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substitute a contract in direct contradiction to law. *Doughl.* 241. See 6 *T. R.* 723; 1 *Bos. & Pull* 273; 8 *T. R.* 31; and 1 *Bos. & Pull* 139; 11, which reports the judgment in the *K. B.* and *Exchequer Chamber* are truly and accurately given. See also 8 *T. R.* 562. In ascertaining if a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void. *Park, c.* 12. An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void; but the rule has never been extended to cases against the revenue laws of a foreign state, as no country pays attention to the revenue laws of another. *Park, c.* 12. *Doughl.* 251.

The questions how far trading with an enemy in time of actual war, and how far insurances upon the goods of an enemy, are legal, expedient, or political, have been frequently considered. As to the first, it was expressly prohibited, by the laws of ancient France, to the subjects of that country, and it appears scarcely to admit of a doubt in England, though the cases on the subject are very few. See 2 *Rol. Ab.* 173; 1 *Vez.* 317. In a very modern case, *Lord Mansfield* said,

that by the maritime law, trading with an enemy is cause of confiscation, provided you take into the fact. But this does not extend to neutral vessels. The common law, however, does not seem directly to forbid such trading; and one argument to show that it does not, is, that several statutes have been specially passed, in order to making such trading illegal. 1 *T. R.* 84. As to the second question—the insurance of enemies' property—under the common law it has been sanctioned; and *Lord Hardwick*, in a case before him, observed, that there had been no determination that insurances on enemies' ships during the war are unlawful, and that there had been several insurances of this sort during the (then) war, when a determination on the legality of trading with an enemy might hurt. 1 *Vez.* 316. The legislature have, however, repeatedly thought it necessary to interfere to prevent these insurances; and in the war which commenced in 1793, to prevent also all kind of trading with the enemy (France), whose proceedings, indeed, were then such as to threaten the dissolution of all civil society; see stat. 21 *G. 2. c.* 4. which expired about a twelvemonth after the (then) war; and stat. 33 *G. 3. c.* 27, which not only renders insurances on French property void during the war, but also subjects the offender to three months' imprisonment, and imposes the penalties of treason on all persons trading with so perfidious a foe. Many strong and ingenious arguments have, however, been urged against what is termed the impolicy of preventing such insurances. The most forcible arise from the assertions that the balance of that trade has always been found in favour of England, and that it has been the means of detecting many of the enemy's plans. But as even the advocates for this measure allow that no insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions; surely the admitting of any sort of insurance, is affording a tempting opening to this which is acknowledged to be dangerous; and it may be worthy the consideration of the legislature to settle both these points in a permanent manner. See at length on this subject, *Park, c.* 12.

After the above was written, the cases of *Brandon v. Nesbitt*, and *Bristow v. Towers*, were determined. See 6 *T. R.* 23. 25. By the first of these the Court of B. R. declared that no action could be maintained either by or in favour of an alien enemy; and as a consequence of that determination, the latter case was decided, after a long argument, by the positive opinion of the court in a very few words, that the insurance of an enemy's pro-

perty is illegal, and no action can be maintained thereon.

This question is now for ever at rest in the law of England, by the decision of the Court of K. B., upon a writ of error from the Common Pleas, in which it was held by *Lord Kenyon, Grose, Lawrence, and Le Blanc*, justices, that it was a principle of the common law, that trading with an enemy, without the king's licence, is illegal in British subjects. *Potts v. Bell*, 8 T. R. 548. See also 1 B. & P. 345 : 1 Hagg. Adm. R. 104.

Though the king may at common law confer a licence to trade with an enemy on any terms, however general, yet where a qualified licence is granted, its conditions must be strictly observed.

Therefore, where the licence to trade was on the express condition that bond be given, in such penalty, by such persons, and in such manner, as the commissioners of the customs shall direct; that the goods shall be exported to the places proposed, and no other; and that a certificate shall be produced within six months from the British consul, or other person there described, that the goods have been landed: if the bond be not given, the licence is void, the voyage illegal, and cannot be insured. 1 East, 475. And see 4 B. & A. 184.

A licence having been obtained for two vessels, sailing under any flag, to proceed from England to Holland, with specified goods, to cruise from one port of Holland to another, to land or lade part of their cargoes at one or more places, as might be more suitable, and having completed their cargoes of specified goods to proceed with the same to England, the licence to be renewed on application by the parties at the return from each voyage during six months; the exporter fearing the vigilance of the Dutch government, where his trade was contraband, delayed to export until after the expiration of six months, and then sailed and was lost: held the parties being in this country, and not applying for a renewed licence, the adventure was not legalized by the original licence, and an assurance thereon was void. 7 Taunton, 468.

7. All insurances upon commodities, the importation or exportation of which is prohibited by law, are void; and the rule prevails in this instance also, whether the underwriter did or did not know that the subject of the insurance was a prohibited commodity. *Park*, c. 13.

Upon the same principle that voyages prohibited by the common statute, or maritime law, may not be the subject of insurance (see ante, 6.) it is, that insurances are also void, on prohibited or uncustomed goods; or if made in any way to protect smuggling, or to de-

fraud the British revenue laws; to obstruct the effect of the navigation acts; or to import or export goods prohibited by royal proclamation in time of war; and goods, which, from their nature, are contraband, as arms or ammunition to an enemy, or money, provisions, or ships, according to peculiar circumstances. But insurances on goods, the exportation or importation of which are forbidden by the laws of other countries, are valid.

If a general insurance be effected on goods, part of which is of a nature to make the voyage illegal, the policy is entirely vitiated. 11 East, 502: 2 Camp. 221. But it is otherwise if no other part of the cargo except that illegally exported could have been seized and forfeited; and therefore where 300 barrels of gunpowder were exported, half of which only were licensed, the insurance as to the 150 which were licensed was held valid. 6 Taunt. 498: 4 Taunt. 792.

As to what are prohibited goods, see the last recent act for the management of the customs, 3 and 4 W. 4. c. 52.

By the 3 and 4 W. 4. c. 52. consolidating the laws relating to smuggling, it is enacted (§ 46), that persons insuring, or otherwise undertaking to deliver goods imported without payment of duty, or any prohibited goods, or delivering such uncustomed and prohibited goods, shall forfeit 500*l.*, and persons agreeing to pay any money for insurance of such goods, or receiving the same, are liable to a like penalty.

8. It is a question not decided, whether in cases of *fraudulent* insurance, where the underwriter has run no risk, he shall be liable to return the premium: in some equitable cases, where the underwriters have been relieved on account of fraud, it has been decreed, that the premium should be returned. 2 Vern. 206: 2 P. Wms. 110: and see *Burr*. 1361. And it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, to recover the premium. 3 Burr. 1909. On the other hand, if the fraud be on the part of the insured, and is notoriously palpable and gross in its nature, the Court of B. R. will order the underwriter to retain the premium. *Park*, c. 10. cites *Tyler v. Horn*.

When the insurance is *illegal*, and the voyage has been performed, the premium cannot be recovered back; for *in pari delicto potior est conditio possidentis*. Thus the premium paid on an illegal insurance, to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck v. Hewitt*, 1 East, 96. And see 3 B. & P. 35: 7 East, 449: 12 East, 296.



So when a policy is void as a wager policy there has never been an apportionment, unless under stat. 19 G. 2. c. 37. though the ship there be something like an usage found to arrive safe, the underwriter may retain the rect the judgment of the court. But if there premium. *Louvy v. Bourdieu*, Dougl. 468. are two distinct points of time, or, in effect, And so he may in the case of a re-assurance two voyages, either in the contemplation of void, by the same statute. 3 Term. Rep. the parties, or by the usage of trade, and only 266. And see *Routh v. Thompson*, 11 East, one of the two voyages was made, the premium shall be returned on the other, though 428. both are contained in one policy. 3 Burr. 1237: 1 Black. Rep. 318. See *Park, c. 19.*

In general, when property has been insured to a larger amount than the real value, the overplus premium, or if goods are insured to come in certain ships from abroad, but are not for a fuller discussion of the subject.

Policy on the Ceres "at and from Oporto in fact shipped, the whole premium shall be to Lynn, with liberty to touch any ports on the coast of Portugal to join convoy, particularly at Lisbon, at twelve guineas per cent, to return 6l. if she sail with convoy to the coast of Portugal, and arrive:" the Ceres sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy of England; in the way from Oporto to Lisbon the fleet was dispersed by a storm, and the Ceres, judging for the best, run for England, and arrived: held, that the insured was entitled to a return of premium. *Audley v. Duff*, 2 Bos. & Pull. 111. See also 7 T. R. 421.

So where the words were, "if she depart with convoy from Portugal, and arrive:"—*Evermd v. Hollingworth*, ib. in notes. If a policy be effected on a foreign built ship, British owned (which not being required to be registered, may sail without convoy), it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built. *L. v. Duff*, 2 Bos. & Pull. 209.

In an action on a policy of insurance with a count for money had and received, if the defendant pay no money into court, but establish, as a defence, that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening his case. 2 Bos. & Pull. 330.

The captors of a ship, seized as prize, are not entitled to a return of premium (paid for insurance) although it be afterwards adjudged to be no prize, and a restitution be awarded to the owners by the Court of Admiralty. 8 T. R. 154.

The assured were held not entitled to a return of premium, upon a policy at and from a place within the limits of the South Sea Company Charter, the ship being without a licence from the South Sea Company at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could, and before they knew of her loss, and the licence was made to relate to

to a larger amount than the real value, the overplus premium, or if goods are insured to come in certain ships from abroad, but are not in fact shipped, the whole premium shall be returned. If the ship be arrived before the policy is made, the insurer being apprised of it, and the insured being ignorant of it, he is entitled to have his premium restored on the ground of fraud: but if both parties are ignorant of the arrival, and the policy be lost or not lost, it seems the underwriter ought to retain it, as if the ship had been lost at the time of underwriting, he would have been liable to pay the amount of his subscription. Clauses are frequently inserted by the parties, that upon the happening of a certain event, there shall be a return of premium. These clauses have a binding operation on the parties, and the construction of them is a matter for the court, and not for the jury to determine. In short, if the ship, or property insured, was never brought within the terms of the contract, so that the insurer never ran any risk, the premium must be returned. *Park, c. 19*, see 3 Burr. 1240: *Cowp.* 668. 1 Show. 156: *Dougl.* (255.) 268: *Simon v. Baydell*.

Two rules are solemnly established, 1st, that whether the cause of the risk not being run is attributable to the fault, will or pleasure of the insured, the premium is to be returned. *Cowp.* 668. And 2dly, where the contract is entire, whether for a specified time, or for a voyage, and the risk is once commenced, and there is no contingency on which the risk is to end at any immediate period, there shall be no apportionment or return of premium afterwards. Hence, in cases of deviation, though the underwriter is discharged, he shall retain the premium. So in cases of insurance for twelve months, where the loss happens in two; even though the premium is calculated at so much per month: likewise where different ports are mentioned in the course of an outward or homeward bound voyage, and the ship is lost before setting out on her return; in all these cases also the premium shall be retained. See *Cowp.* 666: *Lorraine v. Thomlinson*, *Dougl.* (564.) 584: *Bernon v. Woodbridge*, *Dougl.* (751.) 780. But it is otherwise if the jury find an express usage upon the subject of return of premium; and, indeed, it seems that

a time antecedent to the loss. *Cowie et al. v. Barber*, *Term Rep. East*, 55. G. 3. c. 16.

Where a license was obtained and insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter, directing the licence to be obtained, reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the insurance effected subsequently to that; held, that though the voyage was in its inception illegal, being contrary to 12 *Car.* 2. c. 18. § 8. (now repealed by 3 G. 4. c. 42. § 3.) nevertheless the assured might recover back the premium. 5 *M. & S.* 122.

As to the registration of vessels, see the 3 and 4 *W.* 4. c. 55. and tit. *Ships*.

IV. *Bottomry* (or *bottomree*) is a contract by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or bottom of the ship, as a security for the payment; in which case it is understood, that if the ship be lost the lender loses all his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations for the benefit of commerce, and by reason of the extraordinary hazard run by the lender: and in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged during the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore, in this case, is said to take up money at *Respondentia*. It may be added, that in a loan upon bottomry, the lender runs no risk, though the goods should be lost; and on *respondentia*, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. In this consists the chief difference between bottomry and *respondentia*; in most other respects they are the same. 2 *Comm.* 457, 458: *Park*, c. 21.

There is a third kind of contract, included in these terms, for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself: as when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case a certain voyage be safely performed; which kind of agreement is sometimes called *genus nauticum*; and sometimes *usura mariti-*

*ma*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by stat. 19 G. 2. c. 37. that all monies lent on bottomry or respondentia, or vessels bound to or from the East Indies, shall be expressly lent only upon the ship, or upon the merchandize; that the lender shall have the benefit of salvage; and that if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender, for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandize be totally lost. See *Park*, c. 21.

This statute has entirely put an end to that species of contract which arose from a loan upon the mere voyage itself, as far only as relates to India voyages; but these loans may still be made in all other cases, at the common law, except in the following instance, which is another statute prohibition. The stat. 7 G. 1. c. 21. § 2. declares, that all contracts made or entered into by any of his Majesty's subjects, or any person in trust for them, for or upon the loan of any monies by way of bottomry, or any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or places beyond the Cape of Good Hope (mentioned in the statutes relating to the English East India Company,) shall be null and void. This act, it should seem does not prevent the lending money on bottomry, on foreign ships trading, from their own country, to their settlements in the East Indies. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in India under foreign commissions; and to encourage the lawful trade thereto. It seems to be allowed that an American ship, since the declaration of American independency, is a foreign ship within the meaning of this statute. See *Park*, c. 21.

*Bottomry* is a contract of more antiquity than that of insurance, and arose from the power given to the master of a ship, to hypothecate the ship and goods for necessaries in a foreign country. But this origin of bottomry has been doubted. See *Abbot on Shipping*, 118. The ship must be abroad, and in a state of necessity, to justify such an act of the master. See *Moor*, 918: *Hob.* 11. See *Justin v. Ballam*, and case of the ship *Gratitude*, 3 vol. *Rob. Ad. Rep.* 240: *Salk.* 34: *Park*, cap. 21.

The contract is usually by bond or bill of sale; 3 *T. R.* 267. 270; and may be executed either by the owner or by the master in his behalf in foreign parts. But in the case of a contract of this nature by the owner in this

country, the lender has not the same convenient and advantageous remedy by suit in the Admiralty against the ship, as in the case of hypothecation for necessities by the master in a foreign port. 2 *Lord R.* 983: 4 *East*, 319: 3 *T. R.* 268. Where there are several hypothecation bonds, the last in date is preferred, for it was the means of the security of the whole. *Dodson*, 204.

The principal upon which bottomry is allowed is, that the lender runs the risk of losing his principal and interest: and therefore it is no usury to take more than the legal rate. See 2 *Ves.* 148. 154: *Cro. Jac.* 208. 508: *Hardr.* 418: 1 *Sid.* 27: 1 *Lev.* 54: 1 *Eq. Abr.* 372. But if a contract were made by colour of bottomry, in order to evade the statute against usury, it would then be usurious. 2 *Ves.* 146. And as the hazard to be run is the very basis and foundation of this contract, it follows, that if the risk be not run, the lender is not entitled to the extraordinary premium. 1 *Vern.* 263.

The risks to which the lender exposes himself are generally mentioned in the condition of the bond, and are nearly the same as those against which the underwriter, in a policy of insurance, undertakes to indemnify. It has been determined, that *piracy* is one of the risks. *Comb.* 56. And if a loss by capture happen, the lender cannot recover against the borrower: but this does not mean a temporary taking, but such as occasions a total loss. Therefore, where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited, it was held, that the bond was not forfeited, and the obligee may recover. *Joyce v. Williamson, Park*, c. 21. In the same case it was also settled, that a lender on bottomry, or at *respondentia*, is neither entitled to the benefit of salvage, nor liable to contribute in case of general average; for which reason the stat. 19 G. 2. c. 37. above mentioned, contains a positive provision to allow the benefit of salvage in the cases there mentioned. If, however, a man insure *respondentia* interest on a foreign ship, and be obliged to contribute to an average loss, by the laws of her country, English underwriters are bound to indemnify. *Walpole v. Ewer, Park*, c. 21.

The loss within the meaning of a bottomry bond must be a total, not a constructive loss. 1 *M. & S.* 30: *S. C.* 1 *Marsh.* 754. Nor of course a loss from any internal defect in the vessel. So, if the ship be lost by a wilful denation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation; as she was not lost by a peril to which the lender agreed to make himself liable. *Skin.* 152.

345: *Holl.* 126: 1 *Eq. Abr.* 372. 2 *Ch. Ca.* 130. And, indeed, it is generally expressly provided against in the bond.

If the borrower becomes bankrupt after the loan of the money, and before the event happens which entitles the lender to repayment, the lender may prove his debt under the commission, after the contingency shall have happened; as if the event had actually happened before the commission of bankruptcy issued. *Stat.* 19 G. 2. c. 32. § 2. See this Dict. title *Bankrupt*.

*Bottomry* and *respondentia* may be insured, provided it be specified in the policy to be such interest. And by the 19 G. 2. c. 37. the lender alone can make such insurance; and the borrower can only insure the surplus value of the goods over and above the money borrowed. But money expended by the captain for the use of the ship, and for which *respondentia* interest is charged, may be recovered under an insurance on goods, specie, and effects, provided it is sanctioned by the usage of trade. See 3 *Burr.* 1394: 1 *Black. Rep.* 405: and *Gregory v. Christie, Park*, c. 1. p. 11. Finally, where a person insures a bottomry interest, and recovers upon the bond, he cannot also recover upon the policy. *Park*, c. 31. p. 428.

For forms of a bottomry bond or bill, see *Abbot on Shipping. Appendix*.

#### FORM OF A RESPONDENTIA BOND.

KNOW all men by these presents, that I, A. B. of, &c. am held and firmly bound to C. D. of, &c. in the sum or penalty of 1000*l.* of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated this \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of the reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain France, and Ireland, King, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and ninety-four.

The Condition of the above-written obligation is such, that whereas the above-named C. D. hath, on the day of the date above-written, lent unto the above-bounden A. B. the sum of 500*l.* upon merchandizes and effects, to that value, laden or to be laden, on board the good ship or vessel, called the \_\_\_\_\_ of the burden of \_\_\_\_\_ tons, or thereabouts, now in the river Thames,



whereof E. F. is commander. If the said ship or vessel do and shall, with all convenient speed, proceed and sail from, and out of the said river of Thames, on a voyage to any ports or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and from thence do and shall sail and return unto the said river of Thames, at or before the end and expiration of thirty-six calendar months, to be accounted from the day of the date above-written, and that without deviation (the dangers and casualties of the seas excepted): And if the above bounden A. B., his heirs, executors, or administrators, do and shall within — days next after the said ship or vessel shall be arrived in the said river Thames, from the said voyage, or at the end and expiration of the said thirty-six calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay, or cause to be paid, unto the above-named C. D., his executors, administrators, or assigns, the sum of 500*l.* of lawful money of Great Britain, together with — pounds of like money, by the calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time, and so many calendar months, as shall be elapsed and run out of the said thirty-six calendar months, over and above twenty calendar months, to be accounted as from the day of the date above-written; or, if in the said voyage, and within the said thirty-six calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel, by fire, enemies, men of war, or any other casualties, shall unavoidably happen; and the above-bound A. B., his heirs, executors, or administrators, do and shall, within six months next after the loss, pay and satisfy to the said C. D. his executors, administrators, or assigns, a just and proportional average on all goods and effects which the said A. B. carried from England on board the said ship or vessel, and on all other the goods and effects of the said A. B. which he shall acquire during the said voyage, and which shall not be unavoidably lost: Then the above-written obligation to be void, and of no effect, or else to stand in full force and virtue.

Sealed and delivered (being first duly stamped) in the presence of } A. B.

V. INSURANCE UPON LIFE is a contract by which the insurers, for a certain gross sum, or, as is more usual, for an annual payment proportionate to the age, health, and profession of the person whose life is the object of the insurance, engage to pay the person for whose benefit the insurance is effected, or the personal representatives of the party insuring, as the case may be; either a stipulated sum, or an annuity, upon the death of the party insured whenever it may happen, if the insu-

rance be made for the whole term of life, or if the insurance be for a limited period, in case of his death within such period.

These contracts have been found to be attended with so many advantages, to persons whose incomes might otherwise determine with their own lives, or those of others, that a society obtained a charter from Queen Anne for the purpose of granting such annuities, and still subsists, under the name of *The Amicable Society for a Perpetual Assurance Office*. A similar society is established, by deed enrolled in the Court of King's Bench, at Westminster, called *A Society for Equitable Assurances on Lives and Survivorships*. The two companies of *The Royal Exchange* and *London Assurance* also obtained a charter for the same purpose: and by stat. 33 G. 3. c. 14. the two companies of *The Royal Exchange Assurance* for insuring of ships, and for insuring houses, &c. against fire, are authorized to grant annuities for lives or on survivorship; and are incorporated, for that purpose, by the name of *The Royal Exchange Assurance Annuity Company*. Private underwriters may also enter into policies of this nature, if an insured chooses to trust to their single security.

To avoid the iniquitous gambling which had begun to take place upon this, as well as on other insurances, the stat. 14 G. 3. c. 48. provides, that "no insurance shall be made on the life or lives of any person or persons, wherein the person for whose use the policy is made, shall have no interest, or by way of gaming, or wagering, but such insurance shall be null and void." And, in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the benefit of the insurance really is, it is further enacted, by the same statute, "that it shall not be lawful to make any policy or policies, on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person's name interested therein, or for whose use or benefit, or on whose account such policy is so made or under-written. And that in all cases where the insured has an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer, than the amount or value of the interest of the insured in such life or other event."

On this statute it has been determined, that the holder of a note for money won at play, has not an insurable interest in the life of the maker of the note. *Dwyer v. Edie, Park*, 432.

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy. See *Anderson v.*

*Edie, B. R.* sittings in *Trinity Term*, 1795: *Park*, 432; wherein *Lord Kenyon* said, "that it was singular that this question had never been directly decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security." See also *Tidswell v. Angerstein*, *Peak's N. P. cases*, 151.

But this being a contract of indemnity, if the debtor is in any way paid, the assured cannot recover on the policy: resolved in a case of assurance on the life of *Mr. Pitt*, whose debts were paid by parliament. 9 *East*, 72.

To render a policy valid within the 17 *G. 3. c. 48*, a pecuniary interest is necessary; and it was therefore held, that a policy effected by a father on the life of his son, in which he had no pecuniary interest, was void. 10 *B. & C.* 724.

The above decision is said to have created considerable alarm, and it was stated in court during the trial, that policies like the one in question had been effected to the amount of half a million. See *Law Mag.* 4 vol. 372.

The general rules and maxims which govern insurances in general, and on which so much has already been said, apply also to this species of them. The following are such as relate more directly to the contract now immediately in question:

As to the risk.—In a life-insurance the insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or the hand of justice. The death must happen within the time limited by the policy, otherwise the insurers are discharged: and though a man receives a mortal wound during the existence of the policy, if he does not in fact die till after the expiration of it, the insurers are not liable. See *Willes'* opinion in 1 *T. R.* 252. But if a man whose life is insured goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the time insured, is a fact for the jury to ascertain from the circumstances. *Patterson v. Black*, *Park*, 433.

A policy was made for one year from the day of the date thereof: the policy was dated September 3, 1697. The person died on September 3, 1698, about one o'clock in the morning, and the insurer was held liable. 2 *Salk.* 625: 1 *Ld. Raym.* 480. To prevent disputes, it is now usual to insert in the policy the words, *the first and last days included*. *Park*, 436.

With respect to the loss.—This sort of policy being on the life or death of a man, does not

admit of the distinction between total and partial losses. *Park*, 434.

*Fraud* equally vitiates policies on lives, as it does those in marine insurances. *Pr. Ch.* 20: 2 *Vern.* 206. But where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health: for it can never mean that he is free from the seeds of disorder. And even if the person, whose life was insured, laboured under a particular infirmity; if it be proved by medical men that in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable. 1 *Black. Rep.* 312: *Park.* 432. 439.

The conditions of a life insurance required a declaration of the state of the health of the assured, and the policy was to be *valid, only* if the statement were free from *misrepresentation* and *reservation*: the declaration described the assured as resident at Fisherton Anger; she was then a prisoner in the county gaol there: held, that it was a question for the jury, whether the imprisonment were a material fact, and ought to be communicated. 6 *Taunt.* 186.

It is the duty of a party effecting an insurance on life or property to communicate to the insurer all material facts within his knowledge, touching the subject-matter of insurance; and it is a question for the jury, whether any particular fact was or was not material. 8 *Barn. & C.* 586: 4 *Bing.* 60: 5 *Bing.* 503. If a policy is void at the time of the insured's death, no payment by any person after his decease can revive it. Thus, where, by the rules of the society, the insured might (if the quarterly premium was left unpaid for fifteen days), within six months, on certain terms, revive the policy, and the insured died five days after a quarterly payment became due, it was held, that his executor could not, by paying the arrear, revive the policy. 12 *East*, 183: 3 *Camp.* 134.

We have already seen (*ante*, III. 8.) that when the risk is entire, and is once begun, there shall be no apportionment of premium: if, therefore, the person whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. See *Tyrie v. Fletcher*, *Cowp.* 669.

A policy of insurance upon a life (effected by the Amicable Society) did not contain any provision for avoiding the policy in case the insured should suffer by the hands of justice. It was held, that the obligation to pay did not determine, merely because the conduct of the party insured produced the evil; even though such conduct was against the criminal law of the country. To avoid the obligation, the act

must be done fraudently for the very purpose of producing the event. 3 *Russ.* 350.

VI. INSURANCE AGAINST FIRE is a contract by which the insurer undertakes, in consideration of the premium, to indemnify the insured against all losses which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. Various offices have been instituted for these kinds of insurances: some established by the royal charter, others by deed enrolled, and others which give security on land for the payment of losses. Some are called Contribution Societies, in which every person insured becomes a member or proprietor participating in profit and loss. Such are the Hand in Hand, and the Westminster Fire Office for the insurance of goods and buildings; and the Union Fire Office for the insurance of goods. The other companies insure both houses and goods at their own risk. Of these the principal are the London and Royal Exchange Assurance corporations, the Sun, the Phoenix, the British; and there are numbers of other offices recently established for this branch of insurance.

The rules by which these societies are governed are drawn up by their own managers, and a copy given to every person at the time he insures; so that by his acquiescence he submits to their proposals, and is full apprised of those rules, upon the compliance or non-compliance with which he will or will not be entitled to an indemnity. There are not, therefore, many cases on the subject, in our law books. The following are the most requisite to be noticed:—

The *London Assurance Company* insert a clause in their proposals, by which they declare, that they will not hold themselves liable for any damage by fire occasioned by any invasion, foreign enemy, or any *military or usurped power* whatever. Under this proviso it has been held, that the insurers were not exempted from, but liable to make good, a loss by fire occasioned by a mob, which arose under pretext of the high price of provisions, and burned down the plaintiff's malting house. 2 *Wills.* 363.

The *Sun Fire Office*, in addition to the above words, adds, *civil commotion*. It was held, that under these latter words the company were exempt from, and not liable to satisfy, losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute which had passed in favour of the Roman Catholics. *Langdale v. Muson*, *Park*, c. 23.

When a loss happens the insured is bound by the proposals of most of the societies, and ought, in all cases, to give immediate notice of the loss, and as particular an account of the

value, &c. as the nature of the case will admit. He must also produce a certificate of the minister and churchwardens as to his character, and their belief of the loss sustained, and the truth of what he advances. *Park*, 448.

If a policy of insurance from fire refer to certain printed proposals, the proposals will be considered as part of the policy. 6 *T. R.* 710.

Insurance "against all the damages which the plaintiffs should suffer by fire, on stock and utensils in their regular built sugar house," does not extend to damage done to the sugar by the heat of the usual fires employed in refining, being accumulated by the mismanagement of plaintiffs, who inadvertently kept the top of their chimney closed. 6 *Taunt.* 436.

By the proposals of the *Phoenix Company* it is stipulated, that "persons insured shall give notice of the loss forthwith, deliver in an account, and produce a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they know the character, &c. of the assured, and believe that they really sustained the loss, and without fraud:" the procuring of such certificate is a condition precedent to the right of the assured to recover on the policy; and it is immaterial that the minister, &c. wrongfully refused to sign the certificate. *Ib.*

A certificate of some reputable householder alone is not sufficient. *Ib.*

In these insurances against fire, the loss may be either partial or total, and some of the offices, if not all, expressly undertake to allow all reasonable charges attending the removal of goods in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged, by such removal. *Park*, 449.

The insurance companies in general reserve to themselves an option of reinstating the premises, or of paying the amount of the insurance money. See 18 *Ves.* 119.

In a policy against fire from half-year to half-year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half-year, and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half-year, but before the premium of the next was paid: held, that the insurers were not liable though the assured tendered the premium before the end of fifteen days, but after the loss. 1 *Bos. & Pull.* 471.

Soon after this decision the Royal Exchange Assurance Company, the Phoenix, and some other offices, gave notice that they did not mean to take advantage of the above case.

The same principles as to *fraud* and the *re-*



turn of premium, apply to cases in insurance against fire as to all other contracts of insurance.

The plaintiff having one of several warehouses next but one to a boat-builder's shop which took fire; on the same evening after that fire was apparently extinguished, gave instructions by an extraordinary conveyance for insuring *that warehouse*, then having others uninsured, but without apprising the insurers of the neighbouring fire. Though the terms of insurance did not expressly require the communication, held, that the concealment of this fact avoided the policy. 6 *Taunt.* 338: and see 1 *Mon. & Malk.* 90.

These policies are not, in their nature, assignable, nor can the interest in them be transferred without the consent of the office; contrary to what has been expressly determined in case of marine insurances. 1 *T. R.* 26. It is provided, however, that when any person dies, the interest shall remain to his heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name. *Park,* 549.

It is necessary that the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens; and therefore, after the lease of the house is expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *Lynch v. Dalzell*, 4 *Bro. P. C.* and see 2 *Atk.* 554.

The premium upon insurances of course depends upon the terms of the different offices. There are, besides, certain duties imposed both on the policy and amount insured. See 55 *G.* 3. c. 184: 9 *G.* 4. c. 13: and 3 and 4 *W.* 4. c. 23: by which latter statute insurances of agricultural produce and farming stock are exempted from the payment of such duties.

By stat. 17 *G.* 3. c. 50. § 24. if any person sign a policy of insurance against fire, not being duly stamped, he shall forfeit 10*l.* and must also pay 5*l.* over and above the usual stamp-duties, (see *ante*, I. 1.) before it can be received in evidence.

As to the wilfully setting fire to houses, &c. see *tit.* *Arson, Malicious Injuries.*

**INTAKERS.** A kind of thieves in the northern parts of England, so called, because they did take in and receive such booties as their confederates, the outpartners, brought to them from the borders of Scotland; they are mentioned in stat. 9 *H.* 5. c. 7.

**INTASSARE.** See *Tassum.*

**INTENDMENT OF LAW,** *intellectus legis.*] The understanding, intention, and true

meaning of law. *Lord Coke* says, the judges ought to judge according to the common intendment of law. 1 *Inst.* 78.

*Intendment* shall sometimes supply that which is not fully expressed or apparent, and when a thing is doubtful, in some cases intendment may make it out; also many things shall be intended after verdict, in a cause to make a good judgment: but intendment cannot supply the want of certainty in a charge in an indictment for any crime, &c. 5 *Rep.* 121.

Sometimes a thing is necessarily intended by what precedes or follows it; and where an indifferent construction may have two intendments, the rule is to take it most strongly against the plaintiff. *Show.* 162. Though if a plaintiff declares, that the defendant is bound to him by obligation, it shall be intended that the obligation was sealed and delivered: if one is bound in a bond, and in the *solvend'* of the bond it is not expressed unto whom the money shall be paid, or if paid to the obligor, the law will intend it is to be paid to the obligee; and where no time is limited for payment of the money, it shall be intended to be presently paid. 2 *Lil. Ab.* 71.

The intent of parties in deeds, contracts, &c. is much regarded by the law: though it shall not take place against the direct rules of law: the law doth not in conveyances of estates admit them regularly to pass by intendment and implication; in devises of lands they are allowed, with due restrictions. *Vaugh.* 261, 262. Where seisin of an inheritance is once alleged, it shall be intended to continue till the contrary is shown. *Jones*, 181. A court pleaded generally to be held *secund' consuetud'* shall be intended held according to the common law. *Goldsb.* 111.

By intendment of law every parson, or rector of a church, is supposed to be resident in his benefice, unless the contrary be proved. *Co. Lit.* 78. b.

One part of a manor by common intendment shall not be of another nature than the rest. *Co. Lit.* 73. b.

Of common intendment a will shall not be supposed to be made by collusion. *Co. Lit.* 78. b. The law presumes that every one will act for his best advantage; therefore credits the party in whatever is to his own prejudice. *Fin. Law.* 10: *Max.* 54. Usury shall not be intended, unless expressly found by the jury. *Bridgm.* 112: 10 *Rep.* 59. Covin shall not be intended or presumed in law, unless expressed or averred. *Bridgm.* 112. When one word may have a double intendment, one according to the law, and another against the law, that intendment shall be taken which is according to law, and this by a reasonable intendment. 3 *Bulst.* 306: *Yelv.* 50. See further *Deeds,*

*Implication, Indictment*, and such other titles as are applicable to this subject.

**INTENDMENT OF CRIME.** In ancient times felonious attempts, intending the death of another, were adjudged felony; for the will was taken for the fact. *Bract. 1 Ed. 3.* But at this day, the law does not generally punish intendments to do ill, if the intent be not executed; except in case of treason, where intention proved by circumstances shall be punished as if put in execution. *3 Inst. 108.* And by the *9 G. 4. c. 31. § 11.* attempts to murder are subject to capital punishment, and many other attempts to commit crimes are made felonies by the statute. See *tit. Homicide, III., Treason, &c.*

**INTENTION.** Where an act has been done voluntarily, the particular intention with which it was done may either be material or immaterial to the legal charge or claim. Where the intention is material, it is in some instances a conclusion of law which may be drawn by the court, either from intrinsic facts, or extrinsic circumstances; but most usually it is a question of facts under all the circumstances for the consideration of a jury. The question of intention is a conclusion to be drawn by the court from the circumstances, whenever, by virtue of any rule or principle of law, the conclusion is a necessary one from such circumstances. Thus, in cases of homicide the courts frequently infer malice from the facts, without an express finding by the jury; in other words, malice arises by construction.

It is a rule of law (where a general felonious intention is sufficient to constitute the offence) that a man who commits one felony in attempting to commit another, cannot excuse himself on the ground that he did not intend to commit the particular felony. Thus, if A., intending to shoot B., miss him, but destroys C., against whom he had no malice, he is guilty of the murder of C. But in such case, the offence contemplated must be a felony. If a man intending to commit a base trespass, were to shoot another, it would amount at most to the offence of manslaughter. *East's P. C. 513.*

It seems that the rule is to be confined to cases where a general allegation of a malicious and felonious intention is sufficient, and that it does not extend to offences where a particular and specific intention is essential.

In the next place, although the fact itself, or its circumstances, may not supply any conclusive inference as to intention, independently of the finding of the jury, yet they may afford a *primâ facie* presumption, which on recognized legal principles ought to prevail, unless the presumption be rebutted by competent evidence.

VOL. II.

The law constantly notices the universal principle of evidence, that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act. See *3 M. & S. 15.*

In many cases, therefore, the allegation of intention, though essential to sustain the charge or claim, requires no other proof than that of the fact itself, the intention being the result or inference which the law draws from the act itself, in the absence of a sufficient legal justification or excuse. Thus in the case of a libel, the publication and noxious application of which have been proved, in the absence of evidence to repel presumption, a malicious intention is to be inferred without further proof. Where, on the contrary, the act itself is indifferent, and is innocent or criminal, according to the intention of the agent, the intention, like any other matter of fact, requires extrinsic proof. Where a party disposes of forged bank notes, it is an inference of law that he intended to defraud the Bank (*2 B. & C. 261: S. P. R. & R. 169*); and yet, if the jury do not draw the conclusion, but merely find the facts, it seems that the court cannot.

In the absence of any principle or rule of law, by virtue of which either a conclusive inference or any presumption as to intention ought to be drawn from the act or its circumstances, the specific intention of the agent is a matter of fact on which the jury are to exercise their discretion on the evidence before them, as in ordinary cases, civil as well as criminal. Thus on a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independently of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law as far as they are applicable, and their judgment and experience as applied to all the circumstances in the evidence.

Where the particular intention is essential, evidence of former attempts with that intention is admissible to prove the intent. *R. & R. C. 531.* It is a general rule, that whenever the fact of intention is required to be established by collateral evidence, it may be rebutted by contrary evidence. *Per Lord Ellenborough, 6 East, 475. See 1 Starkie on Evid. 416.*

The words of deeds shall be construed according to the intent of the parties, and not

otherwise. The intent shall be destroyed where it does not in deed, &c. agree with the law. *Pl. C.* 160. *b.* 162. *b.*

In every agreement the intent is the chief thing that is to be considered; and if by the act of God, or other means not arising from the party himself, the agreement cannot be performed according to the words, yet the party shall perform it as near the intent as he may. *Pl. C.* 290.

Common usage and reputation frequently govern the matter, and direct the intention of the parties; as upon sale of a barrel of beer the barrel is not sold, but upon sale of a hog's-head of wine it is otherwise. *Savil*, 124: *Hardr.* 3. The intention of a man is not always to be pursued in equity; as if a man settles a term in trust for one and his heirs, yet it shall go to the executor. 1 *Vern.* 164.

All deeds are but in nature of contracts, and the intent of the parties reduced into writing, and the intention is to be chiefly regarded. In an act of parliament the intention appearing in the preamble shall control the letter of the law and from the regard which the law itself gives to the intention of the party, it is, that where there is fine by render, there shall be no dower; and so a rent or recognizance shall not be extinguished by levying a fine to the party. *Vern.* 58. See 14 *Vin. Abr.* tit. *Intent*: and see this *Dict. tits. Agreement, Deed, Limitation, Statute, Will, &c.*

**INTENTIONE.** A writ that lies against him who enters into lands after the death of the tenant in dower or for life, &c., and holds out to him in reversion or remainder. *F. N. B.* 203.

**INTER CANEM ET LUPUM.** Words formerly used in appeals to signify the crime being done in the twilight. *Inter Placita de Trin.* 7 *Ed.* 1: *Rot.* 12: *Glouc. Plac. Car. apud Novum Castrum*, 24 *Ed.* 6. *Rot.* 6. This in Herefordshire they call the *mock-shadow*, corruptly the *mock-shade*, and in the north, *day-light's-gate*; others *betwixt hawk and buzzard*. *Cowell.*

**INTERCOMMONING**, is where the commons of two manors lie together, and the inhabitants of both have time out of mind depastured their cattle promiscuously in each. *Cowell.* See tit. *Common*.

**INTERDICT**, or **INTERDICTION**, *interdictio, interdictum*.] An ecclesiastical censure, prohibiting the administration of divine ceremonies, either to particular persons, or in particular places, or both. *Lind.* 320. See *Wals. Hist. an.* 1357. It was after a general excommunication of a whole country or province: it is mentioned in some of our historians, viz. *Knighton* tells us, *anno* 1208, that the Pope

excommunicated King John, and all his adherents, *et totam terram Anglicanum supposuit interdicto*, which began the first Sunday after Easter, and continued six years and one month; during all which time nothing was done in the churches besides baptism and confessions of dying people.

#### THE ANCIENT FORM OF AN INTERDICT.

In the name of Christ, we the bishop, in behalf of the Father, Son, and Holy Ghost, and of St. Peter, the chief of the apostles, and in our own behalf, do excommunicate and interdict this church, and all the chapels thereunto belonging, that no man from henceforth may have leave to say mass, or to hear it, or in any wise to administer any Divine office, nor to receive God's tithes without our leave; and whosoever shall presume to sing or hear mass, or perform any Divine office, or to receive any tithes, contrary to this interdict, on the part of God the Father Almighty, and of the Son, and of the Holy Ghost, and on the behalf of St. Peter, and all the saints, let him be accursed and separated from all Christian society, and from entering into Holy Mother Church, where there is forgiveness of sins; and let him be anathema maranatha for ever with the devils in hell. *Fiat. fiat. fiat. Amen.*—*Du CANGE.*

This severe church-censure has been long disused. See further *tits. Papist, Rome*.

**INTERDICT.** In the civil law, and law of Scotland, a prohibition nearly equivalent to the injunction of our Court of Chancery. See tit. *Injunction*.

**INTERDICTED OF WATER AND FIRE.** Were anciently those persons who suffered banishment for some crime; by which judgment order was given that no man should receive them into his house, but deny them fire and water, the two necessary elements of life, which amounted, as it were, to a civil death; and this was called *legitimum exilium*, says *Livy*.

**INTEREST**, *interesse*.] Is commonly taken for a chattel real, as a lease for years, &c., and more particularly for a future term; in which case it is said in pleading, that one is possessed *de interesse termini*. Therefore an estate in land is better than a right or interest in them; though, in legal understanding, an interest extends to estates, rights, and titles, that a man hath in, or out of lands, &c., so as by grant of his whole interest in such land, a reversion therein, as well as possession in fee-simple, shall pass. *Co. Lit.* 345. Because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the land. Nor indeed does the bare lease vest any estate in the lessee, but



only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is *possessed* not properly of the land, but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. 1 *Inst.* 46. See 2 *Comm.* 144. b. 2. c. 9. l.: and this Dict. tit. *Estate, Lease, Term.*

A mortgage is an interest in land, and on non-payment, the estate is absolute in law, and his interest is good in equity to entitle him to receive and enjoy the profits till redemption or satisfaction; and on a fore-closure, he hath the absolute estate both in law and equity. 9 *Mod.* 196. See tit. *Mortgage.*

**INTEREST OF MONEY.** The legal profit or recompence allowed on loans of money, to be taken from the borrower by the lender. The rate of legal interest has varied and decreased, according as the quantity of specie in this kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The 37 *H. 8. c. 9.* confined interest to *ten per cent.*, and so did the 13 *Eliz. c. 8.* The 21 *Jac. 1. c. 17.* reduced it to *eight per cent.*: and the 12 *Car. 2. c. 13.* to *six*: and lastly, by 12 *Anne, st. 2. c. 16.* it was brought down to *five per cent per annum*, which is now the extremity of legal interest that can be taken on a loan of money, except in the case of bills of exchange or promissory notes made payable within three months after date, or not having more than three months to run, and which, by the new Bank charter, 3 and 4 *W. 98. § 7.* are no longer subject to the usury laws.

Notwithstanding those laws, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of the country in which the contract was made. 1 *Eq. Abr.* 289: 1 *P. Wms.* 395. See 2 *Bro. C. R. 2.* Thus, Irish, Turkish, American, and Indian interests have been allowed in our courts to the amount of even 10 or 12 *per cent.*, for interest depends on local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. By stat. 14 *G. 3. c. 79.* and 2 *G. 4. c. 51.* all *bona fide* mortgages and securities on estates or property in Ireland, or the plantations, bearing interest not exceeding *six per cent.*, were declared legal, though executed in Great Britain. And now, under stat. 3 *G. 4. c. 47. § 2.* securities made in Great Britain on estates in Ireland or the colonies, with interest not exceeding the rate of interest payable by the law of the country where the estate is situate, are also declared legal and valid. See further, tit. *Usury.*

Interest is in general recoverable in addition to the principal sum upon an express promise, or where a contract may be implied from circumstances, as the particular mode of dealing adopted by the parties, or the usage of trade. *Doug.* 375: and see 1 *Camp.* 52: 3 *Camp.* 467: 1 *Stark.* 487.

It is recoverable where a bond, bill of exchange, or promissory note has been given; *Bunb.* 119: 2 *Barn.* 1077, 1085; although no day of payment is specified, for there the money became due immediately. 7 *B. R.* 124: 15 *East*, 225. So where goods sold and delivered were to be paid for by a bill on which interest would have run. 13 *East*, 98.

But interest is not generally recoverable upon a sale of goods; 12 *East*, 419: 15 *East*, 223: 2 *Camp.* 429; or upon money lent; 5. *East.* 22: 1 *Camp.* 50; or money paid, or money had and received; *ibid.*; or upon the balance of an account stated. 6 *Esp.* 45. But see 2 *Bl.* 761: 3 *Wils.* 205; 1 *East.* 410: 1 *M. & S.* 173.

By the 3 and 4 *W. c. 42. § 28.* upon all debts and sums certain, payable at a certain time or otherwise, the jury in the trial of any issue, or on any inquisition of damages, may allow interest, not exceeding the current rate, from the time when such debts and sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law.

By § 29. the jury may give damages in the nature of interest over and above the value of the goods at the time of conversion or seizure, in actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in actions on policies of insurance made after the passing of the act.

And by § 30. interest is to be allowed on all writs of error for the time that execution has been delayed. See tit. *Error.*

Where an estate is devised for payment of debts, Chancery will not allow interest for book debts. 3 *Ch. Rep.* 94. Where lands are charged with payment of a sum in gross, they are also chargeable in equity with payment of interest for such sum. *Fin. R.* 286. In a long unsettled partnership account, rendered intricate by the neglect of a party, he shall have no interest on the balance when settled. 1 *Bro. C. R.* 239.

Interest is allowed in equity on purchase-money when not paid at the appointed time;

2 *Atk.* 490; on portions when due; 1 *P. W.* 453; 4 *Ves.* 357; on stated accounts; 1 *Mad. Ch.* 102; and in many other cases.

Executors and trustees are also frequently charged with interest in equity where they have withheld money from parties to whom it is due, or unnecessarily called in sums out on good security. 1 *L. & W.* 586; 11 *Ves.* 581. And though the usual rate of interest allowed in Chancery is 4 *per cent.*; 2 *Ves. jun.* 511; in such cases they are generally made to pay 5 *per cent.*; and an executor has been charged with compound interest at that rate. 13 *Ves.* 590. See tit. *Trustees*. And also tits. *Account, Bankrupt, Damages, Mortgage, &c.*

**INTEREST ON LEGACIES.** In case of a vested legacy, due immediately, and charged on land, or money in the funds, which yields an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator. 2 *P. Wms.* 26, 27. See tit. *Executor, Legacy*.

**INTEREST, OR NO INTEREST.** See tit. *Insurance*.

**INTERESTED WITNESS.** Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. 3 *Comm.* 370. See tit. *Evidence*.

**INTERLICATION IN A DEED.** See tit. *Deed, III.*

**INTERLOCUTORY DECREE IN CHANCERY.** See tits. *Chancery, Decree, Injunction*.

**INTERLOCUTORY JUDGMENT.** Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding on default, which is only intermediate, and does not finally determine or complete the suit. As judgment for the plaintiff in abatement, of *respondant ouster*, i. e. that defendant shall answer over, or farther plead in chief, or put in a more substantial plea.

But the interlocutory judgments most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. In such case a writ of inquiry issues to the sheriff, who summons a jury, inquires of the damages, and returns to the court the inquisition so taken, whereupon the plaintiff's attorney taxes costs, and signs final judgment. 3 *Comm.* 396, 397. See tit. *Judgment, I.*

In Scotch practice the term interlocutor is applied to the judgment of the Court of Session, or of the lord ordinary, which exhausts the points

at issue and which, if allowed to become final, will have the effect of deciding the case.

**INTERLOCUTORY ORDER.** See this Dict. tits. *Chancery, Injunction*.

**INTERLOPERS.** Persons who intercept the trade of a company of merchants. *Merc. Dict.* Applied principally to those who infringed the charters of the *East India Company*. See that tit.

**INTERPLEADER, Fr. enterplaidier, Lat. interplacitare.]** To discuss or try a point incidentally happening, as it were, between, before the principal cause can be determined. Interpleader is allowed that the defendant may not be charged to two severally, where no default is in him: as if one brings detinue against the defendant upon a bailment of goods, and another against him upon a trover, there shall be interpleader, to ascertain who hath right to his action. 2 *Danv. Abr.* 779. If two bring several detinues against A. B. for the same thing, and the defendant acknowledges the action of one of them, without a prayer of interpleader, they shall not interplead on the requests of the other; for the interpleader is given for the security of the defendant, that he may not be twice charged, and he hath waived that benefit. 18 *Ed.* 3. 22.

If one brings detinue against B. and counts upon a delivery of goods, &c. to re-deliver to him, and another brings detinue against him also, and counts so likewise; if there be not any privity of bailment between them, yet they shall interplead, to avoid the double charge of the defendant; and also because the court cannot know to whom to deliver the thing detained, if both should recover. *Br. Enterplead*, 3. And upon such several detinues, if the defendant says that he found it, and traverses the bailment, they shall interplead; for then he is chargeable as well to the one as the other; so if he says that they delivered jointly *absque hoc*, that they delivered it as they have counted: but it is otherwise, if the defendant doth not traverse the bailment; because if there was a bailment, he is chargeable only to the bailor, and may plead in bar against the others. 2 *Danv.* 782.

Where two bring several detinues for one thing, and the defendant prays that he may interplead, and delivers the thing to the court, and before the award of the interpleader one discontinues the suit, the other shall not have judgment; but if he discontinue his suit after the interpleader, the other may have judgment. 11 *H.* 6. 19.

If a recovery be had upon an interpleader, judgment shall be given to recover the thing demanded against the defendant; and not against the garnishee, in case of garnishment, &c. 2 *Danv.* 783. When two have inter-

pleaded in detinue, he that recovers shall recover damage against the other. *Br. Damage*, 68.

There was formerly interpleader relating to delivery of lands by the king to the right heir, where two persons out of wardship were found heirs, &c. 7 *Rep.* 45: *Staund. Prer. cap.* 17: *Bro. tit. Enterplead.* And anciently this head (spelt Enterpleader) made a great title in the law.

There are also bills of interpleader in a court of equity. Thus, where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own right, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. *Mitford's Treat.* 47. See *Bunb.* 303: 1 *Eq. Ab.* 80: 2 *Eq. Ab.* 173: 1 *Burr.* 37: *Pract. Reg.* 38.

The principles upon which courts of equity proceed in these cases are similar to those by which the courts of law are guided in the case of bailment: the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in those cases only where, by agreement of both claimants, the property has been bailed to a third person; and the courts of equity extending the remedy to all other cases (leaving those of bailment to the common law) to which in conscience it ought to extend. *Mitford's Treat.* 125.

If a bill of interpleader does not show that each of the defendants, whom it seeks to compel to interplead, claims a right, both the defendants may demur; one because the bill shows no claim of right in him; the other, because (for that very reason) the bill shows no cause of interpleader. 1 *Ves.* 248. Or if the bill shows no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur. As the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff must annex to his bill an affidavit that it is not exhibited in collusion with any of the parties, the want of which affidavit is a cause of demurrer. 1 *Ves.* 248. A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought, by his bill, to offer to pay the money due into court. *Mitf. Treat.* 126.

After a decree on a bill of interpleader, there is generally an end of the suit as to the plaintiff; and if he dies, the cause may proceed without revivor. 1 *Vern.* 351. See further *tits. Chancery, Injunction. &c.*

By the 1 and 2 *W. 4. c.* 58. commonly called the Interpleader Act, after reciting that "it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay," it is enacted, that upon application made by any defendant sued in any of the courts of law at Westminster, or in the Common Pleas of the county palatine of Lancaster, or the Court of Pleas of the county palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or supposed to belong, to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and, finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

§ 2. The judgment in any action or issue directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming under them.

§ 3. If such third party shall not appear upon such rule or order to maintain or re-



linquish his claim, or shall neglect or refuse to comply with any rule or order to be made after appearance, the court or judge may declare such third party, and all persons claiming under him, to be forever barred from prosecuting his claim against the original defendant, his executors, or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

§ 4. No order shall be made in pursuance of this act by a single judge of the Court of Pleas of the said county palatine of Durham who shall not also be judge of one of the said courts at Westminster; and every order to be made in pursuance of this act by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court in like manner as other orders made by a single judge.

§ 5. If, upon application to a judge, he shall think the matter more fit for the decision of the court, he may refer the matter to the court; and thereupon the court may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge.

By § 6. after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expence of action; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," it is enacted, that when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, the court from which such process issued may, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities therein-before contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; the costs of all such proceedings to be in the discretion of the court.

§ 7. All rules, orders, matters, and decisions, to be made and done in pursuance of this act,

except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure the payment of costs; and every such rule or order so entered shall have the force of a judgment, except as to becoming a charge on any hereditaments; and, in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof, execution may issue for the same by *fieri facias* or *copias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *fieri facias*; and such writ may bear *teste* on the day of issuing the same, whether in term or vacation; and the sheriff or other officer, executing any such writ, shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court.

By § 8. the powers of the act are extended to applications for writs of *mandamus*. See tit. *Mandamus*.

A great number of decisions have already taken place upon the above act.

*Who are entitled to the Benefit of the above Act.*—A lien attaching on the goods in dispute, and which must be satisfied by whichever claimant turns out to be entitled, does not prevent the party holding them from applying for relief. 3 *Moo. & S.* 180.

But a party who, by his own act, is placed in a situation to be sued, cannot call upon the court to substitute another defendant in his stead. 9 *Bing.* 82. And where a defendant has been indemnified by a third party for not delivering up the property, he has no right to relief. 1 *Cr. & M.* 73: *S. C.* 1 *Dowl.* 639. Neither will the application be allowed where it may be reasonably suspected there is collusion between the defendant and the third party whom he seeks to substitute. 2 *Moo. & S.* 184.

The case of a wharfinger, who claims a lien on goods for wharfage, &c., which attaching only on one of the parties by whom the goods are claimed, is not within the act. 2 *Moore & S.* 131: *S. C.* 9 *Bing.* 84. Neither does it apply to claims set up in consequence of proceedings in equity. 1 *Dowl.* 506.

*As to the Sheriff.*—The court will relieve the sheriff in the case of conflicting claims on property seized by him, though one claim is only a lien, and not of the whole property. 1 *Dowl.* 357.

But a sheriff will not be entitled to relief unless he comes in the first instance on receiving notice of an adverse claim. 1 *Dowl.* 548: 2 *Dowl.* 11. Neither is he where he has levied under a *fi. fa.*, and while in pos-

session he receives notice of other writs of execution issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy. 1 *Dowl.* 369. Nor where he seizes under a *fi. fa.*; and the question is, whether that writ ought to have a precedence of another. 1 *Dowl.* 523. Nor where he pays over the money to the execution creditor after notice of a claim by a third party. 1 *Dowl.* 636.

One court cannot relieve the sheriff with respect to process issued out of another court. 2 *Dowl.* 151.

Where application is made by the sheriff, the court cannot try the merits of the respective claims on affidavit, but must direct an issue. 2 *Dowl.* 59.

And no one has a right to be heard against the rule, unless called upon by the rule to appear, although he is in fact a claimant, and if called upon in one character, he cannot appear in another. 2 *Dowl.* 55.

*As to Costs.*—The sheriff is not entitled to costs, and his claim to poundage depends on the legality of the seizure. 1 *Dowl.* 169: *Ibid.* 417. 636. Where, however, the execution creditor does not appear in the first instance to support his claim, but afterwards appears and opens the rule, the court will grant the sheriff the costs of his second appearance. *Ibid.* 428. But, although where the execution creditor does not appear, the court will permit the sheriff to withdraw from possession, it will not grant him the costs of keeping possession after notice of an adverse claim. *Ibid.* 569. And before the sheriff applies for relief, he is bound to inquire into the nature of the claims set up; and therefore, if he brings parties before the court in consequence of a claim which is clearly bad in law, the court will compel him to pay the costs. 2 *Dowl.* 166.

Where no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs. 1 *Dowl.* 520. Where the sheriff applies for relief and the claimant does not appear, the judgment creditor is entitled to costs against the claimant; but if the rule does not pray for costs, the order upon the claimant to pay costs will be only conditional, unless he shows cause within four days. 2 *Dowl.* 108.

So where a landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the court will make the sheriff pay the costs of not appearing. *Ibid.* 55.

**INTERPRETATION OF STATUTES, DEEDS, WILLS, &c.** It has been well observed, that in respect of laws, it is scarcely possible to express them in such terms as shall be free

from all ambiguity. Such a degree of precision is perhaps unattainable; and the want of a clear and distinct idea of the object, or the want of views sufficiently comprehensive, or the defect of language, will constantly either encumber the regulation, or leave some part of the rules to be enforced; and the same inaccuracy must almost inevitably prevail, even in the framing of private deeds; and hence rules of interpretation are required in order to insure just and uniform decisions; these rules are drawn from the general scope and intention of the instrument, from the nature of the transaction or circumstances, from the legal rights of the parties, independent of the instrument or law in question, and from many other particulars; and a thorough knowledge of those rules of interpretation is the first ground of science in framing the laws or deeds required for each occasion.

To avoid doubt, many modern statutes declare the sense in which certain words therein used are to be understood, and to what things and persons they are intended to extend. See further *tits. Agreements, Deeds, Statutes, Wills, &c.*

**INTERREGNUM.** There cannot be any *interregnum* in this country, by the policy of the constitution: for the right of sovereignty is fully vested in the successor to the throne by the very descent of the crown. See *tit. King, I.*

**INTERROGATORIES.** Are particular questions in writing, demanded of witnesses brought in to be examined in a cause, especially in the Court of Chancery. These interrogatories must be exhibited by the parties in the suit on each side; which are either direct for the party that produces them, or counter on behalf of the adverse party; and, generally, both plaintiff and defendant may exhibit direct, and counter, or cross interrogatories. See *tits. Depositions, Practice.*

They are to be pertinent, and only to the points necessary, and either drawn or perused by counsel, and must be signed by them: if they are leading, *viz.* such as these, *Did not you do or see such a thing, &c.*, the depositions on them will be suppressed; for they should be drawn, *Did you see, or did you not see, &c.*, without leaning to either side; and not only where they point more to one side of the question than the other, but if they are too particular, they will likewise be suppressed. The commissioners, &c. who examine witnesses on interrogatories, must examine to one interrogatory only at a time; they are to hold the witnesses to every point interrogated; and take what comes from them on their examination, without asking any idle ques-

tions, or putting down any impertinent answers not relating to the interrogatories, &c. See *tit. Depositions, Equity*.

If a contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination. *Staundf. P. C.* 73. *b.* In matters arising at a distance, the court generally grants a rule to show cause why an attachment should not issue, or in very flagrant instances of contempt, an attachments issue in the first instance. *Salk.* 84: *Str.* 185. 564. This process is intended to bring the party into court, and when there he must either stand committed or put in bail, in order to answer such interrogatories as shall be administered to him for the information of the court. These interrogatories are in the nature of a charge or accusation; and if any of them are improper, the defendant may refuse to answer them, and move the court to have them struck out. *Str.* 441. If the party can clear himself upon oath, he is discharged; but if perjured, may be prosecuted for the perjury. *6 Mod.* 73. If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of (as in case of a rescue), the defendant may be admitted to make such simple acknowledgment, and receive judgment without answering to any interrogatories; but refusing to answer or answering evasively is punishable as a high and repeated contempt. *4 Comm.* 287. *c.* 20.

With regard to this singular mode of trial, thus admitted in this one particular instance, and so contrary to the genius of the common law in any other, it may be sufficient to observe, that as the process by attachment in general appears to be extremely ancient (*Y. B.* 20 *H.* 6. 37: 22 *Ed.* 4. 29.); and has, in more modern times, been recognised, approved, and confirmed by several express acts of parliament (*stats.* 23 *Eliz.* *c.* 6. § 3: 13 *Car.* 2. *st.* 2. *c.* 2. § 4: 9 and 10 *W.* 3. *c.* 15: 12 *Anne.* *st.* 2. *c.* 15. § 5.); so the method of examining the delinquent upon oath with regard to the contempt alleged, is at least of as high antiquity, and by long and immemorial usage is now become the law of the land. *M.* 5 *Ed.* 4. *rot.* 75. cited *Rast. Ent.* 268. *pl.* 5: 4 *Comm.* 288. *c.* 20.

It has been remarked, that the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience. Some declamation has also been used against the temptation to perjury afforded by this proceeding; this latter, however, is an argument which can never affect the case of any honest man.

By the 1 *W.* 4. *c.* 22. usually called the Interrogatory Act, the provisions of 13 *G.* 4. *c.* 63. relating to the examination of witnesses in India, are extended to all other colonies and places under the dominion of his Majesty, and to all actions in the courts at Westminster. See further *tit. Deposition*.

**INTERRUPTION**, is when, during the course of prescription, the true proprietor claims his right. *Scotch Dict.*

**INTESTATE**, *intestati.*] There are two kinds of intestates; one who makes no will, another who makes a will, and nominates executors, but they refuse; in which case he dies an intestate, and the ordinary commits administration. 2 *Par. Inst. fol.* 397. In former times, he who died intestate was accounted damned, because (as *Mat. Par.* tells us) he was obliged by the canons to leave at least a tenth part of his goods to pious uses, for the redemption of his soul; therefore, whoever neglected so to do, took no care of his own salvation. They made no difference between a suicide and an intestate: for as, in one case, the goods were forfeited to the king, so in the other they were forfeited to the chief lord. But because it was accounted a very wicked thing to die without making any distribution of his goods to pious uses, and such cases often happen by sudden death, therefore, by subsequent constitutions, the bishops had power to make such distribution as the intestate himself was bound to do; and this was called *elemosyna rationabilis*. And it was by this means that the spiritual courts came first to have jurisdiction in testamentary cases. See *tit. Executors, Will*.

**INTESTATES' ESTATES.** The goods and chattels of persons dying intestate. 2 *Lil. Ab.* 73. See this *Dict. tit. Executor*, I. 1. *V.* 7, 8.

**INTOL AND UTTOL.** Toll or custom paid for things imported or exported, or brought in and sold out. *Cowell*.

**INTRARE MARIS(UM.** To drain any low ground, and by dykes, walls, &c. take in, and reduce it to herbage or pasture; whence comes the word *innings*. *Will. Thorn*.

**INTROMISSION.** The assuming possession of property belonging to another, either on legal grounds, or without any authority: the latter is termed *vitious* intromission. *Bell's Scotch Law Dict.*

**INTRUSION**, *intrusio.*] Is when the ancestor dies seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dies, between whose death and entry of the heir a stranger intrudes. *Co. Lit.* 277: *Bract. lib.* 4. *cap.* 2. Intrusion, therefore, signifieth an unlawful entry into lands and tenements void of a possessor, by him who hath no right to the same; and the diffe



rence between an intruder and an abator is this,—that an abator entereth into lands void by the death of a tenant in fee; and an intruder enters into land void by the death of the tenant for life or years. *F. N. B.* 203.

*Blackstone* ranks intrusion as a species of injury by ouster, or a motion of possession from the freehold, and states it to be, the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. It happens, says he, where a tenant for a term of life dieth seized of lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. The difference between intrusion and abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. So that an intrusion is always immediately consequent upon the determination of a particular estate: an abatement is always consequent upon the descent or devise of an estate in fee-simple. 3 *Comm.* c. 10.

As he who enters and keeps the right heir from the possession of his ancestor is an intruder punishable by common law; so he who enters on the king's land and takes the profits, is an intruder against the king. *Co. Lit.* 277. For this intrusion information may be brought; but before office found, he who occupies the land shall not be said to be an intruder; for intrusion cannot be but where the king is actually possessed, which is not before office; though the king is entitled to the mesne profits after the tenant's estate ended. *Moor*, 295. See tit. *Information*, I.

By stat. 21 *Jac.* 1. c. 14. the defendants may plead the general issue in informations of intrusion, brought on behalf of the king, and retain their possession till trial, where the king hath been out of possession, and not received the profits for twenty years; and no *scire facias* shall issue, whereupon the subject shall be forced to special pleading, &c.

By the 3 and 4 *W.* 4. c. 27. § 36. the writ of entry on intrusion is abolished after the 31st Dec. 1834. See further tit. *Entry*.

**INTRUSION DE GARD.** A writ that lay where the infant within age entered into his lands, and held out his lord. *Old. Nat. Br.* 90.

**INTRUSION,** is the writ brought against an intruder, by him that hath fee-simple, &c. *New Nat. Br.* 453.

**INURE.** To take effect; as the pardon inureth. *Staund. Prec. fol.* 40. See *Enure*.

**INVADIARE.** To engage or mortgage lands; *invadiations*, mortgages of land. *Mon. Angl. tom.* 1. p. 478.

**INVADIATUS.** One, who having been

accused of some crime, not fully proved, is put *sub debita fidejussione*.

**INVASION.** See *Defence of the Realm*.

**INVASIONES.** In the inquisition of serjeancies and knights' fees, anno 12 and 13 of King John, there are some titles called *Invasiones, et Invasiones super regem*.

**INVECTA ET ILLATA.** Terms applied in the Scotch law, to articles subject to certain liens or services.

**INVENTIONES.** Is used in ancient charters for *treasure-trove*; money or goods found by any person, and not challenged by the owner; which by the common law, is due to the king, who grants the privilege or benefit to some particular subjects. *Chart. K. Ed.* 1. to the Barons of the Cinque Ports: *Placit. temp. Ed.* 1. and *Ed.* 2. *MS.* f. 89.

**INVENTORY, inventorium.]** A list or schedule containing a true description of all the goods and chattels of a person deceased at the time of his death, with their value appraised by indifferent persons; which every executor or administrator ought to exhibit to the bishop or ordinary at such time as he shall appoint. *West. Symb. lib.* 2. p. 696.

These inventories proceed from the civil law; and as, by the old Roman law, the heir was obliged to answer all the testator's debts, Justinian ordained that inventories should be made of the substance of the deceased, and he should be no further charged. *Justin. Inst.*

By stat. 21. *H.* 8. c. 5. executors and administrators are required to make and deliver in upon oath to the ordinary, inventories indented, of which one part shall remain with the ordinary, and the other part with the executor or administrator. The intention of this statute was for the benefit of the creditors and legatees, that the executor or administrator might not conceal any part of the personal estate from them; though, as to the valuation, it is not conclusive, but the real value must be found by a jury. If they are under-valued, the creditors may take them as appraised; and if over-valued, it shall not be prejudicial to the executor.

The inventory ought to contain a full and true description and estimate of all the chattels, real and personal, in possession, and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causâ* of the testator or intestate. *Toll.* 248. It must also distinguish such debts as are separate from those which are doubtful or desperate. *Ibid.*

But though generally all the personal estate of the deceased, of what nature or quality soever, ought to be put into the inventory;

yet goods given away in the life-time of the deceased, and actually in the possession of the party to whom given, and the goods to which a husband is entitled as administrator to his wife, are not to be included. 2 *Butst.* 355.

An inventory which has been exhibited by the defendant in the Spiritual Court is evidence against him of assets. See *Bull. N. P.* 140. 1 *H. & M.* 330. And the plaintiff will be allowed to prove that the goods have been under-valued. *Bull. N. P.* 140: 1 *Stank.* 32.

Notwithstanding the law requires that the inventory be exhibited within three months after the death of the person, if it is done afterwards, it is good, for the ordinary may dispense with the time, and even in some cases, whether it shall be exhibited or not; as where creditors are paid, and the will performed, &c. *Raym.* 470.

The old practice of the Prerogative Court of Canterbury was to require an inventory to be exhibited before probate was granted; and this is still prevalent in some country jurisdictions. 1 *Phill.* 240.

According to the modern practice, however, neither the executor nor administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the Spiritual Court by a party interested. 1 *Phill.* 240: *Toll.* 250. And a person having only the appearance of an interest may compel one to be exhibited. 1 *Phill.* 241: 2 *Add.* 236. But, in order to exonerate himself from all liability, it is prudent for the executor to exhibit an inventory before a final settlement. 1 *Hagg.* 106.

In common parlance, &c., the term inventory is applied on other and more frequent occasions, as on the sale of goods; by agreement between parties, accounts of the goods sold (supposing them passing with the possession of a house, &c.) are called inventories. So the accounts taken by sheriffs of goods levied and sold under executions, under distresses of the goods distrained for rent, are called inventories, &c. See this Dict. tit. *Executor*, V. 4. *Distress*.

IN VENTRE SA MERE, *Fr.*] In the mother's belly, relating to which there is a writ mentioned in the register of writs; and in stat. 12 *Cur.* 2. c. 24. an infant in *ventre sa mere*, is applied to the case where a woman is with child at the time of her husband's death; which child, if he had been born, would have been heir to the land of the husband; and this is sometimes privily, and sometimes open and visible. 1 *Shep. Abr.* 142. The law hath consideration of such a child, on account of the apparent expectation of his birth. He might have been vouched in his mother's belly; and action lies for detainment of charters from

him as heir, &c. *Hob.* 222: *Dyer*, 186. When a female comes into land by descent, there the son born after shall oust her and have the land. 3 *Rep.* 61: *Plowd.* 375. But if the daughter and female heir cometh to land in nature of a purchaser, as on will of lands given to J. S. and his heirs, and he hath a daughter when the deviser dies, his wife being then with child of a son; in this case the daughter shall enjoy the land, and not the after-born son. 3 *Rep.* 61: 5 *Ed.* 4. 6: 9 *H.* 7. 24. See this Dict. tits. *Descent*, *Infant*, *II.*, *Limitation*, *Posthumous Children*.

INVERITARE. To verify or make proof of a thing. *Leg. Ina*, c. 16.

To INVEST; INVESTITURE, from the *Fr. investir*.] The giving possession: some define it thus, *investitura est alicujus in eum jus introductio*; a giving livery of seisin or possession. Investitures in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And after conveyance by deed came into use, these investitures were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed title by other means, might know against whom to bring their actions. 2 *Comm.* 311. c. 20. and see pp. 23. 53. 209; and this Dict. tits. *Conveyance*, *Feoffment*, *Tenure*; as also tits. *Advowson*, *Institution*, &c.

The customs and ceremonies of investiture, or giving possession, were long practised with great variety: at first, investitures were made by a form of words, afterwards by such things as had most resemblance to what was to be transferred; as lands passed by the delivery of a turf, &c., which was done, by the grantor, to the person to whom the lands were granted but in after ages, the things by which investitures were made were not so exactly observed. *Ingulph.* p. 901. In the church, it was the custom of old for princes to promote such as they liked to ecclesiastical benefices, and declare their choice and promotion, by delivery, to the persons chosen, of a pastoral staff and ring: the one a symbolical representation of their spiritual marriage with the church; and the other of their pastoral care and charge, which was termed investiture; after which they were consecrated by ecclesiastical persons. Hoveden tells us that King Richard, being taken by the Emperor, gave this kingdom to him, *et investivit eum inde per plenum suum*; and that the Emperor immediately afterwards returned the gift, *et investivit*

*eum per duplicem crucem de auro. Hoved.* 724. Walsingham says, that John Duke of Lancaster was invested Duke of Aquitaine, *per vigam et pileum*, p. 343. See *Symbols*.

INVITATORIA et VENITARIUM. Those hymns and psalms that were sung in the church to invite the people to prayer: they are mentioned in the statutes of St. Paul's Church. MS.

INVOICE, a particular account of merchandize, with its value, custom, and charges, &c., sent by a merchant to his factor or correspondent in another country. See 12 Car. 2. c. 34.

INVOLUNTARY MANSLAUGHTER. See tit. *Homicide*, II.

*IPSO FACTO*, *by the very act*.] The expression is used where any forfeiture or invalidity is incurred; and the meaning of it is, that it shall not be necessary to declare such forfeiture or invalidity in a court of law, but that, by the very doing of the act prohibited, the penalty shall be thereby instantly and completely incurred. Thus, where the same person obtains two or more preferments in the church with cure, not qualified by dispensation, &c., the first living is void *ipso facto*, viz. without any declaratory sentence, and the patron may present to it. *Dyer*, 275. An estate or lease may be *ipso facto* void by condition, &c. 1 Inst. 45. 215.

In many cases estates and property are vested in trustees, &c., by act of parliament, *ipso facto*, without conveyance; as the property of the suitors in the Court of Chancery, standing in the name of the accountant-general, vests in his successor, *ipso facto*, by the very act of his appointment, without any conveyance from the preceding accountant-general or his representatives. *Stat.* 54. G. 3. c. 14.

IRE AD LARGUM. To go at large, to escape, or to be set at liberty *Blount*.

## IRELAND

was a distinct kingdom until the 1st of January, 1801, when a union of Great Britain and Ireland took place, under the provisions of an act passed in the British parliament, 39 and 40 G. 3. c. 67. and of a similar act passed in the Irish parliament, 40 G. 3. c. 38; by which the kingdoms were united into one by the name of THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

Ireland was anciently only entitled the dominion or lordship of Ireland, and the king's style was no other than *Dominus Hiberniæ* till the 38 H. 8. when the title of king was expressly conferred on him by an Irish act, 33 H. 8. c. 1., and which title is recognised by the

English act, 35 H. 8. c. 3. As Scotland and England are now one and the same kingdom, and yet differ in their municipal laws, so England and Ireland are, on the other hand, distinct kingdoms, and yet, in general, agree in their laws. The inhabitants of Ireland are for the most part descended from the English who planted it as a kind of colony, after the conquest of it by Hen. II., and the laws of England were then received and sworn to by the Irish nation assembled at the council of Lismore. *Pryn.* on 4 Inst. 249.

At the time of this conquest, the Irish were governed by what they call the *Brehon* law, so styled from the Irish name of judges, who were denominated *brehons*. 4 Inst. 358. But king John, in the 12th year of his reign, went into Ireland, and carried over with him many able sages of the law; and there, by his letters patent, in right of the dominion of conquest, is said to have ordained and established, that Ireland should be governed by the laws of England (*Vaugh.* 294: 2 *Pryn. Rec.* 85: 7 *Rep.* 23.); which letters patent, *Sir Ed. Coke* apprehends to have been there confirmed in parliament. 1 Inst. 141. But to this ordinance many of the Irish were averse to conform, and still stuck to their *Brehon* law; so that both Hen. III. and Ed. I. were obliged to renew the injunction; and at length, at a parliament holden at Kilkenny, 40 Ed. 3., under Lionel, Duke of Clarence, the then lieutenant of Ireland, the *Brehon* law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. 1 *Comm.* 100.

But as Ireland was a distinct dominion, and had parliaments of its own, though the immemorial customs or common law of England were made the rule of justice in Ireland also, yet no acts of the English parliament, after the 12 John, extended into that kingdom, unless it were specially named, or included under general words, as within any of the king's dominions. See 1 *Comm.* 100.

The original method of passing statutes in Ireland was nearly the same as in England; the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper. But an ill use having been made of this liberty, a set of statutes were there enacted in the 10 H. 7. [*Sir Ed. Poynings* being then lord deputy, from whence they were called *Poynings' laws*], which restrained the power as well of the deputy as the Irish parliament; and, in time, there was nothing left to the parliament in Ireland but a bare negative, or power of rejecting, not of proposing or altering any law. With regard to *Poynings' law* in particular, it could not be repealed or suspended, unless the bill for that purpose,



before it should be certified to England, were approved by both houses.

But the Irish nation being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, by another of *Poynings'* laws, that all acts of parliament, before that time, made in England, should be of force within the realm of Ireland. 4 *Inst.* 351. After this, Ireland continued to be bound by all English acts of parliament in which it was specially named or included under general words. See 1 *Comm.* 103.

This state of dependence being disputed by the Irish nation, it was, by the British act 6 *G. 1. c. 5.* expressly declared, that the kingdom of Ireland ought to be subordinate to, and dependant on, the imperial crown of Great Britain, as being inseparably united thereto; and that the King's Majesty, with the consent of the Lords and Commons of Great Britain in Parliament, had power to make laws to bind the people of Ireland. The same statute also expressly declared "that the Peers of Ireland had no jurisdiction to affirm or reverse any judgments or decrees whatsoever." And a writ of error, in the nature of an appeal, lay from K. B. in Ireland to K. B. in England, as the appeal from Chancery in Ireland lay immediately to the House of Lords in England.

Thus stood the matter till the 22d year of King Geo. III., when, on some further struggles by the Irish, the above stat. 6 *G. 1. c. 5.* was simply repealed in the British parliament by stat. 22 *G. 3. c. 53.* And in the Irish parliament acts were passed to regulate the manner of passing bills, to declare which English or British acts should be accepted and used in Ireland, and to regulate appeals and writs of error. See Irish acts 21 and 22 *G. 3. c. 47, 48, 49.*

Lord Mountmorris, in his *History of the Proceedings of the Irish Parliament*, observes, that as to repeal *Poynings'* law it required the consent of the greater number of the Lords and Commons (which, if it meant any thing, must signify a majority not of these who happened to be present, but of the whole number summoned to parliament), the requisition, in that sense was strictly complied with in 1782, when *Poynings'* law was repealed by the Irish act 21 and 22 *G. 3. c. 47.* *Hist. vol. 1. p. 53.*

As, however, the British statute of Geo. I. was thought to be merely declaratory of the former law, the repeal of it could produce no further operation than to render the law, in some degree, less clear than that statute had made it. Therefore, to produce the effect

earnestly contended for by the Irish, it required another statute, which was accordingly passed in the British parliament, viz. the 23 *G. 3. c. 28.* by which "the right claimed by the people of Ireland, to be bound only by laws enacted by his Majesty and the parliament of that kingdom, in all cases whatever, and to have all actions and suits, instituted in that kingdom, decided in his Majesty's courts there *finally*, and without appeal from thence, is established and ascertained for ever, and at no time to be questioned or questionable; and all writs of error, and appeals in the English courts, shall be null and void.

After this period, till the year 1800, several acts were passed in the Irish parliament for the establishing and regulating the various departments of government there, as in a separate kingdom. In that year, after great debate on the principle, and even on the moral competence of the parliament of Ireland to consent to such a proceeding, the Union of the two kingdoms was ratified by the acts of both parliaments, viz. 39 and 40 *G. 3. c. 67.* of the British, and 40 *G. 3. c. 38.* of the Irish statutes. The following is the substance of the eight Articles of Union:—

Art. 1. That the kingdoms of Great Britain and Ireland, after 1st January, 1801, and for ever, be united into one kingdom, by the name of *The United Kingdom of Great Britain and Ireland.*

Art. 2. That the succession to the crown of the said United Kingdom shall continue limited and settled in the same manner as the succession to the crown of Great Britain and Ireland stands limited and settled according to the existing laws, and to the term of union between Great Britain and Scotland.

Art. 3. That the said United Kingdom be represented in one parliament.

Art. 4. That four lords spiritual of Ireland, by rotation of sessions, viz. one of the four archbishops, and three of the eighteen bishops (see 40 *G. 3. (1.) c. 29. § 1.*); and 28 lords temporal of Ireland (elected for life, subject to forfeiture by attainder, 40 *G. 3. (1.) c. 29. § 4.* by the terms of Ireland); shall sit in the House of Lords of the parliament of the United Kingdom. And in the House of Commons, 100 commoners; two for each of the 32 counties in Ireland; two for Dublin, two for Cork, one for Trinity College, Dublin; and one for each of the 31 most considerable cities, towns, and boroughs; viz. Waterford, Limerick, Belfast, Drogheda, Carrickfergus, Newry, Kilkenny, Londonderry, Galway, Clonmel, Wexford, Youghal, Bandonbridge, Armagh, Dundalk, Kinsale, Lisburn, Sligo, Catherlough, Ennis, Dungarvon, Downpatrick, Co. Limerick, Mallow, Athlone, New Ross, Tralee,

Cashel, Dungannon, Portarlington, Enniskillen. 40 G. 3. (I.) c. 29. § 2.

That the Irish act, 40 G. 3. c. 29. for regulating the election of the said lords and commons shall be part of the treaty of the union, and incorporated in the Union Act [*which it accordingly is.*]

Questions respecting the rotation or election of the peers shall be determined by the House of Lords of the United Kingdom.

Irish peers not being elected to sit in the House of Lords, may be elected as members of the Commons House for any place in Great Britain. In which case they shall be considered merely as commoners.

His Majesty may create peers of Ireland, under certain restrictions, *viz.* whenever three such peerages of Ireland become extinct, one new peerage may be created; and when the whole of such peerage is reduced to 100, then, on the extinction of any peerage, another may be created; so that the peerage of Ireland may be kept up to 100, over and above such peers of Ireland as may be entitled by descent or creation to an hereditary seat in the House of Lords of the United Kingdom.

Questions touching the elections of commoners, or their qualifications, shall be decided by the laws of Great Britain.

The temporary regulations respecting commoners holding places under government were superseded by 41 G. 3. c. 52; by which all persons disabled from sitting in the British parliament are declared disabled from sitting in the united parliament as members for Great Britain, and so for Ireland. See this Dict. tit. *Parliament*, 6. B. 2.

As to the privileges, rights, and rank, of the Irish spiritual and temporal peers in parliament, see this Dict. tit. *Parliament*, III.

Art. 5. The Churches of England and Ireland shall be united into one Protestant episcopal church, to be called, *The United Church of England and Ireland*, according to the doctrine, worship, discipline, and government, of the church of England. The church of Scotland to remain as under the union of that kingdom.

Art. 6. The subjects of Great Britain and Ireland shall be entitled to the same privileges, and be on the same footing, as to encouragements and bounties on the like articles, the growth, produce, or manufacture, of either country respectively, and generally in respect of trade and navigation in the ports and places of the United Kingdom and its dependencies; and in all foreign treaties Irish subjects shall be put on the same footing as subjects of Great Britain.

All prohibitions and bounties on the export of articles, the growth, produce, or manufacture, of either country to the other, shall cease and determine.

That all articles, the growth, produce or manufacture, of either country (not enumerated and subjected by the act, to specific duties), shall be imported into each country from the other free of duty, except countervailing duties. See *post*.

For 20 years from the Union (*i. e.* until 1st January, 1821), certain manufactured articles, *viz.* apparel, cabinet-ware, pottery, sadlery, &c., were subjected to a duty of 10*l.* per cent. Salt, hops, coal, calicoes, and muslins, &c., to certain duties specified.

Articles, the growth, produce, or manufacture, of either country, subject to internal duty, on the materials of which they are composed, are made subject, by certain schedules in the acts to the countervailing duties, there specified; and it is provided, that all articles subject to such internal duty, shall from time to time be subjected, on their importation into each country respectively for the other, to such duty as shall be sufficient to countervail such internal duty in the country from which they are exported; and that, upon the export of like articles from one country to the other, a drawback shall be given equal in amount to the countervailing duty payable on such articles, if it had been imported into the country from whence it is exported.

All articles, the growth, produce, or manufacture, of either country, when exported through the other, are made subject to the like charges, as on exportation directly from their own country.

All duty on the import of foreign or colonial articles into either country, shall, on their export to the other, be drawn back.

Corn, meal, malt, flour, and biscuit, are exempted from the operation of the union acts; so that all these, except malt, were declared free between Great Britain and Ireland, under 46 G. 3. c. 97. See tit. *Corn*. The intercourse of malt between the two countries is regulated by stat. 50 G. 3. c. 34. 53; and the countervailing duties are ascertained by the several acts imposing the internal duties.

Now, under the provisions of the 1 W. 4. c. 17. all duties and drawbacks payable in respect of printed calicoes, stuffs, and linens, removed from Ireland to Great Britain, and *vice versa*, have wholly ceased.

Art. 7. By this article it was provided that the charge of the separate national debt of either country before the union, should continue to be separately defrayed by the respective countries. That for 20 years after the union, the contribution of Great Britain and Ireland towards the annual expenditure of the United Kingdom, should be 15 parts for Great Britain, and two parts for Ireland. That after such 20 years the future expenditure of the

United Kingdom (except the interest and charges of their debts) should be defrayed according to a proportion to be settled by parliament for a subsequent period of not more than 20, nor less than 7 years; and so from time to time, unless the parliament of the United Kingdom should declare that the expenditure of the United Kingdom should be defrayed indiscriminately by equal taxes imposed on the like articles in both countries. For defraying the national debt, and the proportion of her expenditure, the revenue of Ireland was, by the same article, constituted a consolidated fund. It was declared that the proportion of contribution of each country should be raised by taxes in each country respectively; provided that, in regulating such taxes, no article in Ireland should be made liable to any new duty, so as to make the amount exceed the amount of duty payable on the like article in England. That any surplus of Irish revenue should be applied to local purposes in Ireland. That all future loans should be considered as a joint debt to be discharged by each country in their respective proportions, unless particular provisions were made in any particular year. That if, at any future day, the separate debt of each country should have been liquidated, or if the values of their respective debts should be in the same proportion as their contributions (*viz.* as 15-17ths are to 2-17ths), or within 100th part thereof, and if the parliament should think that the respective circumstances of the two countries would admit of their contributing indiscriminately by equal taxes, the parliament might declare that all future expence, and all joint debts then contracted, should be defrayed indiscriminately by equal taxes on the same articles in each country, subject to any requisite exemption in Ireland or Scotland. That, after such declaration, the contribution of England and Ireland respectively should cease to be regulated by the proportions before-mentioned; but that the charges of the separate debts should be defrayed separately by each country. That sums granted by the Irish parliament for encouraging agriculture, manufactures, charities, &c., in Ireland, should continue to be granted for 20 years; and, finally, that the revenue from territorial dependencies should be applied to expenditure of the United Kingdom in the foregoing proportions.

The effect of this article VII. may be considered as almost wholly superseded by the provisions of stat. 56 G. 3. c. 98. (amended by 57 G. 3. c. 48.) by which it is enacted, that the consolidated funds of Great Britain and Ireland shall become one general consolidated fund of the United Kingdom, charged indiscriminately, whether in the Exchequer of

Great Britain or Ireland, with the whole of the interest and sinking funds of the national debts of Great Britain and Ireland, as one joint consolidated national debt, interest, and sinking fund; with the civil list establishments in Great Britain and Ireland; with all other charges on the former separate consolidated funds; and subject to such charges, to be indiscriminately applied to the service of the United Kingdom. The offices of lord high treasurer of Great Britain and Ireland are united, and the office of lord high treasurer of the United Kingdom may be executed by commissioners of the Treasury. A vice-treasurer for Ireland is to be appointed for the issue of money out of the Irish Exchequer; and regulations are made for directing such issues, under warrant of the lord lieutenant of Ireland, and the issues out of the Treasury of Great Britain, from the growing produce of the consolidated fund. The British commissioners for reduction of the national debt are declared commissioners for reducing the debt of the United Kingdom. Two additional commissioners of the Treasury are to be appointed for Irish business; and the balance of joint contributions between Great Britain and Ireland are declared to be cancelled.

Art. 8. All laws in force at the time of the Union, and all courts, civil and ecclesiastical, within the respective kingdoms, shall remain as established, subject to future alterations by the united parliament. All writs of error and appeals (determinable in the House of Lords of either kingdom) shall be decided by the House of Lords of the United Kingdom. The Instance Court of Admiralty in Ireland shall continue, with appeals to the delegates in Chancery there. All laws contrary to the provisions enacted for carrying the articles of union into effect shall be repealed.

By 44 G. 3. c. 92. it is enacted, that where persons, against whom warrants have been issued by judges, &c. in Ireland for any crime or offence against the laws of Ireland, shall "escape, go into, reside, or be," in England or Scotland; or where any persons, against whom warrants have been issued, in England or Scotland, for any offence against the laws of England and Scotland respectively, shall escape, &c. into Ireland, any justice of peace of the county, or place, whither or where such person shall escape, &c. shall endorse the warrant, and the person charged may be apprehended in the place where such warrant is so endorsed, and carried into England, Scotland, or Ireland, as the case may require, to be then proceeded against according to law. By 15 G. 3. c. 92. if the offence is not bailable, the original warrant shall be so endorsed; but if it is bailable, the party shall be bailed in the



place where he is apprehended, by duplicate bonds, one to be transmitted to the proper officer of the place where the warrant was issued, and the other to the Court of Exchequer in the county where the party is bailed; and the penalty may be levied in the county where the bond is taken, on certificate of the breach thereof to the Exchequer there.

By 45 G. 3. c. 92. § 3, 4. subpoenas in criminal prosecutions may be served in England to compel appearance in Ireland, and so *vice versa*.

By 54 G. 2. c. 186. § 2, 3. all warrants signed in England, Scotland, or Ireland, may be indorsed and acted upon in any part of the United Kingdom, in like manner as directed by stat. 13 G. 3. c. 31. as to warrants in England and Scotland, and judges in Ireland may indorse Scotch letters of second deliverance for compelling attendance in Scotland of witnesses in criminal cases resident in Ireland.

By the 2 W. 4. c. 33. the Courts of Chancery and Exchequer in England in suits concerning lands in England or Wales, are empowered to direct process to be served in any other part of the United Kingdom, or in the Isle of Man. And by § 2. a similar power is given to the Courts of Chancery and Exchequer in Ireland, to issue process to any other part of the United Kingdom, or the Isle of Man.

By the 2 and 3 W. 4. c. 93. the inconvenience arising from the process of the Ecclesiastical Courts in England and Ireland being unavailable out of their respective jurisdictions, is remedied by giving such process equal force and operation in any part of the United Kingdom.

Independent of the Roman Catholic Relief Bill (10 G. 4. c. 7.), many important statutes have of late years been passed with reference to Ireland.

By the 1 and 2 W. 4. c. 33. his Majesty may authorize the Treasury to issue 500,000*l.* Exchequer bills for the extension and promotion of public works in Ireland.

By the 2 W. 4. c. 17. the laws relating to the assignment and subletting of lands and tenements in Ireland, were repealed, and other provisions substituted.

By the act for amending the representation of the people of Ireland (2 and 3 W. 4. c. 88.) besides the improvements introduced with respect to the qualifications of electors, five additional members have been given to that country, *viz.* an additional member to the cities of Limerick and Waterford, the borough of Belfast, the town of Galway, and the university of Dublin.

By the 2 and 3 W. 4. c. 118. party pro-

cessions in Ireland are restrained for the period of five years.

By the 2 and 3 W. 4. c. 119. three several acts, passed in the reign of his late Majesty, for the establishing of compositions of tithes in Ireland, were amended, and such compositions rendered permanent. See further *tit. Tithes*.

By the 3 and 4 W. 4. c. 37. for amending the laws relative to the temporalities of the church of Ireland, ecclesiastical commissioners are appointed who are to be a body politic and corporate, by the name of the "Ecclesiastical Commissioners for Ireland," and to have perpetual succession and a common seal.

By § 13. all payments of first-fruits in Ireland are to cease.

By § 14. the commissioners are to make a valuation of all sees and livings in Ireland, and to levy a yearly assignment thereon, to commence from the next avoidance, according to the rates specified in one of the schedules to the act; such tax, and the other funds vested in the commissioners by the act, to be applied by them for the purposes therein mentioned.

By § 32. the bishopric of Waterford, from the passing of the act, shall, and the other bishoprics in the first column given below when they become void, are to be united to the archbishoprics and bishoprics in the second column.

1. Downmore . . . . .	Down and Connor.
2. Raphoe . . . . .	Derry.
3. Oglough . . . . .	Armagh.
4. Ephin . . . . .	Kilmore.
5. Killybeg and Achery . . . . .	Tuam.
6. Cloufert and Kilmacduagh . . . . .	Killala and Kilfenora.
7. Kildare . . . . .	Dublin and Glendalagh.
8. Ossory . . . . .	Ferne and Leighlin.
9. Waterford and Lismore . . . . .	Cashel and Emly.
10. Cork and Ross . . . . .	Cloyne.

By § 46. when the archiepiscopal sees of Tuam and Cashel shall be void, their respective archiepiscopal jurisdictions shall be transferred to the archbishops of Armagh and Dublin.

By § 47. as soon as the archiepiscopal see of Tuam shall be void, the bishopric of Ardagh, now held therewith, is to be united with the bishopric of Kilmore.

By § 51. the archiepiscopal sees of Cashel and Tuam on becoming void are to cease to be included in the rotation established among the archiepiscopal sees by the union, and are to be excluded in the rotation among the episcopal sees, and take place therein next before the episcopal see last in such order of rotation, the bishops whereof may have sat in parliament the previous session. And by § 52. bishoprics on becoming void, or united to another bishopric, are to be excluded from such rotation.

By § 116. the commissioners may suspend the appointment of a clerk to any benefice where divine worship has not been celebrated for three years.

By § 128. lessees of church lands, whether holding the same for lives or for years, may purchase the fee-simple thereof on the terms mentioned in that and the following sections.

By the 3 and 4 W. 4. c. 78. the laws relative to grand juries in Ireland were amended, as also the regulating presentments to be made by them respecting public works.

And by 3 and 4 W. 4. c. 91. the laws relative to jurors and juries in Ireland were consolidated and amended.

In addition to the above acts, many of the improvements that have been made in the criminal law and in the practice of the courts have been extended to Ireland.

By the 4 and 5 W. 4. c. 8. the 3 and 4 W. 4. c. 91. consolidating the laws relative to jurors and juries in Ireland, has been amended.

By the 4 and 5 W. 4. c. 77. the proceedings and practice of the Court of Chancery in Ireland were amended.

By the 4 and 5 W. 4. c. 82. the provisions of the 2 W. 4. c. 33. for effectuating the service of process issuing from the Courts of Chancery and Exchequer in England and Ireland were amended and extended.

By the 4 and 5 W. 4. c. 90. many important alterations were made in the provisions of the 3 and 4 W. 4. c. 37. for amending the laws relative to the temporalities of the Irish church.

By the 4 and 5 W. 4. c. 92. fines and recoveries were abolished in Ireland, and simpler modes of assurance substituted.

And by the 4 and 5 W. 4. c. 93. the laws relating to appeals against summary convictions before justices of the peace in Ireland were amended.

**IRON.** All statutes forbidding the exportation of iron and steel are now repealed. The following acts, though still unrepealed, have long been obsolete.

None shall convert to coal, or other fuel, for the making of iron metal, any trees of such a size, or within a certain compass of London, under penalties by statute; nor shall any new iron mills be set up in Sussex, Surry, or Kent. *Stats.* 1 Eliz. c. 15: 23 Eliz. c. 5: 27 Eliz. c. 19. See tit. *Woods*.

**IRONS,** to secure prisoners. See tits. *Fetters*, *Gaol*, and *Gaolers*.

**IRON WIRE.** See *Wire*.

**IRONY.** In libels makes them as properly libels as what is expressed in direct terms. *Hob.* 215. As where a writing, in a taunting manner reckoned up several acts of public charity done by a person, said, "You will not play the Jew, nor the hypocrite," and then proceeded

in a strain of ridicule to insinuate that what the person did was owing to his vain glory. Or, where a publication pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed for, selected such qualities as their enemies accused them of not possessing (as by proposing such a one to be imitated for his courage, who was known to be a great statesman, but no soldier, and another to be initiated for his learning who was known to be a great general, but no scholar), such a publication being as well understood to mean only to upbraid the parties with the want of those qualities as if it had done so directly and expressly. 1 *Hawk. P. C. c.* 73. § 4: 4 *Bac. Ab. Libel* (A.) 3. p. 453. See tit. *Libel*.

**IRREGULARITY,** *irregularitas*.] Disorder, or going out of rule. In the canon law it is used for an impediment to the taking holy orders; as where a man is base born, notoriously defamed of any crime, maimed, or much deformed in body, &c. In common speech, in our law, it means a transgressing of form in point of practice, &c.

**IRREPLEVIABLE,** or **IRREPLEVISABLE.** That neither may nor ought to be replevied, or delivered on sureties. *Stat.* 13 Ed. 1. st. 1. c. 2. It is against the nature of a distress for rent to be irreplevisable. 1 *Inst.* 145. See tits. *Distress*, *Replevin*.

**IRRITANCY.** The becoming void. *Irritant clause* is a clause by which certain acts specified in a deed are declared to be null and void: and by another clause, called a *resolutive clause*, the right of the proprietor is dissolved and put an end to on his committing the acts so declared void. *Bell's Scotch Law Dict.*

**ISII.** The period of the termination of a tack or lease. *Scotch Dict.*

**ISINGLASS.** A kind of fish glue, brought from Iceland, used by some persons in the adulterating of wine; but for that prohibited by stat. 12 Cur. 2. c. 25.

**ISLE,** *insula*.] Land inclosed in, and environed with the sea or fresh water. There are several islands belonging to England; as the isles of Jersey and Guernsey, Man, &c.

As to islands arising in rivers, or the sea, see tits. *Occupancy*, *Plantations*.

**ISLE OF ELY.** See *Ely*.

**ISLE OF JERSEY.** See *Jersey*.

**ISLE OF MAN.** See *Man*.

**ISLE OF WIGHT.** See *Wight*.

**ISLET.** A small island. See *Ilet*.

**ISSUABLE PLEA.** See *Pleading*, I. 4.

**ISSUABLE TERMS.** Hilary and Trinity terms are usually called issuable terms, from the making up of the issues therein. Though for causes tried in Middlesex and London,

many issues are made up in Easter and Michaelmas terms. See *tit. Judges, Terms*.

ISSUE, *exitus*, from the Fr. *issuer*, i. e. *emanare*.] Hath divers significations in law: sometimes it is taken for the children begotten between a man and his wife; sometimes for the profits growing from amerciements and fines; sometimes for the profits of lands and tenements; but it generally signifies the point of matter issuing out of the allegations and pleas of the plaintiff and defendant in a cause. 1 *Inst.* 126: 11 *Rep.* 10.

Issues is the term applied to the profits on land, which the sheriff is directed to take by a writ of *distringas*, in order to compel the appearance of a party in court, and which, by the common law, he forfeits to the king if he does not appear. *Finch. L.* 352. But now, by stat. 10 *G. 3. c.* 50. the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff. See *tit. Appearance, Attachment, Distringas, Process, &c.*

As to issue, in the sense of children or heirs, see *tit. Estate, Executory Devise, Limitation, Remainder, Will, &c.*

When in the course of pleading the parties in a cause come to a point, which is affirmed on one side and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must be determined either in favour of the plaintiff or the defendant. 3 *Comm.* 313.

The issues concerning causes are of two kinds: upon matter of fact, and matter of law.

An issue in fact is where the plaintiff and defendant have agreed upon a point to be tried by a jury: an issue in law is where there is demurrer to a declaration, plea, &c., and a joinder in a demurrer, which is to be determined by the judges. 1 *Inst.* 71, 72. See *tit. Demurrer*.

As to issues of fact, *viz.* whether the fact is true or false, which are triable by the jury, they were formerly either general or special.

An issue was called general where the defendant pleaded the general issue to the plaintiff's declaration.

In most of the usual actions there was until recently an appropriate plea fixed by ancient usage as the proper method of traversing the declaration in cases where the defendant meant to deny the whole or the principal part of its allegations. *Reg. Plac.* 57: *Doct. & Stud.* 272. This form of plea, or traverse, was called the general issue in that action; and it appears to have been so called, because the issue it tendered involving the whole declaration, or the principal part of it, was of a more general and comprehensive kind than that usually tendered by a common traverse. *Steph. on Plead.* 187.

By the general rules of H. T. 4 *W. 4.* general issues have been in effect abolished, except in the cases hereinafter alluded to; for they are now only operative as a denial of some particular fact, and no longer put in issue all the material allegations of the declaration. See *Pleading*, and the various other titles under which the different forms of actions are mentioned.

There are, however, many acts of parliament which enable the defendant to plead the general issue, and to give the special matter in evidence; and to these cases the alterations introduced by the above rules do not extend.

A special issue is when some special matter, or material point alleged by the defendant in his defence, is to be tried; as in assault and battery, where the defendant pleads that the plaintiff struck first, &c. 1 *Inst.* 126.

In all criminal cases the general issue is not guilty, and a special plea is very rarely pleaded.

All issues are to be certain and single, and joined upon the most material thing in the case: that all the matter in question between the parties may be tried. 2 *Lil.* 85. An immaterial issue joined, which will not bring the matter in question to be tried, is not helped after verdict by the statute of jeofails; but there must be a repleader: but an informal issue is helped. 18 *Car.* 2 *B. R.*

A repleader may be awarded after verdict, for the badness and uncertainty of the issue: and a judgment may be reversed in error, being on an immaterial issue. 2 *Lutw.* 1608: 2 *Lev.* 194. On a joint trespass by many persons, there must be only one issue in each plea joined: and if several offences are alleged against the defendant, he ought to take all but one by protestation, and offer an issue upon that one, and no more. *Moor.* 80. But in action for damage, according to the loss which the plaintiff has sustained, every part ought to be put in issue. 1 *Saund.* 269. In action upon the case for service done for a time certain, the defendant ought to put in issue all the time alleged in the declaration. *Lutw.* 1268. And upon a general issue in waste, the plaintiff must show his title. *Ibid.* 1547. Though when any special point is in issue, the plaintiff is not obliged to set forth any other matter. *Cro. Eliz.* 320. If there are several things in a declaration, upon which an issue may be joined, and it is joined on any of them, it is good; and an affirmative and an implied negative will make a good issue. *Style.* 151. 210.

There must be in every issue an affirmation on the one part, as that the defendant owes such a debt, &c., and a denial on the other part, as that he oweth not the debt, &c. And though the matter contradicts, yet there must



be a negative and affirmative of it, to make a right issue. 1 *Ventr.* 213.

A negative should be as full as the affirmative, or it is no negative to make an issue; as if a defendant pleads a grant of four acres, and two acres only are denied, &c. 1 *Roll. Rep.* 86. It has been held, that issue ought not to be joined on a traverse only, without answering in the affirmative, &c. 2 *And.* 6. 102. But where the matter, which is the gist or cause of the action, is found, it has been adjudged good after verdict, though there was no negative and affirmative to make the issue; as where in debt upon bond the defendant pleads payment, and concludes to the country, without giving the plaintiff opportunity to deny the payment, if the jury in such case find the money paid, it is good after verdict. *Sid.* 341.

Two affirmations do not make a good issue. *Com. Dig. Pleader* (R. 3.): *Doug.* 60: 1 *Leon.* 77. However, an issue will be good if there is a sufficient negative and affirmative in effect, though in form of words there is a double affirmative. 1 *Wils.* 6. Neither do two negatives make a good issue. *Com. Dig. Pleader* (R. 3.): 6 *East*, 557.

There may be a plea to issue to part, and a demurrer to part, which have no dependence on each other. 1 *Saund.* 338. Where the declaration of the plaintiff is good, and the plea of the defendant is ill; if the plaintiff in his replication tender an issue upon such ill plea, and a trial is had, and it is found for the plaintiff, he shall have judgment. *Cro. Car.* 18. And generally, when a plea is bad, that the plaintiff might have demurrer upon it; and he doth not, but takes issue, and it is found for the defendant; this is aided by the statute of jeofails, and the defendant shall have judgment: so likewise where the replication is bad, and issue is taken upon it, and found for the plaintiff, he shall have judgment. *Cro. Eliz.* 455: *Cro. Jac.* 312. But there are many cases where, if the plea or replication is bad in substance, it is not aided by the statute of jeofails. See *tit. Amendment*.

If issue be well tendered, both in point of substance and in point of form, nothing remains for the opposite party but to accept, or join in it; and he can neither demur, traverse, nor plead in confession and avoidance; but he may plead in estoppel. *Steph. on Plead.* 279.

If the tender of the issue comes on the part of the plaintiff, the form of it is—*And this he prays may be inquired by the record, or by the country; and when on the part of the defendant—And of this he puts himself upon the country; and The plaintiff doth the like, &c.*

When issue is joined between the parties, it cannot be afterwards waived, if it be a good issue, without consent of both parties. 3 *Salk.* 211.

Every issue is to be joined in such a court that hath power to try it, otherwise the issue is not well joined; for if the cause cannot be tried, the issue is fruitless; and if it be tried, the trial is *coram non judice*. 2 *Lil. Abr.* 84.

Where an issue is not joined, there cannot be a good trial, nor ought judgment to be given. 2 *Nels. Abr.* 1042.

If the plaintiff will not try the issue after joined, in such time as he ought by the course of the court, the defendant may give him a rule to enter it: which if he does not, he shall be nonsuit, &c. 2 *Lil.* 84.

Where there are two issues joined, one good and the other bad, if entire damages are given upon the trial on both issues, it will be error; but if several damages are found, the plaintiff may release the damages on the bad issue, and have judgment for the rest. 2 *Lil. Abr.* 87, 88. See *tit. Damages*. And it is said, judgment may be entered as to one part of the issue; and a *nolle prosequi* to another part of the same issue, where it may be divided. *Pasch.* 23 *Car.* 2. *B. R.* Where two issues are joined, and a verdict only on one of them, it is a mistrial, and the judgment may be arrested, and a *venire facias de novo* awarded; if error brought, the judgment must be arrested. *Annaly*, 246.

With respect to the trial, &c. of issues, see *tit. Judgment, Nisi Prius, Trial, Venue, &c.*

For further information on the subject, see *tit. Pleadings, Practice*, and the various titles of subjects on which points of pleading arise.

**ISSUE BOOK.** When parties have come to issue, a transcript is made upon paper of the whole proceedings that have been delivered or filed between them. This transcript, when the issue joined is an issue in law, is called the *demurrer book*; when an issue in fact, it is called, in the King's Bench, in some cases the *issue*, in others the *paper-book*; and in the Common Pleas, the *issue*. See 1 *Arch. Pract.* 214: *Steph. on Plead.* 103.

By one of the general rules of H. T. 4 W. 4. the issue or demurrer book shall, on all occasions, be made up by the suitor or agent, and not as heretofore by any officer of the court.

**ISSUE ROLL.** The name of the roll on which the issue was formerly entered as soon as it was joined. The practice, however, for a great length of time, has been only to enter what was called an *incipitur* (see that title) previous to the trial; after that was over, and it became necessary to carry in the roll, the issue was entered *verbatim*, together with the proceedings, subsequent to the award of the *venire* to the judgment inclusive, and the roll was then termed the judgment roll. 1 *Arch. Pr.* 221.

Now by the rules H. T. 4 W. 4. the entry of proceedings on the record for trial, or on

the judgment roll (according to the nature of the case), shall be the first entry of the proceedings in the cause upon record.

**ISSUE, FEIGNED.** See *Feigned issue*.

**ISSUES ON SHERIFFS**, are for neglects and defaults, by amercement and fine to the king, levied out of the issues and profits of their lands; and double or treble issues may be laid on a sheriff for not returning writs, &c. But they may be taken off before estreated into the Exchequer, by rule of court, on good reason shown. 2 *Lil. Abr.* 89.

**ITINERANT**, *itinerans*.] Travelling or taking a journey: and those were anciently called *justices itinerant*, who were sent with

commissions into divers counties to hear causes.

The king's courts were formerly itinerant being kept in the king's palace, and removing with his household. The Common Pleas is now fixed by Magna charta; but though the Court of King's Bench is constantly held in Westminster Hall, yet there is nothing but custom to fix it there, as it is supposed to be before the king, and if actually so, must be itinerant. See *tit. Common Pleas, Judges, Justices, King's Bench, &c.*

**ITINERARY**, *itinerarium*.] A commentary concerning things falling out in journeys. *Law Lat. Dict.*

## J.

### JAR

**JACENS**, *hereditas dicitur, antequam adita sit*. An estate in abeyance. *Dig.*

**JACK**. A kind of defensive coat-armour formerly worn by horsemen in war, not made of solid iron, but of many plates fastened together; which some persons by tenure were bound to find upon any invasion. *Walsing. ham.* It was called *lorica*, because at first it was made with leather. *Cowell.*

**JACTITATION OF MARRIAGE**, is one of the first and principal matrimonial causes in the Ecclesiastical Courts; as, when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. On this ground the party injured may libel the other; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy those courts can give for this injury. 3 *Comm.* 93.

**JACTIVUS**, *Lat.*] He that loseth by default. *Formul. Solen.* 159.

**JACTUS MERCIIUM**. See *Jetsam*.

**JAIL**. See *Gaol*.

**JAMAICA**. An American island taken from the Spaniards in the year 1655. See this *Dict. tit. Navigation Acts*.

**JAMBEAUX**. Leg-armour; from *jambe*, *tibia*. *Blount.*

**JAMPNUM**, **JANNUM**, **JAUM**. Furze, whins, or gorse, and gorsy ground; a word used in fines of lands, &c. when law proceedings were in Latin, and which seems to be taken from the Fr. *jaune*, *i. e.* yellow; because the blossoms of furze or gorse are of that colour. *Cro. Car.* 179: *Cowell.*

**JAQUES**. Small money. *Staundford's P. C. c.* 30.

**JARROCK**. A kind of cork, or other in-

### JET

redient, prohibited to be used in dyeing cloth. *Stat. 1 Ric. 3. c. 8.*

**JAUN**. See *Jampnum*.

**JEJUNIUM**, fasting. *Purgatio per jejunium*, is mentioned in *Leg. Canuti cap. 7. apud. Brompton*. See *tit. Ordeal*.

**JEMAN**, sometimes used for *yeoman*. *Cowell.*

**JEOFAILS**, *j'ai faillé; ego lapsus sum*; I have failed.] An oversight in pleading, or other law proceedings. See this *Dict. tit. Amendment*.

**JERSEY, GUERNSEY, SARK, AND ALDERNEY**. These islands and their appendages were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are, for the most part, the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled *Le Grand Coutumier*. The king's writ or process from the courts at Westminster is there of no force, but his commission is. They are not bound by common acts of our parliament, unless particularly named. 4 *Inst.* 286. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council in the last resort. 1 *Com.* 106.

**JESSE**. A large brass candlestick, with sconces, hanging down in the middle of a church or choir: which invention was first called *jesse*, from the similitude of the branches to those of the *arbor jesse*. This useful ornament of churches was first brought over to this kingdom by *Hugh de Flory*, abbot of St. Austin's, in Canterbury, about the year 1100. *Chron. Will. Thorn.*

**JETSAM, JETZON, and JOTSON**, from

the French *jetter, ejicere*.] Any thing thrown out of a ship, being in the danger of wreck, and by the waves driven to the shore. See *tits. Flotsam, Insurance*, II. 5., *Wreck*.

**JESUITS.** The society of Jesuits was instituted by *Ignatius Loyola*, a Biscayan gentleman. It has been termed the most political and best regulated of all the monastic orders, and from which mankind have derived more advantages, and received greater hurt, than from any other of the many religious fraternities. *Roberts. Hist. Emp. Char. V. vol. 2. 134, 135, &c.*

By the Roman Catholic Relief Bill (10 G. 4. c. 7), after reciting (§ 28.) that Jesuits and members of other religious orders, &c. of the church of Rome, bound by monastic or religious vows, were resident within the United Kingdom, it is enacted, that every Jesuit, and every member of any other religious order, who at the commencement of the act shall be within the United Kingdom, shall within six months deliver to the clerk of the peace of the county where he resides a statement, in the form annexed to the act, containing the particulars of his name, age, place of birth, order to which he belongs, residence, &c., which shall be registered, and a copy transmitted to the lord lieutenant, if such person shall reside in Ireland; or if in Great Britain, to a secretary of state; any one not delivering such statement shall forfeit 50*l.* for every month he remains in the United Kingdom.

By § 29. any Jesuit, &c. coming into the United Kingdom after the commencement of the act shall be guilty of a misdemeanor, and, on conviction, be banished for life.

§ 30. Natural born subjects, being Jesuits, &c. may come into the realm on registering themselves with the clerk of the peace, within six months, under the like penalty for neglect as mentioned in § 28.

By § 31. a secretary of state, being a Protestant, may licence any Jesuit, &c. to come into the kingdom, and to remain for any period not exceeding six months, but may revoke such licence; and any person so licensed not departing the kingdom within twenty days after the expiration or revocation of such licence, is guilty of a misdemeanor, punishable with banishment for life.

§ 32. An account of the licences granted is to be laid annually before parliament.

§ 33. In case any Jesuit, &c. shall, within the United Kingdom, admit any person as a member of any such religious order, or be aiding or consenting thereto, he shall in England and Ireland be guilty of a misdemeanor, and in Scotland be punished by fine and imprisonment.

§ 34. Any person so admitted shall be guilty of a misdemeanor, and be banished for life.

§ 35. Any person banished not departing within thirty days may be conveyed to such place as his Majesty shall direct; and (§ 36.) if found at large at the end of three months from being sentenced, without some lawful cause, shall be transported for life.

By § 36. the preceding provisions are not to extend to religious orders consisting of females.

**JEWELS.** See *Jacalia*; and also *tits. Baron and Feme Carrier*.

**JEWES, Judæi.]** The first time we find the Jews mentioned in any document connected with English history is in the canons of Ec-bright, Archbishop of York, which contain an ordinance, that "no Christian shall Judaize, or presume to eat with a Jew." *Ex. MSS. Cotton, Nero, A. fol. 131.* See *Wilkins' Concilia Mag. Brit. vol. i. p. 11: Johnson's Coll. of Eccl. Law, vol. iii.*

By the laws attributed to Edward the Confessor, it is declared that "the Jews, wheresoever they be, are under the king's guard and protection; neither can any one of them put himself under the protection of any rich man without the king's licence, for the Jews, and all they have, belong to the king; and if any person shall detain them, or their money, the king may claim them if he please as his own."

William the First, soon after the Conquest, encouraged the Jews to come over in large numbers from Rouen, and is reported to have appointed a particular town for their residence, of the name of which we are not accurately informed. *Magd. Cent. c. 14. 686: Stowe Annals, x. 103: Holinshed, vol. iii. p. 15. Baker's Chron. x. 37.*

*Peck*, in his annals, relates, that many of the Jews who came over in this reign, took up their residence at Stamford. *Peck's Ann. of Stamford, lib. iv.* And *Wood*, in his *History of Oxford*, shows, upon the authority of some ancient deeds, that in the tenth year after the Conquest great numbers of them were already living at the university, where they soon afterwards erected a synagogue. *Wood's Ann. and Antiq. Oxon.*

During the whole of the reign of William the First, and of those of William Rufus and Henry the First, the Jews appear to have enjoyed complete toleration, and to have rapidly increased in numbers and in wealth. William Rufus, we are told, was in the habit, when a bishopric fell vacant, of delaying the nomination of a prelate, that he might retain the temporalities of the see in his own hand; and on such occasions he generally framed the vacant benefices to the Jews. *Pet. Bles. Cont. ad an. 1100.* King Stephen, however, and the em-



press Maude, during her short authority, subjected them to various exactions, which were continued throughout the reign of Henry the Second. It would appear that whenever these sovereigns are in want of money, they generally extort it from the Jews, under the pretence of mulcting them for some crime which they were accused of having committed. But they obtained, after repeated solicitations, one indulgence in the twenty-fourth year of the last named monarch, namely, permission to buy burial grounds in the neighbourhood of the different towns where they resided; previous to which time they had only been allowed to have one place of interment in England, situate in the outskirts of London, to which spot they had been compelled to bring their dead from all parts of the country. *Hoved.* 568: *Brompt.* 1129: *Holinsh.* lib. 2 p. 101: *Stowe*, lib. 3. p. 89.

The accession of Richard the First brought with it an increase of suffering to the Jews, one of the first acts of that king being to issue a proclamation, forbidding any Jew to approach the palace during his coronation. *Mult.* Paris, 108. Anxious to propitiate the monarch, the Jews deputed some of their chief men, who were the bearers of rich presents, and who ventured to approach the court yard of the palace during the ceremony. By the pressure of the crowd they were forced within the gates, and were driven back by the attendants. A report was quickly circulated that the king had ordered them to be put to death for disobedience to his commands, whereupon they were sought out and slain by the populace in every part of the city without mercy; their houses burnt; many of them perishing with their families in the flames. And although orders were given to quell the tumult, it was not put down until the following day by a large force sent into the city by the king. *Holinsh.* lib. 2. c. 118. § 40: *Gulielm. Neubrigensi*, 313.

Other parts of the country seemed inclined to follow the example of London; and notwithstanding the king caused writs to be issued throughout the counties, forbidding any molestation to be offered to them, the Jews were in many places subject to severe persecutions. And after the departure of the king to the continent, on his way to the Holy Land, they were plundered, and many of them slain in the principal towns by the assembled crusaders. At York, where the feeling against them appears to have spread to all the inhabitants, they were killed without regard to age or sex; and five hundred, who escaped into the castle, after defending themselves for awhile with desperate bravery, at length put their wives and families to death, and then destroyed themselves. *Chron. Walt. Hem.* c. 43. p. 515.

During the remainder of the reign of Richard the First, and some years after King John mounted the throne, the Jews appeared to have been treated with some degree of favour; and the latter monarch, in the second year of his reign, granted them for four thousand marks two charters, the one extending as well to the Jews of Normandy, by which they were allowed to live freely in the king's dominions, and to hold lands, and to have their privileges as they had in the time of Henry the Second.

They did not enjoy the benefit of these charters many years; for in 1210 King John threw off the mask which he seems only to have worn to tempt the Jews to increase and display their wealth; and during the rest of his reign they were heavily taxed, and the payment of the impositions enforced by imprisonment and torture.

When Magna Charta was extorted from the king, two clauses were inserted in it having reference to the Jews; but they were introduced to afford protection to the persons who were debtors to the Jews from the claims of the crown, and not to give any relief to the Jews themselves, whose residence in London were pillaged by the forces of the barons.

During the minority of Henry the Third the Jews obtained a respite from persecution; many measures were adopted for their protection, and the charter of the preceding reign was confirmed. They were, however, required to wear a badge, consisting of two white tablets of linen parchment on the breast, to be attached to their upper garment; but this order appears to have proceeded from no unkindly intention, but to have been meant as a safeguard. *Toucey, Angl. Jud.* 79.

The toleration thus afforded them gave offence to the clergy; and the Archbishop of Canterbury published a general prohibition, by which all persons were forbidden to sell them any provisions, or to have any dealings with them. And although the crown sent directions to the sheriff to prevent this edict of the church from being enforced, they obtained only a short exemption from prosecution. The annals of historians, from the fourteenth year of the conclusion of the reign of Henry the Third, present a disgusting record of the various cruelties and extortions that were practised upon them, during which they vainly entreated permission to seek an asylum in foreign lands, for proclamations were issued forbidding them to leave England without the king's licence. 2 *Dem.* 45. In the thirty-ninth year of his reign Henry the Third assigned the Jews over to his brother Richard, Earl of Cornwall, as a security for a sum advanced by the latter. *Mud. Exch.* 156.

Two ordinances or statutes were passed to-

wards the conclusion of this reign: by the first, all debts due to Jews were prohibited from being secured as rent charges on lands; and by the second it was enacted, no Jew should hold any freehold in any manors, lands or tenements, excepting that they might hold houses as theretofore for their habitations in the towns where they resided. These ordinances were made to preserve the rights of tenure, which were endangered whenever the crown seized upon the debts and landed property of the Jews, for thereby the lords of the fee were deprived of their accustomed fruits and privileges.

King Edward the First, in the third year of his reign, was forced to pass the statute known by the name of the *Statute de Judaismo*, in consequence of the injuries experienced by the people in general from the laws and proceedings against the Jews. This statute enacted, that no Jew should practise usury; that no distress for the debt of a Jew should be so grievous as not to leave the debtor the moiety of his lands and chattels for his subsistence; that no Jew should have power to sell or alien any house, lands, or tenements, without the king's leave; but that they might purchase houses in cities as theretofore, and take leases of land to farm for ten years. It directed they should only reside in such cities and boroughs as were the king's own; and that all Jews above the age of seven years should wear a badge, in the form of two tables of yellow taffety, upon their upper garments.

These provisions were strictly enforced, and the direction to wear badges was subsequently, by an edict, extended to Jewesses as well as Jews. Several measures were also taken to induce the Jews to renounce their faith. In England, as in most other countries, a custom prevailed, by which, when a Jew was converted, the king seized all his property. Letters patent were published, declaring that in future any Jew conforming to Christianity should retain the moiety of his property to his own use.

They, however, continued subject to tallages of heavy amount, and to the accusation of various crimes, the chief of which was clipping and falsifying the coin of the realm, for which, in the seventh year of this reign, no less than 294 were executed. Large sums were also exacted from them under threats to accuse them of this offence, and this system of extortion was carried to such an extent, that a proclamation was issued declaring no Jew should be answerable for any offence theretofore committed; but to bring himself within the security, he was to pay a fine to the king.

In the sixteenth year of this reign it is stated, all the Jews throughout England were,

on the same night, thrown into prison, and only released on payment of 12,000 pounds of silver. *Stowe*, 203, 4. *Holinshed* relates they were subjected to this violence in consequence of a promise made to the king by the Commons of a fifth of their moveables, provided he would banish the Jews from the country; which promise induced the latter to offer him the above sum to be released and allowed to remain in England. *Holinsh.* vol. iii. p. 283. The king, on his return from France in 1290, consented to a decree for the final banishment of the Jews, whereupon the Commons granted him a fifteenth part of their goods; and the clergy at the same time made him a gift of a tenth of their moveables. *Walt. Hem.* p. 21. See the collection of *Parliamentary Writs* lately published, vol. i. p. 15. The number of Jews who left England at the time appointed by the decree have been estimated at 15 or 16,000.

It was not until after the death of Charles the First that the Jews sought to return to this country. In the overtures they made to the parliament, they asked for the repeal of all laws in force against them, and offered to pay 500,000*l.*, provided at the same time the Bodleian library at Oxford was made over to them, along with the cathedral of St. Paul's for a synagogue. It appears that this proposal was actually taken into consideration, was debated several times, and that the negotiation was broken off in consequence of the parliament demanding 800,000*l.* for the privileges required, which the Jews refused to give. *Monteth's Hist. of Great Brit.*, 473.

The next attempt was made after Cromwell assumed the protectorate, when a Jew, of the name of *Rabbi Manasseh Ben Israel*, came over from Holland as their negotiator. He presented a petition to Cromwell, praying the Jews might be allowed the free exercise of their religion, which was strongly opposed by the well-known *Prynne*, in two tracts. Although the petition was debated in the council, no definite step seems to have been taken, probably owing to the country being generally opposed to their re-admission; and a deputation of Jews from Asia, one of whose objects was to inquire into the pedigree of the Protector, in the hope that they might trace it to a Jewish origin, and prove him to be the promised Messiah, was ordered to leave England. *Histoire d'Oliver Cromwell par Raguenet*, 290.

Notwithstanding their re-admission was not sanctioned by any act of the state, it has been asserted by many writers that the Jews returned to this country during the protectorate; 4 *Comm.* 374; while others postpone the period until the restoration. *Tovey's Anglia Judaica*, 259.

In the latter part of the year 1660 the House of Commons was recommended by the lords of the council to consider of the measures for the protection of the Jews, and as early as 1662 they had a synagogue in London. In 1670, the committee of the House of Commons, for bringing in a bill to prevent the growth of Popery, was directed to inquire into the numbers of the Jews and their synagogues, and upon what terms they were permitted to have their residence here. *Comm. Journ.* 6 Feb. 1670.

In the beginning of the seventeenth century an instance occurred where a Jew of immense riches turned out of doors his only daughter who had embraced Christianity; and on her application for relief, it was held he could not be compelled to afford her any. *Lord Raym.* 699. But to prevent such inhumanity in future, the statute 1 *Anne*, c. 30. ordains that if Jewish parents refuse to allow their Protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper. See 1 *P. Wms.* 524: 2 *Eq. Ab.* 513. c. 2.

In 1753, an act was passed enabling foreign Jews to be naturalized without being obliged to take the sacrament, as required by the 7 *Jac.* 1; but the act was repealed the first day of the ensuing session, in consequence of the clamour raised against it throughout the country.

The nature of the toleration, formerly extended to the Jewish worship in this country, appears in the following record of the 37th year of Henry the Third:—"Rex providit, quod universi Judæi in sinagogis suis celebrent submissa voce, secundum ritum eorum, ita quod Christiani hoc non audient." *Madox, Exch.* 162: 1 *Raym.* 293. But one of the most curious facts concerning their religious principles is, the existence of a bishop or presbyter of the Jews, who appears sometimes to have been appointed by the crown; at others, elected by the Jews, subject to the Royal approbation. The principal records in this matter may be found in *Raym.* 95. 362. 591: *Madox, Exch.* c. 7. p. 177: *Tovey, Anglia Judaica*, 53. et seq.: *Selden, Op.* III. p. 1583, 4.

There was anciently a Court of Exchequer of the Jews, which was considered a branch of the Court of Exchequer, but had its particular officers, who were called the justices of the Jews. 4 *Inst.* 254.

A Jew brought an action, and the defendant pleaded that the plaintiff was a Jew, and that all Jews are perpetual enemies of the king and our religion. But, by the court, a Jew may recover as well as a villein, and the plea is but in disability so long as the king

shall prohibit them to trade; and judgment for the plaintiff. *L. P. R.* 4. cites *Mich.* 36 *Car.* 2. *B. R.*: 1 *Lilly, Pract. Register*, 3.

And it was said in argument, that the Jews are here by an implied licence, but on a proclamation of banishment they are in the same situation as alien enemies on a determination of letters of safe conduct. 2 *Show.* 371.

These cases occurred in the reign of Charles the Second, when most of the Jews in this country must have been aliens born, and are no foundation for a belief that has prevailed, that Jews, whether born in England or not, are looked upon by the law as aliens.

It was also formerly doubted whether a Jew could be a witness. 2 *Hale, P. C.* 279: 1 *Atk.* 24. But it has been held he may, on being sworn on the Old Testament. 1 *Atk.* 442: *Str.* 1104.

A plaintiff had leave given him by the court to alter the venue from London to Middlesex, because all the sittings in London were on a Saturday, and his witness was a Jew, and would not appear on that day. 2 *Mod.* 271.

So a Jew was ordered to swear his answer in Chancery, upon the Pentateuch, and that the plaintiff's clerk should be present to see him sworn. 1 *Vern.* 263.

A bequest for the maintenance of an assembly for the reading of the Jewish law and advancing the Jewish religion, has been held illegal, as that religion is not tolerated, but only connived at by the legislature. *De Costa v. De Paz*, 2 *Swanst.* 487. n. So is a legacy to maintain a synagogue; but it is no objection to a charitable bequest that the objects to be benefited are Jews. *Isaac v. Gompertz, Ambler*, 2nd edit. 228. n. 1. See also 2 *Starkie*, 356.

Whether Jews can hold real property is a question which has frequently been debated even down to the present day. See *Blunt's History of the Jews*, and pamphlet by *Mr. Goldsmid*, where this point is ably discussed.

After the repeal of the Jews' Naturalization Bill, it was proposed in the House of Lords by *Lord Temple* to submit it to the judges, but the motion was rejected principally on the ground that the latter are not obliged to give their opinion on extra-judicial questions where no bill is depending.

In practice, however, it has been considered that Jews born in this country are entitled to hold lands like other individuals. And, as was said by *Sir Samuel Romilly*, in 2 *Swanst.* 511., no case has occurred in which a title has been objected to on the ground that the estate belonged to a Jew.

The disabilities under which the Jews labour at the present day arise from the tests imposed by the law upon persons filling public offices and employments. These tests are oath of ab-



juramentum, as settled by the 6 G. 3., and the declaration substituted for the sacramental test, by the 9 G. 4., both of which contain the words, "upon the true faith of a Christian." A Jew is of course debarred from any situation where these are required; he is prevented from sitting in parliament, holding any office, civil or military, under the crown, or any situation in corporate bodies. He may be excluded from practising at the bar, or as an attorney, proctor, or notary; from voting at elections; from enjoying any exhibition in either university; and from holding some other offices of inferior importance.

A bill for the removal of these disabilities has twice passed the House of Commons; but has been each time thrown out of the House of Lords by a large majority. See further on this subject the various authors referred to throughout this title; and particularly, *Blunt's History of the Establishment and Residence of the Jews in England*.

**JOBBER.** One who buys or sells cattle for others. There are also stock-jobbers, who buy and sell stock for other persons, and gamble in the funds for themselves. See *tit. National Debt, Stock-jobbers*.

**JOCALIA**, Fr. *joyaux*.] Jewels; derived from the Lat. *jocus*, *joculus*, and *jocula*, which comprehend every thing that delighteth; but, in a special and more restrained sense, it signifies those things which are ornaments to women, and which in France they call their own; as diamonds, ear-rings, bracelets, &c. But in this kingdom a wife shall not be entitled to jewels, diamonds, &c. on the death of her husband, unless they are suitable to her quality, and the husband leaves assets to pay debts, &c. 1 *Roll. Abr.* 911. See *tit. Baron and Feme, IV*.

**JOCARI.** To contend with pikes. *Mat. Paris, anno 1252*.

**JOCARIUS.** A jester. In an ancient deed of Richard, abbot of Berney, to Henry Lovet, among the witnesses to it was *Willielmo tunc joculario Domini Abbatis*. In Domesday it is said Berdic was *joculator regis*, the king's jester.

**JOCELET**, Sax. *prædiolum, agri colendi portiuncula*.] A little farm or manor; in some parts of Kent a *yoklet*, as requiring but a small yoke of oxen to till it. *Sax. Dict.*

**JOCULATOR.** See *Jocarius*.

**JOCUS PARTITUS.** It is so called when two proposals are made, and a man hath liberty to choose which he will. *Bracton, lib. 4. tract 1. c. 32. p. 2. : Hengham. Mag. c. 4.*

**JOINDER IN ACTION.** The coupling or joining of two in a suit or action. *F. N. B. fol. 218. 201. 221.* In all personal things, where two are chargeable to two, the one may

satisfy it, and accept of satisfaction, and bind his companion; and yet one cannot have an action without his companion, nor both only against one. 2 *Leon.* 77. In joint personal actions against two defendants, if they plead severally, and the plaintiff is nonsuit by one before he hath judgment against the other, he is barred (in that suit) against both. *Hob.* 180. A person, in consideration of a sum of money paid to him by A. and B., promises to procure their cattle distrained to be delivered; if they are not delivered, one joint action lies by the parties; for the consideration cannot be divided. *Style*, 156. 203: 1 *Dunn. Abr.* 5.

Upon a joint grievance all parties may join; as the inhabitants of a hundred, &c. And an action brought against owners of a ship, in case of goods damaged, &c. *quasi ex contractu*, must be made against all of them. 3 *Lev.* 355: 3 *Mod.* 321: 2 *Salk.* 440. Though one partner acts in trade, where there are many partners, actions are to be brought against all the partners jointly for his acts. 1 *Salk.* 292. If two men are partners, and one of them sells goods in partnership, action for the money must be brought in both their names. *Godb.* 244. But where there are two partners in merchandize, and one of them appoints a factor, they may have several writs of account against him, or they may join. *Moor*, 118. And if one of the merchants dies, the survivor is to bring the action. 2 *Salk.* 444.

Where several persons, called dippers, at Tunbridge Wells, joined in an action against a person who exercised the business of a dipper, not being duly appointed, and disturbed plaintiffs therein. These dippers were twelve in number, all women, chosen by the freeholders of the manor within which the wells lay, and approved by the lord of the manor, and the employment was attended with profits which arose merely from the voluntary contributions of the company; and defendant having acted as dipper without a proper appointment, the dippers joined in an action against her.—Held by the court to be well brought, because, although the dippers were severally entitled to receive for their own several use, such voluntary gratuities as the company were pleased to give them respectively, yet with regard to a stranger's disturbing them in their employment, they were all jointly concerned in point of interest; and that it was hurt done to them all. See 1 *Saund.* 853: *Eccleston v. Clipsham, ib.* 191. (b.) note to *Cabell v. Vaughan*.

Two counts may be joined in the same declaration, where the same judgment may be given in both. 2 *Wils.* 321. (See also 3 *Wils.* 354.) It has been adjudged, that debt on an obligation, and on a *mutuatus*, may be joined

in the same action, though the former is a contract under seal, and the other only a simple contract, and the plea to the one is *non est factum*, and the other *nil debet*, but the judgment is the same in both. 1 *Vent.* 366: *Cro. Car.* 366. So debt and detinue may be joined in the same action, for they are of the same nature; but debt and trespass or debt and account cannot be joined, for they are of different natures. *Bro. Joinder in Action*, 97. But in 5 *Mod.* 92, it is said by the court that it seems strange that debt and detinue should be joined, because these actions have different judgments; so debt for rent upon a lease, either by parol or indenture, and for goods sold and delivered, may be joined in the same action. *Bro. Joinder in Action*, 90: *Gilb. C. P.* 5: 4 *Bac. Ab.* 11. So several trespasses, committed on several days, and in several places, though separate wrongs, and several causes of action, may be joined in the same action. 8 *Rep.* 876. *Buckner's case*. So an action against a common carrier upon the custom of the realm for a misfeasance and trover may be joined. 4 *Bac. Ab.* 11: 2 *Wils.* 319: 1 *Vent.* 223: 1 *T. R.* 277. So an action on the case for immoderately riding a horse and trover may be joined. 1 *Lutw.* 98. 101: *Cro. Car.* 20. So an action on the case for disturbing the plaintiff in his right of common, and of cutting and taking rushes upon the common for litter for his cattle, and trover, may be joined. 3 *Wils.* 456. But detinue and trover cannot be joined. *Willes's Rep.* 118. So debt upon a bond and upon a judgment may be joined in the same action. 1 *Lutw.* 43; 1 *Wils.* 248: 2 *Brown. Ent.* 83, 84: 2 *Salk.* 772. So an action on the case for wrongfully and injuriously obstructing and hindering the plaintiff from landing his goods upon a yard of the defendant, contrary to a written agreement between them, and trover, may be joined. 3 *Wils.* 348. 354: 1 *T. R.* 274. There held, that wherever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. See further, 2 *Saund.* 117, note (2).

But actions founded upon a *tort*, and upon a contract, cannot be joined in the same declaration as *assumpsit* and action upon the case for a *tort*, because the pleas are different. 1 *T. R.* 276: 1 *Vent.* 366. So *assumpsit* and trover cannot be joined; and though this is a verdict for the defendant on the count for the trover, yet it is said, that it does not cure the declaration, but it is bad *ab initio*. 2 *Lev.* 101: 3 *Lev.* 99: 1 *Salk.* 10: 3 *Wils.* 354. So *assumpsit* and an action upon the case founded upon fraud or deceit, cannot be joined, because they require different pleas. *Carth. C.* 444. 189. So a count by the plaintiff, as on a

contract made with the testator, and a count in his own right, cannot be joined. *Hob.* 88: 1 *Salk.* 10: 3 *T. R.* 659, 660: 1 *Ld. Raym.* 1215: 10 *Mod.* 316.

But it is now settled, after several conflicting decisions, that if the money recovered on each of the counts will be assets, the counts may be joined in the same declaration. 2 *Saund.* 117. d.: 3 *Dougl.* 34. Thus the same declaration which contains counts on promises to the testator may contain a count on an account stated with the plaintiff as executor concerning money due to the testator from the defendant, or concerning money due to the plaintiff as executor (*Freeman*, 538: 1 *Taunt.* 322: 6 *East*, 405.); or a count for money lent by the plaintiff as executor (3 *B. & A.* 365: 3 *Dougl.* 34.); or a count for money had and received by the defendant to the use of the plaintiff as executor (2 *Saund.* 208: 2 *T. R.* 477: 3 *T. R.* 659: 2 *B. & A.* 364: 2 *B. & C.* 149.); 9 *B. & C.* 669; or a count for money paid by the plaintiff as executor, to the use of the defendant (3 *East*, 103.); or a count for goods sold and delivered by the plaintiff as executor (6 *East*, 405; 9 *B. & C.* 669.); or a count for materials found, and, as it should seem, for work and labour done by the plaintiff as executor (1 *Crompt. & I.* 403: *S. C.* 1 *Tyr.* 308.); or a count on a bill of exchange endorsed to the plaintiff as executor (1 *T. R.* 487: 1 *B. & C.* 150.); or on a promissory note made to him as executor (5 *Price*, 412.) affirmed in error, 7 *Price*, 591. So in a declaration in debt a count on a judgment recovered by the plaintiff as executor may be joined with counts on debts which accrue to the testator. 1 *Doug.* 4. note 1. See further, *Williams on Executors*, 1151.

So a plaintiff shall not have an action against another to charge him as executor, and also in his own right; for the judgment in the one case is *de bonis testatoris*, and in the other *de bonis propriis*. *Hob.* 88: 2 *Lev.* 228. Therefore a count for money had and received by the defendant as executor, for the plaintiff's use, or for money lent him as such, cannot be joined to a count on a promise made to the testator. And such mis-joinder of action, either by or against an executor, is a defect in substance, and, therefore, had on a general demurrer, or in arrest of judgment, or in error. 4 *T. R.* 347: 1 *H. B.* 108: 2 *Bos. & Pull.* 424. But a count on an action stated with the defendant as executor, whether the account be averred to have been stated of money due from the testator to the plaintiff (1 *H. B.* 102.), or of money due from the defendant as executor to the plaintiff (7 *Taunt.* 580: 7 *B. & C.* 444.), may be joined to counts on promises made by the testator. And so it should seem

may a count for money paid by the plaintiff to the use of the defendant as executor. 7 B. & C. 448. 452.

So a man cannot join trespass and trespass on the case in the same action, for they are two distinct things, and of different natures, and the judgments are different; for in trespass the judgment is *quod capiatur*, and in trespass on the case, *quod sit misericordia*. 1 *Ld. Raym.* 273, 274. The result of all these cases seem to be, that wherever the same plea may be pleaded, and the same judgment given in all the counts of the declaration, and wherever the counts are of the same nature, and the same judgment is given on them all, though the pleas be different, as in the case of debt upon bond, and on a *mutuatus* already mentioned, they may be well joined. 2 *Staud.* 117. *d. note* 2.

If one man call two other men thieves, they shall not join in an action against him; nor one joint action will not lie for, or against several persons for speaking the same words; for the wrong done to one is no wrong to the other; and the words of the one are not the words of the other. 1 *Danv.* 5: *Palm.* 313.

But if two partners are libelled in their trade, they may maintain a joint action. 3 *Bos. & Pull.* 150.

So, in assault and battery, on a joint trespass, the plaintiff may declare severally, but it remains joint till severed by the declaration. 2 *Salk.* 454. A man cannot declare in an action against one defendant for an assault and battery, and against another for taking away his goods; because the trespasses are of several natures. But where they are done by two persons jointly at one time, they may be both guilty of the whole, *Style*, 153: 10 *Rep.* 66. If two men procure another to be indicted falsely of barratry, he may have an action against them both jointly; and it is the same if two conspire to maintain a suit, though one only gives money, &c. *Latch*, 226.

Tenants in common cannot join in an action of waste against their lessee; but it is otherwise in the case of coparceners, or joint-tenants. *Moor.* 34. See those titles; and further on this subject, this Dict. tit. *Action*.

As to the joinder of several parties, and different offences in criminal cases, see tit. *Indictment*.

**JOINDER OF COUNTIES.** There can be no joinder of counties for the finding of an indictment. See tit. *Indictment*.

**JOINDER IN DEMURRER.** See tit. *Demurrer*.

**JOINDER OF ISSUE.** When one party denies the fact pleaded by his antagonist, who has tended the issue thus: "And this he prays may be inquired of by the country," or, "And

of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A. B. doth the like." Which done, the issue is said to be joined. See tit. *Issue*.

**JOINT ACTIONS.** See tit. *Action, Joinder in Action*.

**JOINT AND SEVERAL.** An interest cannot be granted jointly and severally; as if a man grants the next advowson, or makes a lease for years, to two jointly and severally, those words (severally) are void, and they are joint-tenants. A power or authority may be joint and several. 5 *Rep.* 19. Joint words of parties shall, by construction of law, be taken respectively and severally. 5 *Rep.* 7. *b.*

When it appears by the count that the several covenantees have, or are to have, several interests or estates, there, when the covenant is made with the covenantees, and each of them, these words make the covenant several, in respect of their several interests. 5 *Rep.* 19. And see *Jenk.* 262, 263. *pl.* 63. Grant of the next avoidance to two, and each of them, to present A. to the said church, is good; for the contention is avoided by restraining both to present A. *Jenk.* 263. *pl.* 63. See 14 *Vin.* 46. 48. 469. and this Dict. tit. *Covenant, Estate*.

In an indictment where several offenders are jointly charged with the offence, the charge against them is joint and several. 2 *R. R.* 173: 1 *Chitt. C. L.* 252. 255.

**JOINT EXECUTORS.** See tit. *Executor*, II. V. 3. 5.

**JOINT FINES.** If a whole vill is to be fined, a joint fine may be laid, and it will be good for the necessity of it; but in other cases, fines for offences are to be severally imposed on each particular offender, and not jointly upon all of them. 1 *Roll. Rep.* 33: 11 *Rep.* 42: *Dyer.* 211. See tit. *Fines for Offences*.

**JOINT INDICTMENTS.** See tit. *Indictment*.

**JOINT LIVES.** A bond was made to a woman *dum sola*, to pay her so much yearly as long as she and the obligor should live together, &c. Afterwards the woman married, and debt being brought on this bond by husband and wife, the defendant pleaded, that he and the plaintiff's wife did not live together; but it was adjudged, that the money should be paid during their joint lives, so long as they were living at the same time, &c. 1 *Lutw.* 555. Where a person, in consideration of receiving profits, of the wife's lands on marriage, during their joint lives, was to pay a sum of money yearly, in trust for the wife, though it was not said every year during, &c. it was held, that the payment shall be intended to continue every year also during their joint



lives. 1 *Lutw.* 459. Lease for years to husband and wife, if they, or any issue of their bodies, should so long live, has been adjudged so long as either the husband, wife, or any of their issue should live; and not only so long as the husband and wife, &c. should jointly live. *Moor*, 339. See *tits. Agreement, Covenant, &c.*

**JOINT-STOCK COMPANIES.** By the 6 *G.* 1. c. 18. commonly called the Bubble Act, all companies acting as corporate bodies, and raising transferable stocks, were declared illegal, but this statute was repealed by the 6 *G.* 4. c. 91. The second section of the latter act empowers the crown, on granting any charter, to declare the members of the corporation so formed personally liable to its debts.

The repeal of the 6 *G.* 1. c. 18. gave rise to innumerable schemes, in the shape of joint-stock companies, rivalling in absurdity the projects which led to the passing of that statute, and at length ended in what was called, and will long be remembered, as the panic of 1825; when the country was, to use the words of Mr. Huskisson, within twenty-four hours of a general bankruptcy. Since that period speculation has flowed in a safer channel, and joint-stock companies are now chiefly restricted to the establishment of district banks, canals, rail-roads, &c., within our own country.

All unincorporated companies are nothing more than ordinary partnerships, 9 *Eust.* 516: 3 *Ves. & B.* 180; and all the members are personally liable as partners.

**JOINTENANTS**, as it is frequently written, or, rather, as seems most consistent,

## JOINT-TENANTS,

*simul tenentes*, or *qui conjunctim tenent*.] They who hold lands or tenements by joint-tenancy.

AN ESTATE IN JOINT-TENANCY is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants, an estate is called an estate in joint-tenancy; *Litt.* § 27; and sometimes an estate in jointure, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term jointure is now usually confined to that joint estate, which, by virtue of the stat. 27 *H.* 8. c. 10. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower. See *tit. Jointure*.

### I. Of the Nature of an Estate in Joint-tenancy, and how created.

II. *The consequences and Incidents of such Estate; and of the Acts of Joint tenants to alienate or incumber the same.*

III. *How it may be severed or destroyed.*

I. The creation of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenant claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties; and never by the mere act of law. Now if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands; for the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the granter has thus united their names, the law gives them a thorough union in all other respects. 2 *Comm.* 189. c. 12.

The essential difference between joint-tenants in common is, that joint-tenants have the lands by one joint title, and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says *Lord Coke*, that joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, *viz.* that their occupation is undivided, and neither of them knoweth his part in several. *Co. Lit.* 189. a.

The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, of title, of time, and of possession; or in other words, joint-tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

*First*, They must have one and the same interest. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different. One cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. 1 *Inst.* 188. But if land be limited to A. and B. for their lives, this makes them joint-tenants of the freehold; if to A. and B. and their heirs, it makes them joint-tenants of the inheritance. *Litt.* § 277. If land be granted to A. and B. for their lives, and to the heirs of A., here A. and B. are joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee severalty; or if land be given to A. and B., and the heirs of the body of A., here both have an estate for life, and A. hath a several remainder in tail. *Litt.* § 285.

In the creation of a joint tenancy in fee, particular care must be taken not to insert the words, and the survivor of them. For the grant of an estate to two and the survivor of them, and the heirs of the survivor, does not make them joint-tenants in fee, but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor. Whether during their joint lives the fee continues in the grantor, or remains in abeyance, and whether they can convey their estate, and what is the proper mode of conveyance to be used, are points which have been much agitated, and which, perhaps, are not yet quite settled: they were all mentioned in the case of *Vick v. Edwards*, 3 P. Wms. 372. In that case lands were devised to B. and C. and the survivor of them, and the heirs of such survivor in trust to sell. Lord Talbot held, that the fee was in abeyance, that the trustees joining in a fine of the premises might make a title to a purchaser by way of *estoppel*, and that the heirs joining might be of use, as it would supply the want of proving the will; but that in every other respect it would be void. In this case the word *estoppel* must not be understood in its strict technical sense; and all that is meant by it is, that the fine operates by way of conclusion upon, or bar to the vendors, till the contingency happens upon which the fee is to arise, and then it passes to the purchaser. This doctrine is open to objection (see 1 P. Wms. 505: 2 Saund. 380.); but it seems generally to be acquiesced in, and perhaps the liberality of succeeding times may think a common conveyance, by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either fine or a common recovery. 1 Inst. 191. a. in. n. Sec 4 B. & A. 303.

*Secondly.* Joint-tenants must also have a unity of title; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same dispositive. Litt. § 278. Joint-tenancy cannot arise by descent or act of law; but, as has been already said, merely by purchase or acquisition, by act of the party, and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the joint-tenancy. 2 Comm.

*Thirdly.* There must also be an unity of time; there estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B., or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are joint tenants of this present estate, or this vested remainder. But if after a lease

for life, the remainder be limited to the heirs of A. and B., and during the continuance of the particular estate A. dies, which vests the remainder of one moiety in his heir; and then B. dies, whereby the other moiety becomes vested in the heir of B.; now A.'s heir and B.'s heir are joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other at another. 1 Inst. 188. Yet where a feoffment was made to the use of a man and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held, that the husband and the wife had a joint estate, though vested at different times; because the use of the wife's estate was in abeyance, and dormant till the inter-marriage, and on that event had relation back, and took effect from the time of creation. Dy. 340: 1 Rep. 101.

*Lastly.* In joint-tenancy there must be an unity of possession. Joint-tenants are said to be seised *per my et rer tout*, by the half or moiety, and by all: that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not one of them a scisin of one half or moiety, and the other of the other moiety, neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. Litt. § 288: 5 Rep. 10: Bract. l. 5. tr. 5. c. 26. And, therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. Litt. § 665: 1 Inst. 187: 4 Bro. Ab. l. Cui in vita, 8: 2 Vern. 120: 2 Leo. 39.

If a father makes a deed of bargain and sale of lands to his son, to hold to him and his heirs, &c. to the use of the father and son, and their heirs and assigns for ever, they are joint-tenants. 2 Cro. 83. And if the father devises lands to his eldest and other sons, they are joint-tenants, and not tenants in common. Goldsh. 28: Poph. 52.

A man devised lands to his wife for life, and after her death to his three daughters, and the heirs male of their bodies, &c. The wife and the two eldest daughters died; and it was held that the surviving daughter should have the whole for life, the three sisters being joint-tenants for life, and several tenants in tail in the inheritance. Leon. 47.

Two or more purchase land, and advance the money in equal parts, and take a conveyance to them and their heirs; this makes a joint-tenancy with the chance of survivorship. But where the proportions of money are not equal, they are in nature of partners; and though the legal estate survives, the survivor shall be as a trustee for the others, in respect of the sums paid by each. So, if where two having purchased jointly, afterwards one lays out a considerable sum on improvements, &c. and dies, in equity it shall be a lien on the lands, and a trust for the representatives of him who advanced it. 1 *Eq. Ab.* 291.

A rent of 10*l.* a year is granted to A. and B. to hold to one until he marry, and to the other till he is presented to such a church; it was holden they were joint-tenants, and that if either of them die before marriage or presentment, the rent shall survive. *Co. Litt.* 180.

If lands are given to two women, and the heirs of their bodies, the remainder to them and their heirs; they shall be joint-tenants for life, tenants in common of the estate-tail, and joint-tenants of the fee-simple. *Ibid.* 183. But where a remainder is limited to the right heirs of two persons, in this case they shall take severally, though the words be joint. 5. *Rep.* 8. Land is granted to a man, and such woman as shall be his wife: here is no joint-tenancy, but the man will have the whole; though if one make a feoffment in fee to the use of himself, and of such wife as he shall after marry, for their lives; when he takes a wife, they are joint-tenants. *Co. Litt.* 188: 1 *Rep.* 101.

Lands are settled to the use of husband and wife for their lives, remainder of both their bodies. The children of this marriage are joint-tenants. *Staples v. Maurice, Bro. P. C. tit. Joint-tenants, Ca. 3.*

One person is in by the common law, and another by limitation of use, yet they may be joint-tenants by virtue of a deed of grant, &c. *Jenk. Cent.* 330. Land given in the premises of a deed to three, to hold to one for life, remainder to another for life, remainder to the third for life, they are not joint-tenants, but shall take successively. *Dyer*, 160.

In a case in the King's Bench during Lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters, equally to be divided, and their respective heirs, ought to be construed; and the following passage in 1 *Inst.* 290. *b.* was much relied upon, by two of the judges, as an authority to show that the words equally to be divided, imply a tenancy in common. "If a verdict find that a man hath *duas partes manerii, &c. in tres partes divisas*, this shall not be intended to be in common; but if verdict be,

*in tres partes indivendas*, then it seemeth that they are tenants in common by the intendment of the verdict." But Lord Holt, who was for a joint-tenancy, observed, that no such matter appears in the case of 21 *Ed.* 4. there cited by Lord Coke in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. *Fisher v. Wigg*, 1 *P. Wms.* 14, &c. and Mr. Cox's notes there: *Salk.* 361: *Com. Rep.* 88. 92: 12 *Mod.* 296: 1 *Ld. Raym.* 622. In the two latter books, and in *P. Wms.* the case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to wherever the doubt is, whether there shall be a tenancy in common or joint-tenancy; and seems an acknowledged authority in cases of surrenders of copyhold. 1 *Wils.* 341. See also *Anglesey (Pl.) v. Rum. Dom. Pro.* September 1727: *Boher v. Gyles*, 2 *P. Wms.* 280: *Bro. P. C.*: *Hall v. Digby, et al. Bro. P. C.*: *Hawes v. Hawes*, 1 *Wils.* 165: *Guskin v. Guskin, or Denn v. Guskin, Cowp.* 660. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a will; and Lord Mansfield declared the opinion of the two judges, who differed from Holt, to be the better and more liberal one; and Astin, J. noticed, that equally to be divided had been adjudged a tenancy in common, even in a deed. See 1 *Inst.* 190. *b.* in *n.*

Where two purchase to them and their heirs, with *equal* payments, this is a joint-tenancy in equity, and there is survivorship. 19 *Ves.* 440: *Prec. Ch.* 332. Devise to A. and B. between them constitutes a tenancy in common. 2 *Meriv.* 70. See further, tit. *Tenants in Common.*

II. Upon the principles of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estates, beside those already casually noticed. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion. *Co. Lit.* 214. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privacy of the relation of their estate. *Ibid.* 119. On the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them; *Ibid.* 49; and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. *Ibid.* 319. 364. In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other. *Ibid.* 195. But if two or more joint-tenants be seised of an advowson, and they present different clerks,



the bishop may refuse either, because neither joint-tenant hath a several right of patronage, but each is seised of the whole: and, if they do not both agree within six months, the right of presentation has lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title of both of them, in respect of the privity and union of their estate. *Co. Lit.* 185. Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land, for each has an equal right to enter on any part of it. 3 *Leon.* 262. But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds. 1 *Leon.* 234. And if any waste be done which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the stat. *West.* 2. c. 22: 2 *Inst.* 403. So, too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver; 1 *Inst.* 200; yet now by the stat. 4 *Anne.* c. 16. joint-tenants may have actions of account against each other for receiving more than their due share of profits of the tenements held in joint-tenancy. This action is, however, seldom brought; but the practice is, to apply to a court of equity to compel an account. 2 *Comm. c.* 12. See *post*, III. 2.

From the same principle also arises the remaining grand incident of joint-estates, viz. the doctrine of survivorship; by which, when two or more persons are seised of a joint-estate of inheritance, for their own lives, or *pour autre vie*, or are jointly possessed of any chattle-interest, the entire tenancy, upon the decease of any of them, remains to the survivor, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. *Lit.* § 280, 281. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety for the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of the two joint-tenants has a concurrent interest in the whole; and

therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a joint-estate with him, for no one can now have an interest in the whole, accruing by the same title, and take effect at the same time with his own: neither can any one claim a separate interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains: and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant. 2 *Comm. c.* 12.

The right of survivorship is called by our ancient authors the *jus accrescendi*, because the right, upon the death of one joint-tenant, accumulates and increases to the survivors. *Brac. l.* 4. *tr.* 3. c. 9. § 3: *Fleta*, l. 3. c. 3. And this *jus accrescendi* ought to be mutual; which seems to be one reason why neither the king, nor any corporation, can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety by benefit of survivorship; for the king and corporation can never die. 2 *Comm. c.* 12. cites 1 *Inst.* 190: *Finch*, L. 83: 2 *Lev.* 12. But *Lord Coke* expressly says, "there may be joint-tenants though there be not an equal benefit of survivorship: as if a man let lands to A. and B. during the life of A., if B. die, A. shall have all by survivorship; but if A. die, B. shall have nothing." 1 *Inst.* 181. The mutability of survivorship does not therefore appear to be the reason, why a corporation cannot be a joint-tenant with a private person: for two corporations cannot be joint-tenants together: but whenever a joint-estate is granted to them, they take as tenants in common. *Co. Lit.* 190.—The above is *Mr. Christian's* observation on the preceding passage in the Commentaries.—It may, however, be remarked that *Blackstone* merely states this as one reason, against the king or a corporation being a joint-tenant with a private person. In the passage cited from 1 *Inst.* 181. the assertion that joint-tenancy may be without equal benefit of survivorship, and the case put by *Lord Coke*, do not extend to instances where no benefit of survivorship can possibly arise to either party; as must be the case between two corporations.

If there are two joint-tenants for life, it is

said each of them hath an estate for life, and for the life of his companion; and for that reason, if one of them make a lease, it shall continue not only during the life of the lessor, but after his death during the life of his companion, as long as the original estate out of which it was derived: though it hath been resolved, that such a joint-tenant hath only an estate for his own life, and a possibility of surviving his companion to be entitled to his part; therefore if he grants over his estate, that possibility is gone; and if he dies, the estate of the grantee shall revert to him in reversion. 1 *Roll.* 441: *Jones*, 55: 4 *Sulk.* 204, 205.

If one joint-tenant grants a rent charge, &c. out of his part, and dies, the survivor shall have the whole land discharged: for he hath the land by survivorship, and not by descent from his companion. *Lit.* 286: 1 *Co. Inst.* 184. But if a joint-tenant in fee makes a lease for years, of the land, to begin presently or *in futuro*, and dies, it cannot be avoided by the survivor; because immediately, by force of the lease, the lessee hath a right in the same land during his time, of all that to the lessor belongs. *Lit.* 289.

And if one joint-tenant in fee makes a lease for years, reserving a rent, and dieth; the survivor shall have the reversion, but not the rent, because he claims by title paramount. *Co. Lit.* 18.

Joint-tenants, as to the possession of lands in jointure, are seised by entireties of the whole, and of every part equally (and the possession of any joint-tenant is the possession of both); but as to the right of land, they are seised only of moieties; therefore if one grant the whole, a moiety only passeth. 1 *Bulst.* 3: *Cro. Eliz.* 809. If there be two joint-tenants, and each make a several lease of the whole, their several moieties only shall pass, by each lease. 1 *Wils.* 1. Joint-tenants cannot singly dispose of more than the part that belongs to them; where they join in a feoffment, in judgment of law each of them gives but his respective part; so it is of a gift in tail, lease for life, &c. And for a condition broken they shall only enter on a moiety of the lands. 1 *Inst.* 186.

Every joint-tenant hath a right, as to his own share, to several purposes, as to give lease, forfeit, &c. 1 *Inst.* 186: *Lit.* 287. One joint-tenant may lease to his companion; but one joint-tenant cannot make a feoffment, or grant to another joint-tenant, though he may release. 1 *Vent.* 78: *Raism.* 187. By whatever means a joint-tenant comes to the estate of his companion, by conveyance, &c. from him, it may enure by way of release. 2 *Cro. Moor.* 649.

Action of trespass or trover may not be

brought by one joint-tenant against his companion, because the possession of one is the possession of the other. 1 *Sulk.* 290. So neither can one joint-tenant maintain an ejectment against another, unless he has been ousted; for as the possession of one is, in the contemplation of the law, the possession of the other, it is necessary to prove an actual ouster to rebut this presumption. A denial of title, and a refusal by one joint-tenant to pay to another his share of the profits, is an ouster. *Cowp.* 217: 11 *East*, 49. So if one joint-tenant bids another go out of the house, and he goes accordingly, this is an actual ouster. *Vin. Abr.* V. 14. 512.

Joint-tenants may either join or sever in bringing an ejectment against a third party. 12 *East*, 39. 57: 3 *Camp.* 190.

One joint-tenant may distrain for rent alone; and he may avow in his own right, and as bailiff to the others, but he cannot avow solely; and he may not bring debt alone. 5 *Mod.* 73. 150.

So one joint-tenant may, without the assent of his fellows, appoint a bailiff to distrain for rent due to all the joint-tenants. 4 *Bing. R.* 562: 2 *Bro. & B.* 465.

But a notice to quit, given by one joint-tenant, will be only valid so far as his own interest is concerned, unless he was acting at the time under the authority of the other parties interested. 3 *Tunst.* 120.

If a joint-tenant in fee-simple is indebted to the king, and dieth, the lands cannot be extended in the hands of the survivor; who claimeth not from his companion, but from the feoffor, &c. 1 *Inst.* 185. Where there are two joint-tenants, and one is indebted to the king, and dieth, the other shall hold the land discharged of the debt: but if the husband and wife have a term jointly, and the husband is indebted to the king, and dieth, in such case the term shall be subject to the debt, because the husband might have disposed of the whole estate. *Plowd.* 321.

Judgment in action of debt is had against one joint-tenant for life, who, before execution, releases to his companion; adjudged that the moiety is still liable to the judgment during the life of the releasor; but, if he had died before execution, the survivor should have had the land discharged of the debts and judgment. 6 *Rep.* 78. Husband and wife were joint-tenants, and action was brought against the husband alone, who made default, thereupon the wife prayed to be received; but it was not allowed, because she was not a party to the writ; but he in reversion may be received, and plead joint-tenancy in abatement of the writ. *Moor.* 242.

If a feme sole and A. B. purchase a term

for years jointly, and afterwards intermarry, 'action of accounts in courts of common law the joint-tenancy continues. *Dyer*, 318: 2 (see this Dict. tit. *Account*), yet a court of equity, by its modes of proceeding, is enabled to investigate, more effectually, long and intricate accounts in an adverse way, and to compel payment of the balance. In the case of partition, if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of common law; and where the tenants in possession are seised of particular estates only, the person entitled in remainder cannot be bound by the judgment in a writ of partition. The courts of equity, having thus assumed the jurisdiction in complicated cases, seem by degrees to have been considered, as having on these objects a concurring jurisdiction with the courts of common law, in cases where no difficulty could have attended the proceeding in those courts. *Mif. Treat.* 109—111.

If there be two joint-tenants, and one releaseth to the other, this passeth a fee without the word heirs, because it refers to the whole fee, which they jointly took, and are possessed of, by force of the first conveyance: but tenants in common cannot release to each other; for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer, otherwise than as persons who are sole seised. *Co. Lit.* 9. 200. b.

III. An estate in joint-tenancy may be severed and destroyed, by destroying any of its constituent unities. That of time, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But the joint-tenant's estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. *Co. Lit.* 188. 193.

By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do. *Lit.* § 290. For this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the stats. 31 *H. 8.* c. 1: 32 *H. 8.* c. 32. joint-tenants and tenants in common, either of inheritances or other less estates, are compellable by writ of partition to divide their lands. And the stat. 8 and 9 *W. 3.* c. 31. made perpetual by stat. 3 and 4 *Anne*, c. 18. directs the manner of proceeding upon such writs.

In this case of partition of estates, as also in settling accounts between the parties, resort is often had to courts of equity. For though accounts may be taken before auditors in an

In *Parks v. Gerard*, *Ambl.* 236. it was held, that the partition must be at the equal expence of the parties, however unequal their share, and although one party offered to relinquish his share rather than incur the expence: but this opinion has not been followed. See *Cal-mady v. Calmady*, 2 *Ves. jun.* 568; and full discussion of the subject in a very complicated case, *Agar v. Fairfax*, 47 *Ves.* 533. In *Barry v. Nash*, 1 *Ves. & B.* 351. it is stated, that upon a bill for partition there are no costs to the hearing, and that the costs of the partition and conveyances are to be borne in proportion to the interests. In the same case it was held, that partition cannot be objected to from the minuteness of the interest, or the inconvenience, difficulty, or reluctance of the joint-tenants. It has been suggested as important that courts of equity should be authorised to effect partitions, which should be binding upon the legal estates of infants and absentees, and to decree the sale of interests not conveniently susceptible of division.

Although proceedings for partition in courts of equity were for a considerable time the most usual course, yet the proceeding by writ of partition under stat. 8 and 9 *W. 3.* c. 31. has of late become frequent, and is attended with the advantage of operating upon the estate itself, whereas a Court of Equity can only direct conveyances.

The Irish act 9 *W. 3.* c. 12. contains provisions nearly similar to those of the English act, 8 and 9 *W. 3.* c. 31. with the addition of some useful provisions respecting the boundaries and fences of the lands allotted in partition: and by Irish acts, 8 *G. 1.* c. 5. and 40 *G. 3.* c. 71. general regulations are made as to fences of lands, of adjoining proprietors or tenants; and by 5 *G. 2.* c. 9. Irish provisions are made for ascertaining the boundaries, and



draining of bogs. By stat. 7 *Ann.*, c. 18. (and a similar Irish act, 1 *G. 3.* c. 23.) it is provided, that, if co-parceners, joint-tenants, or tenants in common, are seised of advowsons, &c., and a partition is made between them to present by turns, every one shall thereupon be seised of his separate part of the advowson to present in his turn.

\* For proceedings under the 8 and 9 *W. 3.* c. 31. see *Halton v. Thanet* (E.) 2 *Blackst. Rep.* 1134. 1159.

In general, it is advantageous for the joint-tenants to dissolve the jointure, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in the moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. 1 *Jon.* 55. And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture; for, in the first place, by the severance of the jointure, he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may by possibility last longer than that which he is legally entitled to. 4 *Leon.* 237: 1 *Inst.* 252: 2 *Comm.* 187. c. 12.

The joint-tenancy may be severed by destroying the unity of title. As if one joint-tenant alien and conveys his estate to a third person, here the joint-tenancy is severed, and turned into a tenancy in common; for the grantee and remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent, grantor); though till partition made, the unity of possession continues. *Lit.* § 292. 319. 321. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority of the other, is already vested. 1 *Inst.* 185: *Lit.* § 287: and see 3 *Burr.* 1488: and this *Dict. tit. Will.* And it has been determined that articles of marriage entered into by a female infant joint-tenant, who died before attaining her age of twenty-one years, were not in equity a severance of joint-tenancy. *May v. Hook*, in *Canc.*: 1 *Inst.* 246. a. in n.

It may be also destroyed by destroying the

unity of interest. If therefore there be two joint-tenants for life, and the inheritance is purchased by, or descends upon either, it is a severance of the jointure. *Cro. Eliz.* 470. Though if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging of the inheritance: because being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate. 2 *Rep.* 60: 1 *Inst.* 182. If a joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of title and interest. *Lit.* § 302, 303. And wherever, and by whatever means, the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it. 1 *Inst.* 188. Yet if one of three joint-tenants alien his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship. *Lit.* § 294. And if one of the three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure: for they still preserve their original constituent unities. *Lit.* § 304.

Whenever, therefore, by any act or event different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and undivided possession, title vesting at one and the same time, and by one and the same act or grant; the joint-tenancy is instantly dissolved. 2 *Comm.* 196. c. 12. Of this proposition the following cases may afford some further illustration.

When a fee-simple estate is limited by a new conveyance, there one may have the fee, and another an estate for life; but when two persons are tenants for life first, and one of them gets the fee-simple, there the jointure is severed. 2 *Rep.* 6. If a reversion descend upon one joint-tenant, the jointure is severed, and by operation of law they are then tenants in common. 1 *Bulst.* 113. And a diversity has been taken, that where the reversion comes to the freehold, the jointure is destroyed; but when the freehold comes to him in reversion, and to another, it is otherwise. *Cro. Eliz.* 470, 473.

Two infants are joint-tenants, and one of them makes a scoffment of his moiety: this will be a severance of the joint-tenancy. *Bro. Jointen.* 13. A joint-tenant in fee grants a lease for life, and then dies; it severs the jointure; though, if the tenant for life die before either of the joint-tenants, then it is *in statu*

*quo prius. Co. Lit.* 193. If there be two joint-tenants in fee, and one makes a lease for life to a stranger, the freehold and reversion is severed from the jointure: but in case one such joint-tenant leases for years, the jointure of inheritance is not severed; and the other joint-tenant shall have the reversion by survivorship. *Lut.* 729. 1173. Two joint-tenants are of a lease for twenty-one years, and one let his part but for three years, the jointure is severed, so that survivorship shall not take place. *1 Inst.* 188. 192. In case three persons are jointly interested in a term, that one of them mortgages his third part; by this it has been held, the joint-tenancy was severed. *1 Salk.* 158. But where one joint-tenant of lands, in order to sever the joint-tenancy, and provide for his wife, makes a deed of gift of his moiety to her; this being made to the wife, and so void in law, cannot be made good. *Preced. Canc.* 124.

If two joint-tenants be of a term, and one commits felony, or is out-lawed, &c., the jointure will be severed; for the king shall have the moiety by the forfeiture: and if the joint-tenancy is of personal things, all will be forfeited. *Plowd.* 401.

Where there were several joint-tenants in fee-tail, and some of them suffered a common recovery of the whole, the estate of the others was turned to a right; and contingent remainders might be destroyed, and a new estate gained thereby. *Sid.* 241. And if one joint-tenant levied a fine, it severed the joint-tenancy; but it did not amount to an actual turning out of his companion. *1 Salk.* 286.

A joint-tenancy may be suspended without being severed; and if the suspension cease during the life of both the joint-tenants, the joint-tenancy will be revived.

A grant for life or in tail by a joint-tenant in fee only suspends the joint-tenancy; but a lease for years neither severs nor suspends a joint-tenancy of the freehold.

*Joint-tenancy in Things Personal.*—Goods and chattels may belong to their owners in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary, because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners; but if a horse, or other personal chattel, be given to two or more absolutely, they are joint-tenants thereof; and unless the jointure be severed, the same doctrine or survivorship shall take place as in estates of lands and tenements. *Lit.* § 232: *1 Vern.* 482. And in like manner if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common without any *jus accrescendi* or survivorship. *Lit.* § 321.

So also if 100l. be given by will to two or more, *equally to be divided* between them, and the survivor and survivors of them, this has been held to make them tenants in common, as the same words would have done in regard to real estates, the words *survivors*, &c. being to be understood of such of them as shall be living at the testator's death. *1 Eq. Ab.* 292. But in case of the devise of a debt to two or more, share and share alike, equally to be divided between them, and if either of them die, to the survivors or survivor of them; it was determined in *Dom. Proc.* that they were joint-tenants; and the decree of *Cowper, Ld. C.* declaring them tenants in common, reversed. See *Cox's P. Wms.* i. 91. and note there; and *Bro. P. C. tit. Joint-tenants*, Case 1. Residuary legatees and executors are also joint-tenants, unless the testator uses some expression which converts their interest into a tenancy in common; and if one dies before a division, or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. *2 P. Wms.* 347. 529: and see *3 Bro. C. R.* 455: *Hall v. Digby*, *Bro. P. C. tit. Joint-tenants*, Case 2 and note there. But for the encouragement of husbandry it is held, that a stock on a farm, though occupied jointly, shall always be considered as common, and not as joint property, and there shall be no survivorship therein. *1 Vern.* 217.

Devise of the residue of realty and personalty to testator's two sons as joint-tenants. For twenty year after their father's death they carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never, in any manner, entered into any agreement respecting such farming business, or ever accounted with each other. Held, that as to the leasehold and personal estates which passed by the will of the father, the two sons remained joint-tenants, but that as to all the after purchased estates, they were tenants in common. *Morris v. Barrett*, *3 Y. & J.* 384.

So, for the encouragement of trade, there is no survivorship of a capital or stock in trade among merchants and traders: for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet.* *1 Inst.* 182.

It is now settled that all real property belonging to and used for the purposes of a partnership is to be considered as personal property and that the *jus accrescendi* does not apply to it. *3 Bro. C. C.* 199: *1 Swanst.* 508. 521: *11 Ves.* 29: *7 Ves.* 425: *Bac. Ab. Joint-tenants.* (B.)

The writ of partition, whereby joint tenants were formerly compellable at law to divide their lands, is now abolished. See *Limitation of Actions*, II. 1.

**JOINTURE OF LANDS.** A jointure is a settlement of land and tenements made to a woman in consideration of marriage; or it is a covenant, whereby the husband, or some friends of his, assureth to the wife, lands or tenements, for term of her life: it is so called, either because it is granted *ratione juncturae in matrimonio*, or for that land in frankmarriage was given jointly to husband and wife, and after to the heirs of their bodies, whereby the husband and wife were made as it were joint tenants during the coverture. 3 *Rep.* 27. By some, a jointure is defined to be a bargain and contract of livelihood, adjoined to the contract of marriage; being a competent provision of freehold lands or tenements, &c. for the wife, to take effect after the death of the husband, if she herself is not the cause of the determination or forfeiture of it. 1 *Inst.* 36: 4 *Rep.* 2, 3. See this Dict. tit. *Dower*, IV.

As to what requisites a jointure must possess in order to be a bar of dower under the 27 *H. 8. c.* 10. see tit. *Dower*, IV.

All other settlements in lieu of dower, not made according to the statute, are jointures at common law, and no bars to claim dower: and a jointure was no bar of dower before this statute; as a right or title to a freehold cannot be barred [at law] by acceptance of a collateral satisfaction. *Co. Lit.* 26. A father made a settlement to the use of himself for life, and afterwards to the use of his son and his wife, for their lives, for the jointure of the wife; this was adjudged no jointure to bar the wife of her dower, because it might not commence immediately after the death of the husband, who might die in the life-time of the father. So, if a feoffment be made to the use of the husband for life, remainder to another for years, remainder to the wife for life for her jointure. 2 *Cro.* 489. But a feoffment in fee, upon condition that the feoffee shall make another feoffment to the use of the feoffor, and to his son's wife in tail, remainder to the right heir of the feoffor, which feoffment is made accordingly; is a good jointure within the statute, and bar to the dower of the wife. *Moor*, 28.

An estate settled in jointure, coming from the ancestors of the wife, and not of the purchase of the husband or his ancestors, is not within the stat. 11 *H. 7. c.* 20. as to discontinuances, alienations, &c. by the wife. Where a father of the intended wife, in consideration of marriage, &c., covenanted to assure lands to the husband and wife, his (the covenantor's) daughter, and the heirs of her body, &c., this

was held no jointure, within the meaning of the stat. 11 *H. 7. c.* 20. being an advancement of the woman by her own father. 2 *Cro.* 264: 2 *Lit. Ab.* 80. And an estate in fee simple conveyed to a woman for a jointure was held not to be any jointure within the statute; which never extended to lands granted to women in fee: but an estate in fee, conveyed to a woman for her jointure, and in satisfaction of her dower, is a jointure within the stat. 27 *H. 8. c.* 10. 4 *Rep.* 3.

An estate for life is the usual jointure; and an estate for life upon condition, may bar the wife if she accepts it; as a jointure to a woman on condition to perform the husband's will was judged good, where the wife entered and agreed to the estate. 9 *Rep.* 1, 2. &c. If no inheritance is reserved to the husband and his heirs, but the estate is limited to the wife for life, or in tail, the remainder to a stranger; it is not a jointure within the stat. 11 *H. 7. c.* 20. though made by the husband or his ancestor. *Cro. Eliz.* 2. A husband covenanted to stand seised of lands, to the use of himself and his heirs, till the marriage should take effect; and afterwards to himself, his wife, and their heirs; and it was adjudged a good jointure within this stat. 27 *H. 8. c.* 10. *Dyer*, 248.

A man makes his wife a jointure after marriage and afterwards by will devises, that she shall have a third part of all his lands, with her jointure; here the wife will have the third part of all as a legacy, and if she waives her jointure, she may have a third part of the residue for dower. *Dyer*, 62. If a master, in consideration of service by his servant, grants lands to his servant and a woman he intends to marry, and the heirs of their bodies, creating an estate-tail; this is not a jointure; not being a gift of the husband, or any of his ancestors, but of his master, and in consideration of service, which will not make the husband such a purchaser as the law requires. *Moor*, 683. But as to considerations, if an estate is settled in jointure upon a woman, in consideration of money paid, and also of a marriage to be had; the marriage shall be looked upon to be the consideration. *Cro. Jac.* 474. A husband, tenant in tail, remainder to his wife for life, makes a feoffment, in fee to the use of himself and wife for life; for her jointure: it is no bar to the wife's dower, because it may be avoided by a remitter to her first estate for life. *Moor*, 872.

If the husband make a lease for lands to his friends for any number of years, in trust for his wife and children, that she shall have 100*l.* a-year out of it, or in any such manner: by this she may have the provision, which is



no jointure, and likewise her dower. By *Bridgman, Ch. J.*, an estate is made to husband in tail, with remainder to his wife for life, and remainder to others; this is not such a jointure, as, with her acceptance, within the statute will hinder her from dower; and though the husband die without issue, it will not help it, but the wife shall be endowed in his other land: but if the estate were made to the husband and wife for their lives, it would be otherwise. 13 Jac. 1. B. R.: 2 *Shep. Ab.* 74.

If lands are conveyed to a woman before marriage, in part of her jointure only, and after marriage other lands are granted in full; it is said she may waive and refuse the lands conveyed to her after coverture, and retain her first jointure-lands and dower also. 3 Rep. 1. 5: 4 Co. 5.

Where a jointure is made of lands (according to the direction of the statute of 27 H. 8. c. 10.), before coverture, and after the husband and wife alien them by fine, she shall not have dower in any other lands of her husband; but it is otherwise where the jointure is made after marriage, when the wife's estate is waivable, and her election of choosing comes not till the death of the husband. 1 Inst. 36.

If a jointure be made to a woman, during coverture, in satisfaction of dower, she may waive it after her husband's death; but if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it when she is at liberty, it is her own act, and she cannot avoid it. 4 Co. 3. Also, *vide Co. Lit.* 29. b. 36. b. 348. a. 357; 1 Bulst. 163: *Moor*, 171. pl. 1002: *Park*, 352, 353: 3 Co. 273: *Leon*, 272: *Cro. Jac.* 490: *Dyer*, 351: *Hob.* 72: 2 *Rol. Abr.* 422.

The important question, whether a jointure on an infant, before marriage, may be waived, was not quite settled till the case of *Drury v. Drury*, which was heard before *Lord Northington, C. Hil. T. 1 G. 3*. The points determined by *Lord Northington* in the case were; first, That the stat. of 27 H. 8. c. 10. which introduced jointures extends to adult women only; infants not being particularly named; and therefore that, notwithstanding a jointure on an infant, she may waive the jointure, and elect to take dower. Secondly, That a covenant by the husband, that his heirs, executors, or administrators shall pay the wife an annuity for her life, in full for her jointure, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured of lands generally, is not a good equitable jointure within the statute. Thirdly, That a woman, being an infant, cannot by any contract previous to her marriage bar herself of

a distributive share of her husband's personalty in case of his dying intestate.

But from this decree there was an appeal to the House of Lords; and, after hearing the judges *seriatim* on the question, whether a jointure or an infant could be waived, on which they were divided in opinion, the decree was reversed as to all the above points. See *Bro. P. C. tit. Dower, ca. 4. Buckingham (Earl) v. Drury*; where it appears that, by the decree of the Lords, it was declared, "that the respondent (the widow,) is bound by the agreement entered into in consideration of, and previous to, her marriage; and that the same ought to be performed and carried into execution; and that the respondent is thereby barred of her dower, and of any share of her husband's personal estate, under the statute of distribution."

Before the above decision, the only judicial opinions, as to the effect of a jointure on an infant, were Sir J. Jekill's in *Cray v. Willis*, 1 *Eq. Ab.* 389. c. 17. against its barring; and *Lord Hardwick's* in *Seys v. Price*, *Barn. C.* 117; and in *Harvey v. Ashley*, 3 *Atk.* 607. to the contrary. See *Vin. tit. Dower, Q. 3. pl. 18*.

In equity any provision, however precarious, and whether secured out of realty or personalty, which an adult, previously to marriage, accepts in lieu of dower, is sufficient to bar the dower. *Jordan v. Savage, Bac. Ab. Jointure, B. 5*: *Charles v. Andrews*, 9 *Mod.* 152: *Williams v. Chetty*, 3 *Ves.* 545: 4 *Bro. C. C.* 513. By analogy to the determination in *Drury v. Drury*, infants may be barred by an equitable jointure, but not, like adults, by a precarious provision. It must, to be effectual, be, although an equitable provision as certain as is required to operate as a legal bar. *Carruthers v. Carruthers*, 4 *Bro. C. C.* 500: *Smith v. Smith*, 5 *Ves.* 189.

After the death of the husband, the wife may enter into her jointure, and is not driven to a real action, as she is to recover dower by the common law; and upon a lawful eviction of her jointure, she shall be endowed according to the rate of her husband's land whereof she was dowable at common law. *Co. Lit.* 37: *stat.* 27 H. 8. c. 10. If she be evicted of part of her jointure, she shall have dower *pro tanto*. A wife's jointure shall not be forfeited by the treason of the husband: but femecoverts, committing treason or felony, may forfeit their jointures: and being convicted of recusancy, they shall forfeit two parts in three of their jointures and dower, by *stat.* 3 Jac. 1. c. 1. If a woman conceals her jointure, and brings dower and recovers it, and then sets up her jointure, she is barred of her jointure; and by bringing a writ of dower for her thirds, the

wife waives the benefit of entry **into** lands, so as to hold them in jointure. *Cro. Eliz.* 128. 187: 3 *Rep.* 5: *stat.* 3 *Jac.* 1. c. 5. §. 13. See further *tits. Baron and Feme, Dower*, II. IV., *Forfeiture, Marriage, &c.*

**JOINTRESS, or JOINTURESS.** She who had an estate settled on her by the husband, to hold during her life, if she survive him. *Stat.* 17 *H.* 8. c. 10: 1 *Inst.* 46. When estates settled on a wife are a jointure, if the jointress makes an alienation of them by fine, feoffment, &c. with another husband, it is a forfeiture of the same; but if they are not a jointure by law, it is otherwise. 2 *Nels.* 1040. A jointress within the statute may make a lease for forty years, &c. if she so long live; and also for life, and be no forfeiture, though she levies a fine *sur cognisance de droit, &c.* *Cro. Jac.* 688: 3 *Rep.* 50: 1 *Lit.* 81. In other cases, if she levied a fine, it was a forfeiture; and if a jointress, within the *stat.* 11 *H.* 7. c. 20. suffered a recovery covinously to bar the heir, the heir might enter presently, &c. 2 *Leon.* 206: 1 *Plowd.* 42.

With respect to the acts of jointress, or those of her husband defeating her of her jointure, and how far equity will relieve her, *vide Co. Lit.* 36: *Dyer*, 358: 2 *Inst.* 673: *Hob.* 225: 1 *Chan. Cas.* 119, 120: 2 *Chan. Cas.* 162: 2 *Vent.* 343: 1 *Vern.* 427. 479: 1 *Eq. Ab.* 18. 221. 222: 2 *Vern.* 701: and 14 *Vin. Ab. tit. Jointress and Jointure*; and this *Dict. tits. Baron and Feme, Dower.*

**JOUR, Fr.]** A day, used in heads of our old law; *tout jours*, for ever. *Law Fr. Dict.*

**JOURNAL,** is a day-book or diary of transactions used in many cases, as by merchants and other tradesmen in their accounts, by mariners in observations at sea, &c.

**JOURNALS OF PARLIAMENT,** are not records but remembrances, and have been of no long continuance. *Hob. Rep.* 109. See *tit. Evidence.*

**JOURNEYHOPPERS.** Regrators of yarn, which formerly perhaps was called *journ.* They are mentioned in the (repealed) *stat.* 8 *H.* 6. c. 5.

**JOURNEYMAN,** from the *Fr. journée, i. e. a day, or day's work.* Was properly one who wrought with another by the day; though it is extended by statute to those also who covenant to work with others in their trades or occupation by the year. 5 *Eliz. c.* 4. See *tit. Labourers, Servants.*

**JOURNEY'S ACCOUNTS,** *dictæ computata, journées accoutmées.* Was a term in our old laws thus understood: if a writ abated by the death of the plaintiff or defendant, or for false Latin, want of form, &c., the plaintiff might have a new writ by journey's accounts, *i. e.* within as little time as he possibly could

after the abatement of the first writ; and this second writ was a continuance of the cause, as if the first writ had not abated. *Terms of the Law.* See 6 *Rep.* 10: 1 *Lut.* 297: *Cro. Jac.* 520.

This learning is now of little use, it being customary to enter a judgment that the writ be quashed, and then to sue forth another.

And by *stat.* 8 and 9 *W.* 3. c. 11. §. 7. the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit. The death to be suggested on the roll. And by §. 6. death of the party after interlocutory judgment shall not abate the suit. See *tit. Abatement.*

**JUBILEE, annus jubileus.]** The most solemn time of festival at Rome, when the pope gives his blessing and remission of sins. It was first instituted by Boniface the Eighth, in the year 1300, who granted a plenary indulgence and remission of sins to all who should visit the churches of St. Peter and St. Paul at Rome in that year, and stay there fifteen days; and this he ordered to be observed once in every hundred years; which Pope Clement the Sixth reduced to fifty years, *anno* 1350, and to be held upon the day of the circumcision of our Saviour: and Urban IV. in the year 1389, ordained it to be kept every thirty-three years, that being the age of our Saviour; after which, Pope Sixtus the Sixth reduced it to twenty-five years. In imitation of the grand jubilee of Rome, the monks of Christ Church in Canterbury, every fiftieth year invited a great concourse of people to come thither, and visit the tomb of Thomas Becket. And King Edward the Third, in the fiftieth year of his age, which was 1362, caused his birth-day to be observed at court, in the name of a jubilee, giving pardons, privileges, and other civil indulgences. Jubileus signified afterwards a man one hundred years old, and likewise a possession or prescription for fifty years. *Du Fresne, J. U. D.* 1 *Comm.* 393. *Canon Law.*

**JUDAISM, Judaismus.]** The customs, religion, or rites of the Jews: also the income heretofore accruing from the Jews to the king: and the word *Judaism* was formerly used for a mortgage; and sometimes taken for usury. *Ex Mango Rot. Pipæ, de anno,* 9 *Ed.* 2.

*Judaismus* is also taken for the mansion or dwelling-place of the Jews in any town. And it sometimes signifies usury. *Mon. Aug.* 1 *tom.* p. 834.

**JUDGES, judices.]** Chief magistrates in the law, to try civil and criminal causes, and punish offences.

In Great Britain the king is considered as the fountain of justice, and general conservator of the peace of the kingdom. The original

power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual by the people in their collective capacity, therefore, every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints; and in this kingdom this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone the right of erecting courts of judicature; for though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is, consequently, necessary, that courts should be erected to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings, in person, often heard and determined causes between party and party. But, at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts, which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot alter, but by act of parliament. 2 *Hawk. P. C. c. 1. § 3.*

And though the king himself used to sit in the Court of King's Bench, and still is supposed to do so, he did not, neither by law is he empowered to, determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority. 3 *Comm. 42.*

In criminal proceedings, or prosecutions for offences, it would be a still higher absurdity if the king, personally, sat in judgment; because, in regard to these, he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than against the king, yet, as the public, which is an invisible body, has delegated all its power and rights with regard to the execution of the laws, to one

visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is, therefore, the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And hence also arises the most mild and equitable branch of the prerogative, *one of the most distinguishing features in a monarchy*, that of *pardon*ing offences; for it is reasonable that he who only is injured should have the power of forgiving.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by stat. 16 *Car. 1. c. 10.* which abolished the Court of Star Chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council. See 1 *Comm. 266—269. c. 7.*

Formerly the number of judges in the different courts of law frequently varied. There were so many suits in the Common Pleas about the commencement of the reign of Edward the Second, "that the king was necessitated to increase the number of his justices, who were to sit there, unto six, which commonly were not above three before that time, and so to divide them that they might sit in two places." *Dugdale, Orig. Jur. c. 18.* There were as many as nine in the time of Edward the Third. During the reign of Henry the Sixth it appears from *Fortescue* there were usually in the Common Pleas five judges, six at the most; in the Court of King's Bench four, sometimes five. King James the First, during the greater part of his reign, appointed five judges in the Courts of King's Bench and Common Pleas for the benefit of a casting vote in case of a difference in opinion, and that the circuit might at all times be fully supplied with judges of the superior courts. 3 *Comm. 40 n.* However, in subsequent reigns, although, upon a permanent indisposition of a judge, the fifth was sometimes appointed



(*Raym.* 475), the number of judges in the King's Bench, the Common Pleas, and the Exchequer (where they had also varied), was restricted to four, until the passing of the recent act of the 1 W. 4. c. 70. which transferred the jurisdiction of the courts of great session in Wales, and of the county palatine of Chester, to the courts of common law at Westminster, and empowered his Majesty to appoint an additional puisne judge in each court.

The judges of the courts of common law are, therefore, now the lord chief justices of the Courts of King's Bench and Common Pleas; the lord chief baron of the Exchequer; the four puisne (*i. e.* younger or rather inferior) judges of the two former courts; and the four puisne barons of the latter.

The chief justice of the King's Bench is called *capitalis justiciarius banci regis vel ad placita coram rege tenenda*; he hath the title of lord, whilst he enjoys his office; and is styled *capitalis justiciarius*, because he is chief of the rest; and for this reason he hath usually the title of lord chief justice of England. This judge was anciently created by letters patent under the great seal, but is now made by writ, in a very short form.

The ancient dignity of this supreme magistrate was very great; he had the prerogative of the vicegerent of the kingdom, when any of our kings went beyond sea, being chosen to this office out of the greatest of the nobility; and had the power alone, which was afterwards distributed to three other great magistrates; that is, he had the power of the chief justice of the Common Pleas, of the chief baron of the Exchequer, and the master of the Court of Wards; and he commonly sat in the king's place, and there executed that authority which was formerly performed *per comitem palatii*, in determining differences which happened between the barons and other great persons of the kingdom, as well as causes criminal and civil between other men: but King Richard I. first diminished his power, by appointing two other justices, to each whereof he assigned a distinct jurisdiction; viz. to one the north parts of England, to the other the south: and in the reign of King Edward I. they were reduced to one court, with a further abridgment of their authority, both as to the dignity of their persons and extent of their jurisdiction; for no more were chosen out of the nobility, as anciently, but out of the commons, who were men of integrity, and skilful in the laws of the land; whence, it is said, the study of the law dates its beginning. *Orig. Jud.*

In the time of King John, and other of our ancient kings, it often occurs in charters of privilege, *Quod non ponatur respondere, nisi co-*

*ram nobis, vel capitali justitia nostrâ*: and this high officer (or rather the court over which he presides) has, at this time, a very extensive power and jurisdiction in pleas of the crown, and is particularly entrusted, not only with the prerogative of the king, but the liberty of the subject.

The chief justice of the Common Pleas has also the title of lord whilst he is in office, and is called *dominus justiciarius communium placitorum; vel dominus justiciarius de banco*; who, with his assistants, did originally hear and determine Common Pleas in civil causes, as distinguished from the king's pleas, or pleas of the crown. *Bract. lib. 3.*

The chief justices are installed or placed on the bench by the lord chancellor; and the other judges by the lord chancellor and the lords chief justices.

Besides the lords chief justices, and the other judges of the courts at Westminster, there are many other justices commissioned by the king to execute the laws: as *Justices of Assize, of Nisi Prius, Oyer and Terminer, Justices of the Peace, &c.* See those several titles.

The judges of the courts of equity are the lord chancellor, the master of the rolls, and the vice chancellor, the latter of whom was first appointed by the 53 G. 3. c. 24.

By the 6 G. 4. c. 78. § 2, the king may make up the salary of the master of the rolls to 7000*l.* a year.

By the 2 and 3 W. 4. c. 116. his Majesty is empowered to grant the following judicial salaries:—to the chief justice of the King's Bench, 10,000*l.*; to the chief justice of the Common Pleas, 8,000*l.*; to the chief baron of the Exchequer, 7,000*l.*; to each of the puisne judges of the three courts, who may have been appointed before the 16th November, 1828, 5,500*l.*; to such as have been appointed since, or may be appointed hereafter, 5,000*l.*; to the vice chancellor, 6,000*l.*

By the 2 and 3 W. 4. c. 111. the king may grant the lord chancellor an annuity of 5,000*l.* on the resignation of his office.

By the 39 G. 3. c. 110; 53 G. 3. c. 153; and 6 G. 4. c. 84. a retiring pension of 3,750*l.* may be granted to the master of the rolls; and by the latter statute, the like pension to the vice chancellor.

By virtue of the 39 G. 3. c. 110; 53 G. 3. c. 153; and 6 G. 4. c. 82. a pension may be granted to the lord chief justice of the King's Bench of 4,000*l.* a-year.

By the 39 G. 3. c. 110; 53 G. 3. c. 153; and 6 G. 4. c. 83. a pension may be granted to the lord chief justice of the Common Pleas of 3,750*l.*

By the 39 G. 3. c. 110; 53 G. 3. c. 153;

and 6 G. 4. c. 84. a like retiring pension may be granted to the lord chief baron.

By the same statutes, and the 1 W. 4. c. 70. retiring pensions may be granted to all puisne judges of the three courts of 3,500*l*.

By the 39 G. 3. c. 110. § 7. and 6 G. 4. c. 84. § 5. the above judges (with the exception of the lord chancellor) must have continued in office fifteen years, unless prevented by ill health.

In order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the stat. 13 W. 3. c. 2. that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu se bene gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And by the noble improvements of that law in the statute of 1 G. 3. c. 23. enacted at the earnest recommendation of King George III. himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats); and their full salaries are absolutely secured to them during the continuance of their commissions, by which means the judges are rendered completely independent of the king, his ministers, and his successors; his Majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the crown." *Comm. Journ.* 3 March, 1761. See *Ld. Raym.* 747. and stat. 1 Anne, st. 1. c. 8. which continued the commissions of the judges for six months after the demise of the crown.

The personal safety of the judges, and the respect due to them, being also of essential consequence towards the preservation of their independence and integrity, which is no less in danger from the *ardor civium prava juben-tium*, than from the *vultus instantis tyranni*, many provisions have been made by law to restrain and punish affronts and injuries, to them personally, and to the courts of justice over which they preside.

One species of treason under stat. 25. Ed. 3. c. 2. (see tit. *Treason*) is, "If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." But this statute extends only to the actually killing of them, and not to wounding or attempting to kill them. It extends also only to the officers

therein specified; and, therefore, the barons of the Exchequer as such, are not within the protection of this act. 1 Hal. P. C. 231. But the lord keeper, or commissioners of the great seal, now seem to be within it, by virtue of the stats. 5 Eliz. c. 11: 1 W. & M. c. 21. 2 Comm. 84.

As to striking in the king's superior courts of justice in Westminster-Hall, or at the assizes, or using threatening or reproachful words to a judge, see tit. *Misprision*.

A judge sitting at *nisi prius* has power to fine a defendant conducting his own defence to a criminal charge for contempt of court. 4 B. & A. 329.

As the judges are thus guarded against influence or injury to enable them to do justice to the people, so are they protected in the upright discharge of their duty, by being indemnified from answering for the consequence of the judgments given by them.

The judges of courts of record are freed from all prosecutions whatsoever, except in parliament, where they may be punished for any thing done by them in such courts as judges; this is to support their dignity and authority, and draw veneration to their persons, and submission to their judgments; but if a judge will so far forget the dignity and honour of his post as to turn solicitor in a cause which he is to judge, and privately and extra-judiciously tamper with witnesses, or labour jurors, he may be dealt with according to the same capacity to which he so basely degrades himself. 12 Rep. 24: *Vaugh.* 138: S. P. C. 173.

Judges are not in any way punishable for a mere error of judgment; and no action will lie against a judge for an erroneous judgment, or for a wrongful imprisonment, &c. 2 Hawk. P. C. c. 1. § 17: 1 Mod. 148.

But it is said, that where judges are limited to the subject-matter of their jurisdictions, and they exceed the limits of their jurisdictions, action lies against them: *per Powel, J.* 3 Lutw. 1565. cites *Hard.* 480.

A judge is not answerable to the king, or the party, for mistakes or errors of his judgment, in a matter of which he has jurisdiction. 1 Salk. 397.

If an action be brought against a judge of record for an act done in his judicial capacity, he may plead that he did it as a judge of record, and that will be a sufficient justification. And so may a judge of a court in a foreign country, under the dominion of the crown. *Mostyn v. Fabrigas, Cowp.* 172. See this Dict. tit. *Action, Courts Martial, Navy, &c.*

That a judge of record is not liable to an action for any thing done within his jurisdiction, as such, is established by a case in 1

*Mod.* 184: 2 *Mod.* 218. *Hamond, v. Howell.* Hamond and other jurymen had been fined and imprisoned by the court at the Old Bailey, for acquitting persons of a riot, when the evidence showed them to be guilty. This was certainly a very strong exercise of authority; and it was determined by the Court of Common Pleas that the fine and imprisonment were illegal, and the parties were discharged. But when *Hamond* brought an action against the Recorder of London, one of the judges at the Old Bailey, it was held it would not lie as he was a judge of record. And this doctrine was lately confirmed in *Gurratt v. Ferrand*, 4 *Barn. & Cres.* 625.

With respect to the general conduct of the judges, the following observations are worthy attention:

A judge at his creation takes an oath, *That he will serve the king, and indifferently administer justice to all men, without respect of persons, take no bribe, give no counsel where he is a party, nor deny right to any, though the king, or any other, by letters, or by express words, command the contrary, &c., and in default of duty, to be answerable to the king in body, land, and goods.* *Stat.* 18 *Ed.* 3. *st.* 4. See also *stat.* 20 *Ed.* 3. *c.* 1, 2.

*Judex est lex loquens*, and ought to judge by law, and not by examples. By *Glanvil* a judge is called *justitia in abstracto*, because he should be, as it were, justice itself. *Co. Lit.* 71: 7 *Rep.* 4. And all the commissions of judges are bounded with this limitation, *Facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ.*

The judges are to give judgment according to law, and what is alleged and proved: and they have a private knowledge, and a judicial knowledge, though they cannot judge of their own private knowledge, but may use their discretion; but where a judge has a judicial knowledge, he may and ought to give judgment according to it. King Henry IV. commanded of Judge Gascoigne, if he saw one in his presence kill A. B., and another person, who was not culpable, should be indicted of this, and found guilty before him, what would he do in this case; to which he answered, That he ought to respite the judgment against him, and relate the matter to the king, in order to procure him a pardon: for there he cannot acquit him, and give judgment according to his private knowledge. *Plowd.* 82.

The king in all cases doth judge by his judges; who ought to be of counsel with prisoners; and if they are doubtful or mistaken in matter of law, a stander-by may be allowed to inform the court, as *amicus curiæ*. 2 *Inst.* 178. Our judges are to execute their offices in proper person, and cannot act by deputy, or

transfer their power to others, as the judges of ecclesiastical courts may. 1 *Rot. Ab.* 382: *Bro. Judges*, 11. Yet where there are divers judges of a court of record, the act of any one of them is effectual, especially if their commissions do not expressly require more. 2 *Hawk. P. C.* c. 1. Though what a majority rules when present is the act of the court. If on a demurrer or special verdict, the judges are divided in opinion, two against two, the case must be returned into the Exchequer Chamber. 3 *Mod.* 156. And a rule is to be made for this purpose, and the record certified, &c. 5 *Mod.* 335. In fines levied, all the judges of C. B. ought to be particularly named; but when writs of *certiorari* to remove records out of that court, &c. are directed to the chief justice, without naming his companions. 1 *H. 7.* 27: *Jenk. Cent.* 167.

When a record is before the judges, they ought *ex officio* to try it: and they are to take notice of statutes, and of the terms, &c. *Jenk. Cent.* 215. 228. No judge is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him. 3 *Inst.* 29.

A judge shall not be generally excepted against, or challenged, or have any action brought against him, for what he does as judge. 1 *Inst.* 294: 2 *Inst.* 422.

A judge ought not to judge in his own cause, or in pleas where he is a party. 8 *Rep.* 118. If a fine be levied to a justice of Bank, he cannot take the consuance; for he cannot be his own judge. 8 *H.* 621. *Br. Patents*, pl. 15. cites *S. C. per Martin*. If a fine be levied by, or to a justice in Bank, his name shall not be in the fine. 11 *H.* 6. 49. *b.* So if a justice of Bank be sued in Bank, he cannot record it; it shall be recorded by the other justices. *Ibid.* If the chief justice of Bank be to sue a writ there, the writ shall not be in his name, but in the name of the secondary. 8 *H.* 6. 19. *b.*

None may judge in his own cause, for it is a manifest contradiction that a man can be agent and patient in the same thing, and what Lord Coke says in *Dr. Bonham's* case is far from any extravagancy; for it is a very reasonable and true saying, that if an act of parliament should ordain, that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament, *per Holt*, *Ch. J.*: 12 *Mod.* 687: *Bridgm.* 11, 12.

Judgment given by a judge, who is a party in the suit with another, and so entered of record, is error, although several other judges sit there, and give judgment for the judge who is party. *Jenk.* 90. *pl.* 74.

Where a judge has an interest, neither he



nor his deputy can determine a cause or sit in court: and if he does, a prohibition lies. *Hard. 503.*

Judges are punishable, however, for wilful offences against the duty of their situation; instances of which happily live only in remembrance; and as to which, the following short extracts and references may be sufficient:

Among the laws of King Edgar is this, *viz.* *Judex qui injustum judicium judicabit alii i, det regi 'XXs. nisi jurare audeat, quod rectius judicare nesciuit. Decem Scriptores Anglicani, 872. l. 3.* The same among the laws of Canute, *Ibid.* 924. l. 2. adds, that *Et dignitatem suam legalitatis semper amittat, si non eum redimat erga regem, sicut ei permittetur. In Danelaga lahtithes reus sit; si non juret, quod melius nesciuit. Chronicon Johannis Bronton.*

There are ancient precedents of judges, who were fined when they transgressed the laws, though commanded by warrants from the king; and it is said, that *Earl Tytost*, who was a chancellor, was beheaded, for acting upon the king's warrant against law. *Burnet's Rich. 2. p. 38.*

Bribery in judges is punishable by loss of office, fine, and imprisonment; and by the common law, bribery of judges in relation to a cause depending before them, has been punished as treason. 1 *Leon*, 295: *Cro. Jac.* 65: 1 *Hawk. P. C.* See tit. *Bribery*. A judge ignorantly condemns a man to death for felony when it is not felony: for this offence the judge shall be fined and imprisoned, and lose his office. *Jenk. Cent.* 162. If a judge who hath no jurisdiction of the cause, give judgment of death and award execution, which is executed, such judge is guilty of felony; and also the officer who executes the sentence. *H. P. C.* 35: 10 *Rep.* 76. And if justices of peace, on indictment of trespass, arraign a man of felony, and judge him to death, and he is executed, it is felony in them. *H. P. C.* 35: *Dalt. c.* 98.

A justice cannot raise a record, or embezzle it, nor file an indictment which is not found, nor give judgment of death where the law does not give it; if he does, it is misprision, he shall lose his office, and make fine for misprision; but it is not felony. *Br. Judges, pl.* 33. cites 2 *Ric.* 3. 9.

Judges by the common law had no jurisdiction to examine witnesses at their chambers, though by consent of parties and rule of court they might have done so on interrogatories.

Now by the 1 *W. 4. c.* 22. the courts of law, and the several judges thereof, may order the examination of parties to suits, upon interrogatories or otherwise, before the master or prothonotary, and other persons. See tit. *Deposition.*

By the 1 *W. 4. c.* 70. whereby his Majesty was empowered to appoint three additional puisne judges, it is enacted, that the puisne judges of each court shall sit by rotation in each term, or otherwise, as they shall agree among themselves; but only three shall sit at the same time in Bank during term, unless in the absence of the lord chief justice or lord chief baron; and any one of such judges, when occasion shall require, while the other judges of the same court are sitting in Bank, may sit apart to add or justify special bail, discharge insolvent debtors, administer oaths, receive declarations required by statute, hear and decide upon matters on motion, and make rules and orders in causes and business depending in the court to which such judge belongs, in the same manner as may be done by the court in Bank.

By § 4. every judge, to whatever court he belongs, may sit in London and Middlesex, for the trial of issues arising in any of the courts, and transact such business at chambers, or elsewhere, depending in any of the said courts, as relates to matters over which they have a common jurisdiction, as may, according to the practice of the court, be transacted by a single judge.

The words "common jurisdiction" must be understood with reference to the subject-matter of the matter itself, and not with reference to the court itself. 2 *Dowl. P. C.* 45.

By § 11. in all cases relating to the practice of any of the three superior courts at Westminster, in matter over which they have a common jurisdiction, or of, or relating to, the practice of the Court of Error in the Exchequer Chamber, the judges of such courts jointly, or any eight or more of them, including the chiefs of each court, may make general rules and orders for regulating the proceedings of all such courts, which rules and orders are to be observed therein, and no general rules and orders respecting such matters shall be made in any manner except as aforesaid.

Also, by the 2 *W. 4. c.* 39. § 14. (the Uniformity of Process Act) the judges of such court may, and they are required to make general rules and orders for the effectual execution of that act, and for fixing the costs in respect of the matters therein contained.

And by the 3 and 4 *W. 4. c.* 42. various powers are given to the judges, *viz.* to alter the present mode of pleading, &c. (§ 1.); to make regulations as to the admission of matter, documents, &c. in evidence, &c. (§ 15.); to make regulations as to the officers for taxing costs (§ 36.); and as to paying money into court in certain actions (§ 21).

With regard to the proceedings before a single judge at chambers, what business may

be transacted before him, and what orders he is empowered to make, the reader is referred to the various books of practice. See also this Dict. tit. *Practice*.

An order made under a misapprehension, and after an erroneous opinion given by a judge, is not binding. 1 *D. P. C.* 607.

And an attachment will not lie for disobeying a judge's order, unless made a rule of court. *Ibid.* 689.

See further 14 *Vin. Abr.* tit. *Judges*; and this Dict. tits. *Assize Circuit, Justices*.

JUDGES OF THE COURT OF BANKRUPTCY. See tit. *Bankruptcy*.

JUDGES OF THE INSOLVENT COURT. The judges of the Insolvent Court consist of a chief and three other commissioners, who, by 7 *G. 4. c.* 56. must be barristers of ten years' standing. The court-house is in Portugal-street, Lincoln's-inn-fields. Three of the commissioners make circuits throughout the country (generally thrice in a year) for the purpose of discharging the insolvent debtors confined in the different gaols, while the fourth remains in London.

JUDGER. In Cheshire, to be judger of a town, is to serve on the jury there. *Leicester's Hist. Antiq.* 302.

JUDGMENT, *judicium, quasi, juris dictum*.

The sentence of the law, pronounced by the court, upon the matter contained in the record. 3 *Comm.* 395. c. 24.

I. *Of the various kinds of Judgments in Civil Cases.*

II. *Points of Practice relating thereto.*

III. *Of Arrests of Judgment; and of Statutes Regulating Judgments.*

I. *Judgments* are of four sorts. 1. Where the facts are confessed by the parties, and the law determined by the court, as in case of judgment upon a demurrer. 2. Where the law is admitted by the parties, and the facts disputed; as in case of judgment upon a verdict. 3. Where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by confession or default. Or, 4. Where the plaintiff is convinced, that fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a nonsuit or *retraxit*. 3 *Comm.* 396. c. 24.

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises

of law and fact, which stand thus: against him who hath rode over my corn I may recover damages by law; now A. hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow; which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is, indeed, the result of deliberation and study to point out; and, therefore, the stile of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own: but, "it is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court after due deliberation and inquiry. 1 *Inst.* 39.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some pleas, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action; in which it is considered by the court that the defendant do answer over, *respondet ouster*; that is, put in a more substantial plea. 2 *Saund.* 30. It is easy to observe, that the judgment here given is not final, but merely *interlocutory*; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

But the *interlocutory* judgments, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is, indeed, established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. This sort of *interlocutory* judgment happens in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just; or by *non sum informatus*,

when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client, which is a species of judgment by default.

If these, or any of them, happen in actions where the specific thing sued for is recovered, as in action of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*), in action of debt to be brought by the creditor, as to the debt, and for the specific sum due; which judgment, when confessed, is absolutely complete and binding, provided the same (as is also required in all other judgments) be regularly docketed; that is, abstracted and entered in a book, according to the directions of stat. 4 and 5 W. & M. c. 20, by which it is provided, that no judgment shall affect purchasers of lands, and mortgagees, till docketed, nor have any preference against heirs, executors, &c. in the administration of estates. See *post*, *Judgments acknowledged for Debts*.

But where damages are to be recovered, a jury must be called on to assess them, unless the defendant to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages (indefinitely); but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire into the said damages, and return such inquisition into courts: This process is called a *writ of inquiry*; in the execution of which the sheriff sits as a judge, and tries by a jury, subject to nearly the same law and conditions as a trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in the manner of a *postea*, and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, without the aid of a writ of inquiry.

It was said by Wilnot, C. J., that a writ of inquiry is an inquest of office to inform the conscience of the court; who, if they please, may themselves assess the damages. 3 Wils. 62. Hence, a practice is now established in the courts of K. B. and C. P., in actions where

judgment is recovered by default upon a bill of exchange, or promissory note, to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 Term Rep. 275: H. Black. Rep. 541. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a judge, at sittings or *nisi prius*; and then the judge acts only as an assistant to the sheriff. The number of jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the Court of K. B. in an action of *scand. mag.* brought by the Duke of York (afterwards James II.) against Titus Oates, fifteen were sworn upon the jury, and gave all the damages laid in the declaration, viz. 100,000*l.* In that case, the sheriff of Middlesex sat in court covered, at the table below the judges. 3 St. Tr. 987. See further, *Writ of Inquiry*.

Final judgments are such as at once put an end to the action by declaring, that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the judgment be for the plaintiff, it is also considered, that the defendant be either amerced, for his wilful delay of justice, in not obeying the king's writ, by rendering the plaintiff his due; 8 Rep. 40. 64; or be taken, *capiatur*, till he pays a fine to the king for the public misdemeanor, which is coupled with the private injury, in all cases of force (8 Rep. 59: 11 Rep. 45: 5 Mod. 305.); of falsehood, in denying his own deed (*F. N. B.* 121: 1 Inst. 131: 8 Rep. 60: 1 Rol. Ab. 219: Lill. Entr. 379: C. B. Hil. 4 Ann. Rot. 430.); or unjustly claiming property in replevin; or of contempt in disobeying the command of the king's writ, or the express prohibition of any statute. 8 Rep. 60. But in actions of trespass, ejectment, assault, and false imprisonment, it is provided by the 5 and 6 W. & M. c. 12. that no writ of *capias* shall issue for this fine, nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. And, therefore, upon such judgments in the Common Pleas, they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all. Salk. 54: Carth. 390.

But in all other cases, where it was necessary at common law, the *capiatur* should now be added to the judgment.

If judgment be for the defendant, then, in case of fraud and deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined. 8 Rep. 59, 60. But in most cases it is only considered, that he and his pledges



of prosecuting, he (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*; that is, without any farther continuance or adjournment; the king's writ commanding his attendance being now fully satisfied, and his innocence publicly cleared. 3 *Comm.* 395—399.

And these pledges are now dispensed with and omitted in actions commenced by writs of *capias*, summons, or detainer, under the uniformity of the process act.

If a rule be given for the defendant to plead, at a certain day, and he do not plead accordingly, the plaintiff may enter judgment against him, without moving the court; though in real actions and criminal causes, on indictment, &c. there must be a motion in court for a peremptory rule. 2 *Lall.* 116. Yet a plaintiff, after he hath signed judgment against the defendant, may waive it if he will, and accept of a plea from the defendant. *Trin.* 23 *Car. R. R.*

By r. 66. *H. T.* 2 *W.* 4. judgment for want of a plea after demand, may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made.

In the case of a verdict for the plaintiff, the judgment is, that he recover his *damages* and costs in an action of *assumpsit*, covenant, case, trover, trespass, and *replevin*; or his *debt*, damages, and costs, in an action of debt; or his *goods* or their value, and damages and costs, in an action of *detinue*; and in either case also his costs of increase; or if the verdict be for the defendant, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence; and in *replevin*, the judgment at common law for the defendant is also, that he have a return of the goods, or, on the stat. 17 *Car.* 2. c. 7. for the arrears of the rent and costs. 1 *Archb. Pr.* by *Chitty*, 319.

II. Judgment is sometimes had with a *cessat executio*; and if the defendant gives judgment, with a stay of execution till a certain day, the plaintiff may, notwithstanding sue forth a *capias* or a *fieri facias* into the county where the action is laid, returnable before the day, to enable him at that day to take a *testatum* against the defendant; though he shall not in that case sue out a *capias* to warrant a *scire facias* against the bail. *Pasch.* 22 *Car.* 2. See tit. *Capias*. If debt be brought against an executor upon the bond of the testator, and he pleads *plene administravit*, this is a confession of the debt; and the plaintiff

may have a judgment with a *cessat executio*, till the defendant hath assets. 4 *Rep.*: 2 *Nels. Abr.* 1052.

Judgment upon a demurrer to a declaration &c. is no bar to any other action; because it is not on the merits, and the plaintiff may afterwards make his declaration right, and then proceed. 2 *Lall.* 113. But other judgments may be pleaded in bar to any other action for the same cause; and judgment in an inferior court may be alleged in bar to an action in a superior court. 2 *Lev.* 93.

Formerly when a general verdict was given in *nisi prius*, the party for whom it was given must in the Court of King's Bench, on or after the day in bank, that is, on or after the return day of the *distringas* (where the trial had been had at the sittings in term), or on or after the first day of the next term (if the cause has been tried in the vacation), have entered a rule for judgment *nisi causa* with the clerk of the rules, and waited the four days limited by it before he could sign final judgment. This rule was also necessary after the execution of a writ of inquiry, either on a demurrer or a judgment by default: 1 *Salk.* 399; or where a general verdict was given subject to an award. 4 *East*, 310. But it was not required after a special verdict, in which case the prevailing party might, as he may now, proceed to sign judgment, tax his costs, and sue out execution, immediately after the decision of the court without any rule for judgment; nor was it ever necessary after a nonsuit, for the judgment in that case might, as it now may, be signed immediately after the day in bank. *R. E.* 5 *G.* 2. r. 3. a. And now by the late rule of the court, *H. T.* 2 *W.* 4. r. 67, after a verdict or nonsuit, judgment may be signed the day after the appearance day (i. e. the fourth day after the return day) of the *distringas* without any rule for judgment; also, after the return of a writ of inquiry, judgment may be signed after the expiration of four days from such return, without such rule.

As to the time when a writ of inquiry may be returned, see tit. *Execution*, III.

If verdict pass for the plaintiff, and he will not enter his judgment, the defendant, by motion of course, may oblige him to it. 2 *Lill. Abr.* 97. The defendant may enforce the plaintiff to enter his judgment to the end he may plead it to another action. *Latch.* 216: 1 *Danv.* 722: *Pal. m.* 281. So if the defendant wants to bring a writ of error—

It is not, it seems, necessary to give a term's notice previous to signing the judgment where four terms or more have elapsed since the trial, the rule requiring a term's notice applying only to cases where the matter is still

in controversy and where the plaintiff's neglect to proceed in the cause has occurred before the verdict. 1 *Archb. Pr.* by *Chitty*, 316.

Formerly, also, if a verdict were given after term, no judgment could be given on it till the next term following; for the judgment is the act of the court, and the court sits not but in term. *Mich.* 22 *Car. B. R.*

But now judgment may be entered and execution issued during the vacation in cases where there has been a nonsuit, or a verdict for either party at the sittings or assizes; if the judge certify immediate execution ought to issue. See tit. *Execution*, III.

By the 3 and 4 *W. 4. c.* 42 § 18. at the return of any writ of inquiry, or writ for the trial of any issue under that act, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or judge shall certify under his hand upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the courts at Westminster shall think fit to order such judgment or execution to be stayed till a day named.

At common law a judgment if entered during term related to the first day of the term; and when a party was entitled to sign judgment, it might be entered during vacation as of the preceding term. But this is altered by one of the rules of *H. T.* 4 *W. 4.* See tit. *Execution*, IV. 1.

Judgments are not only to be signed by the proper officer, but entered of record, before which they are not judgments; and in a judgment given to recover a sum of money, the sum must be entered in words at length, and not in figures, which may be easily altered; and a judgment was reversed, because the time when given was in figures, and the sum recovered expressed in figures, &c. But the court may amend their judgments of the same term, because the term is but as one day in law; though they may not do it in another term. 2 *Lill.* 103: 3 *Lev.* 430. If a judgment be unduly obtained, the court will vacate the judgment, and restore the party damaged; if not punish the offender; but it is against the course of the court to vacate a judgment the last day of the term. *Pasch.* 1656.

If a judgment be obtained, but the plaintiff doth not take out execution within a year and a day, the judgment must be revived by *scire facias*. If any thing be entered in a judgment, which is not mentioned in the plaintiff's declaration, the judgment is not good. 2 *Lill.* 104. And where it appears upon the record, that the plaintiff hath no cause of action, he shall never have judgment. 8 *Rep.* 120. In

such case the court may give judgment for the defendant. 1 *Plowd.* 66.

In debt on specialty, the whole and exact sum must be demanded, or the judgment upon it will not be good. 3 *Mod.* 41. If more be in the judgment than the plaintiff demands, it is erroneous; though this may be helped by a *remisit damna* for part. 2 *Lill.* 27. If in case, trespass, &c., a verdict is given for more damages than laid in the plaintiff's declaration, and he does not remit the surplus damages, but takes judgment for the whole, it is an incurable error, and cannot be amended. See tits. *Damages*, *Debt*.

If issue is found against one party in a suit, and not against the other, judgment may be for the plaintiff to recover against him where the matter is found; and a *nil cupiat per billam* be entered against the plaintiff as to the other. 1 *Saund.* 216. And when several damages are recovered against several defendants, the plaintiff may enter a *nolle prosequi* as to one of the defendants, &c. and have judgment against one only for the damages against him. 3 *Mod.* 101. If one entire judgment is given against two several persons, and one of them is an infant, appearing by attorney, the whole judgment is void; which being entire cannot be divided, except the infant be joint executor with the other party. When a judgment is entire, it cannot be divided, to make one part of it good, and another part thereof erroneous; but if it be not an entire judgment, it may. 2 *Lill.* 100. See *post*, III. On action where damages are to be recovered, if the declaration be good in part, and insufficient in part, and the defendant demurs upon the entire declaration; the plaintiff shall have judgment for that which is well laid, and be barred for the rest. 2 *Saund.* 379. And in an action of debt upon three bonds, if it appears that one of them is not forfeited, &c. the plaintiff shall have judgment for the other two. 1 *Saund.* 286.

There were four counts in the declaration; *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry, and executes it; the demurrer being determined, the court held the judgment regular, and that there was no occasion for a *nolle prosequi* to be entered on the roll as to the three counts, until he enter final judgment. *Stra.* 532.

Where a judgment is partly by the common law, and partly by statute, the judgment at common law may remain, and be complete, without the other. 1 *Salk.* 24.

Where there are two distinct judgments, one at common law, and the other by statute, one may be affirmed, and the other reversed, on a writ of error. *Annaly*, 50.

Where entire judgment is given for the plaintiff on two counts, one of which is bad, the court may reverse it as to the first, and affirm it as to the second count. 6 *Taunt.* 645. (625.)

Every judgment ought to be complete and formal: one judgment cannot determine another judgment, and the judges will not give a judgment against law, although the plaintiff and defendant do agree to it. 1 *Salk.* 213: *Cro. Eliz.* 827. In actions personal, judgment given against the plaintiff upon any plea to bar him, is peremptory. *Jenk. Cent.* 52. If the defendant doth not deny the debt, or other matter in suit, but endeavours to elude the action by insufficient pleading; in this case, if it be found for the plaintiff, he shall have judgment; but not *vice versâ*, if for the defendant, because the matter of the suit is not fully and sufficiently denied, but in some measure confessed by the insufficient plea. *Ibid.* 70.

Judgment may not be given for the plaintiff upon an insufficient bar, if the replication be so, and show no title; but a judgment shall not be set aside for mispleading a point collateral to the issue. *Hob.* 8. 128. See *post*, III. In debt upon an obligation, the defendant pleaded that he delivered it on a condition to be performed by the plaintiff, which he had not done, and therefore it was not his deed; the jury found for the defendant, that the condition was not performed, yet the plaintiff had judgment; for the defendant's plea confesses it to be his deed, and the verdict did not disprove it, and the issue is, deed or no deed, &c. Here, therefore, the plaintiff hath his judgment upon the defendant's confession, not upon the verdict. *Jenk. Cent.* 102. A judgment contrary to the verdict found in the cause is generally void; for it is to be warranted by the verdict. *Mich.* 22 *Car. B. R.* There may be cases where judgment may be given for one of the parties contrary to the verdict; as where the defendant pleads such a plea as in effect acknowledges the demand, there, though there should be a verdict for the defendant, judgment shall be for the plaintiff, or the judge of *nisi prius* may refuse to try it. *Annaly*, 250. If a verdict is imperfect, judgment cannot be given upon it; and for the uncertainty of the verdict, judgment may be void. 2 *Lill.* 111: *Raym.* 220. Action of debt lies upon a good judgment, as well after writ of error brought as before. *Raym.* 100: 2 *Mod.* 127. But if error is brought, and depending, the court will, on motion, stay proceedings in the new action, or rather prevent plaintiff from taking out execution, defendant confessing judgment in the last suit. See *tit. Debt.* If a judgment is recovered jointly against three defendants, the plaintiff cannot bring action of debt upon that judgment against one alone. 2 *Leon.* 220. A plaintiff shall not have a new action of debt on the same bond, &c. after judgment had on it, as long as the judgment is in force. 6 *Rep.* 2: 2 *Nels. Ab.* 1056. And if the House of Lords reverse a judgment of B. R., the lords are to enter the new judgment, and not the Court of B. R., who by the first judgment had executed their authority. 1 *Salk.* 402. See *tit. Appeal, Error.*

A regular judgment in a crown cause cannot be set aside on payment of costs. 1 *Wils.* 163.

Where there is a judgment and no surprise, it shall not be set aside on an affidavit of a matter relative to the merits which might have been pleaded. *Annaly*, 157.

Where the condition of a bond was, that the money was not to be paid till a future day, and the conusee by virtue of a warrant of attorney entered judgment, and took out execution before the day, the court would not set the judgment aside, but the execution. *Annaly*, 270.

A regular interlocutory judgment may be set aside, so as to let in the defendant to try the merits of his case; but it must be on payment of costs, and such merits likewise must appear upon affidavit. *Stra.* 823. 1242: 1 *Burr.* 568. A writ of inquiry was set aside, and defendant let in to plead a fair plea on payment of costs. *Salk.* 518: 6 *Mod.* 191.

The stat. 8 *W. 3. c.* 11. orders judgment for costs, upon demurrers, and on suing writs of error, where the former judgment is affirmed, &c. See this *Dict. tit. Costs.* The statutes of jeofails extends to judgments upon *nihil dicit*, confession, *non sum informatus*, &c. *Stat.* 4 *Ann. c.* 16. For further matter, see *tit. Abatement, Amendment, Execution, Issue, Practice*, &c.

III. *Arrests of Judgment* arise from error appearing upon the face of the record. Where the judgment is for the plaintiff it may be arrested in consequence of such error, on whatever part of the record it may arise. It is, however, only with respect to objections apparent on the record that such motion can be made. Nor can it be made, generally speaking, in respect of formal objections. This was formerly otherwise, and judgments were constantly arrested for errors of mere form; but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind, and commonly called the statutes of amendment and jeofails, by the effect of which, judgment, at the present day, cannot, in general, be arrested for any objection of form. The judgment may



be arrested where the verdict materially differs from the pleadings and issue thereon: as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff is a bankrupt," and the verdict finds specially that he said "the plaintiff *will be* a bankrupt." Or if the case laid in the declaration is not sufficient in point of law to found an action upon.

It is an invariable rule with regard to arrest of judgment upon matter of law, "that what ever is alleged in arrest of judgment must be such matter as would have been, upon demurrer, sufficient to overturn the action or plea." As in an action for slander, in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now, if a verdict be found for the plaintiff, but the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable; and, if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *et converso*, "that every thing that may be alleged in case of defence, will be good in arrest of judgment;" for if a defendant omits to state some particular circumstance, without proving when, at the time, it is impossible to support the action or defence, this omission shall be cured by a verdict. As if, in an action of trespass, the declaration be not alleged, that the trespass was committed on any certain day, *Carth. 380*; or, if the defendant justifies, by prescribing for the right of common for his cattle, and does not plead that his cattle were *loam and couchant* on the land; *Cro Jac. 11*; though either of these defects might be good cause to demur to the declaration or plea; yet, if the adverse party omits to take advantage of such omission at due time, but takes issue, and has a verdict against him, these exceptions cannot, after verdict, be moved in arrest of judgment. For the verdict ascertains the facts, which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose, that a jury, under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective. *1 Mod. 292*.

After judgment for plaintiff on demurrer, without argument, and general damages assessed, the Court of C. P. refused to permit the defendant to move in arrest of judgment, on the ground that the damages appeared to be partly given upon a count which could not be sustained: for the defendant had the opportunity of excepting to that count on demurrer. *6 Tuntton, 650. (630.)*

Exceptions, that are removed in arrest of judgment, must be much more material and glaring, than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceeding. But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, these cannot be cured by a verdict. *3 Comm. 323—5.*

Although it appear to the court that the defendant's title is not good, if the plaintiff, in his declaration, hath not set forth a good title for himself, the court shall never give him judgment. *2 Lill. 98*. Though the plaintiff strays the defendant's title, if he gives him another title by pleading, &c., the defendant shall have judgment; for the court are to judge upon the whole record. *8 Rep. 93*. But if action of trespass is brought for trespass done in lands belonging to such a house, and it appears at the trial that the plaintiff had no title to the house, the court cannot give judgment to turn him out of possession, because that was not judicially before them. *3 Salk. 213*.

If the verdict be for the defendant, the plaintiff, in some cases, moves for judgment *non obstante verdicto*; that is, that judgment be given in his own favour, without regard to the verdict obtained by the defendant. This motion is made in cases where, after a pleading by the defendant, in confession and avoidance, as, for example, a plea in bar, and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospect examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment, while, on the other hand, the plea being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff, without regard to the verdict; and this, for the reason above explained, is also called a judgment, as upon confession. Sometimes it may be expedient for the plaintiff to move for judgment *non obstante*, &c., even though the verdict be in his own favour: for in such a case as above described, if he takes judgment as upon the verdict, it seems that such judgment would be erroneous, and that the only safe course is to take it as upon confession.

By *r. 65. H. T. 2 W. 4.* no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there be so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term.

Judgments are to continue till they shall be attained by error. *4 H. 4. c. 23.* And after verdict given in any court of record, there shall be no stay of judgment for want of form in a writ, count, &c., or mistaking the name of either party, sum of money, day, month, year, &c., rightly named in any writ or record preceding, &c. *18 Eliz. c. 14.* See *tit. Abatement, Amendment, Error.*

By *stat. 17 Car. 2. c. 8.* in all actions personal, real, or mixed, the death of either party between the verdict and the judgment shall not be alleged for error, so as such judgment be entered within two terms after such verdict. Upon this statute the judgment is entered for or against the party as though he were alive; *1 Salk. 42*; and it need not be actually entered—it is sufficient if it be signed within two terms after the verdict. *1 Sid. 385: Barnes, 261: 1 Salk. 401.* But there must be a *scire facias*, to revive it before execution; *1 Wils. 302*; and such *scire facias* pursuing the form of the judgment should be general; *2 Ld. Raym. 1280*; as in judgment recovered by or against the party himself. *Tidd. c. 42.* If the plaintiff die after the assizes begin, though the trial be after his death, that is within the remedy of the statute. *1 Salk. 8.* See *tit. Execution.*

By the statute of frauds, *29 Car. 2. c. 3. § 14, 15.* the day of signing any judgment shall be entered on the margin of the roll (and so in counties palatine, by *stat. 8 G. 1. c. 25. § 6.*): and such judgment, as against purchasers, shall relate to such time only. See also *stat. 4 and 5 W. & M. c. 20.* as to docketing and registering of judgments by the officers of the several courts.

By the *8 and 9 W. 3. c. 11. § 6.* the death of the plaintiff or defendant, after interlocutory and before final judgment, shall not abate the action: but a *scire facias* shall issue to show cause why damages should not be assessed, and a writ of inquiry of damages awarded thereon; on return of which, final judgment shall be given for the plaintiff.

Where either party dies after the interlocutory judgment, and before the execution of the writ of inquiry, the *scire facias* on this act ought to be, to show cause why the damages ought not to be assessed and recovered, and to have the judgment of the court thereon. *Lill. Ent. 647: 6 Mod. 144.* But when the death happens after writ of inquiry

executed, and before final judgment, the *scire facias* must be to show cause why the damages assessed should not be adjudged. *1 Wils. 243; 1 T. R. 388.* The judgment upon this statute is not entered for or against the party himself, as upon *17 Car. 2. c. 8.* but for or against his executors, &c. *1 Salk. 42.* And where a defendant dies after interlocutory, and before final judgment, two writs of *scire facias* must be sued out, before execution can be had; one before final judgment issued, in order to make the executors party to the record, and the other after final judgment issued, to give them an opportunity of pleading no assets, &c. *2 Lamb. 72. n.: Say. 266.* See further *tit. Execution, Scire Facias.*

As to the effect of bankruptcy in executions sued out on judgments, see *tit. Execution, IV.*

**JUDGMENTS ACKNOWLEDGED FOR DEBTS.** The course for one to acknowledge a judgment for debt is for him that doth acknowledge it to give a warrant of attorney to some attorney of that court where the judgment is to be acknowledged, to appear for him, to file common bail, and receive a common declaration, and then plead *non sum informatus*, &c. or to let it pass by *nihil dicit*; whereupon judgment is entered for want of a plea. *2 Lill. 105.* The person to whom this warrant of attorney is given, has all the benefit of a judgment and execution, against the debtor's person and property, without being delayed by any intermediate process, as in the case of a regular suit. It is frequently given by a person arrested, upon condition of his discharge, and that longer time shall be allowed him for the payment of the debt, or that some other indulgence shall be shown him. But to prevent persons in this situation from being imposed upon, the old rules of court (*B. R. E. 15 Ch. 2: R. E. 4. G. 2.*) declared that no warrant of attorney to confess a judgment, given by a person arrested upon *mesne process*, shall be of any force, unless some attorney were present on behalf of the person in custody, who should explain the nature of the warrant, and subscribe his name as a witness to it. *Crompt. Pract. See 1 Salk. 402: 4 Taunt. 977.*

And those regulations have been enforced by a late rule (*H. T. W. 4. c. 72.*) which requires the attorney, on witnessing the warrant of attorney, to declare himself the defendant's attorney, and to state he subscribes in that capacity.

It has been held that these rules are not confined to prisoners in the custody of the sheriff, or other officer who arrested them, but extended to prisoners in the custody of the marshal. *3 T. R. 616.* However, they do

not extend to persons in custody on execution; 1 *T. R.* 715; 7 *T. R.* 19; or to warrants of attorney given for any other cause of action than that for which the defendant is in custody; 3 *Burr.* 1792; 2 *L. Ray.* 797; 1 *East.* 241; and consequently not to a person in custody on criminal process. 4 *T. R.* 433.

A warrant of attorney is generally accompanied by a defeazance, which by rule, *M.* 42 *G.* 3. must be written on the same paper or parchment as the warrant of attorney, or otherwise a memorandum must be therein made, containing the substance of such defeazance. See 3 *Taunt.* 465. The stipulations of the defeazance must be strictly observed by both parties. It sometimes contains an agreement that no *scire facias* shall be necessary to revive the judgments obtained upon it, which is binding on the defendant. 2 *B. & C.* 242.

A judgment confessed upon terms, being in effect conditional, the court will see the terms performed: but where a judgment is acknowledged absolutely, and a subsequent agreement is made, this does not effect the judgment, and the court will take no notice of it. 7 *Mod.* 400.

If a warrant of attorney to confess a judgment is given unconditionally, or without delay of execution, judgment may be signed, and execution taken out upon the same day it is given; and thus a debtor may give one creditor a preference to another, who has obtained judgment after a long litigation. 5 *T. R.* 235.

If one gives a warrant of attorney to confess judgment, and dies before it is confessed, this is a countermand of the warrant. 1 *Ventr.* 310. And the death is in general a revocation of the warrant. Though the courts have, on motion, allowed judgment to be entered up. Where they may be entered after the party's death, see *Annaly*, 158. But the rule does not hold in adversary suits. *Ibid.* 183.

The court will seldom grant leave to enter up judgment after the death of the plaintiff, particularly where the application is not made until after the first day of the term following the death; 2 *Str.* 718; 8 *T. R.* 257; and in no case will they allow it to be entered up after the decease of a sole defendant. 2 *Str.* 1081; 5 *Bing.* 1.

However, if the warrant expressly authorise judgment to be entered up by the plaintiff's representatives, the court will allow them to do so. *Barnes*, 44.

If a feme sole gives warrant of attorney to confess judgment, and marries before it is entered, the warrant is absolutely countermanded; and judgment shall not be entered against husband and wife. 1 *Salk.* 399.

But in several subsequent cases, the court has allowed the judgment to be entered up

against the husband and wife. 1 *Show.* 89: 2 *Chitty's R.* 117.

Where a warrant of attorney is given to a feme-sole, her marriage is no revocation; 1 *Salk.* 117; and upon application to the court, founded on a proper affidavit; 3 *Burr.* 1469: 6 *D. & R.* 46; they will allow the judgment to be entered up in the name of the husband and wife. 7 *Mod.* 53.

Judgment may be entered on a warrant of attorney at the time therein specified; and if it be given to secure the payment of money, the plaintiff need not delay the signing until default in such payment, unless it be so stipulated. 2 *B. & B.* 464: *S. C. Moore*, 307.

If a warrant be to enter judgment as of such a term, or any time after, the attorney may enter it at any time during life; but, without those words, the judgment must be entered the term expressed in the warrant; and, if no term be mentioned, it may be intended the next term. 1 *Mod.* 1. Or it has been held it may be entered within a year after the date of it; and if judgment upon a warrant of attorney be not entered within the year, it cannot be done without leave of the court, in term time, or of a judge, in vacation, on application founded upon an affidavit made of the party's being living, and the debt not satisfied. 2 *Lill. Abr.* 118: 2 *Show.* 253: 1 *H. B.* 94.

In order to obtain leave to enter up judgment on an old warrant of attorney, it must be sworn that the defendant was alive on a day in full term: the *essom day* is not sufficient. 4 *M. & S.* 174: 8 *B. & C.* 768.

By *r.* 73. *H. T.* 2 *W.* 4. "leave to enter up judgment on a warrant of attorney above one and under 10 years old, must be obtained by a motion in term, or by order of a judge in vacation; and if 10 years old or more, by a rule to show cause."

By rule of *Michaelmas*, 42 *G.* 3. (2 *East*, 136.) no judgment can be signed upon any warrant authorising any attorney to confess judgment, without such warrant of attorney being delivered to and filed by the clerk of the dockets, who is ordered to file the warrants in the order in which they are received. See also *Tidd's Pr.*

If any person, having acknowledged or suffered a judgment as a security for money, afterwards, on borrowing other money of another, mortgage his lands, &c., without giving notice of such judgment, unless he pay it off in six months, he shall forfeit his equity of redemption, &c. *Stat.* 4 *W. & M.* c. 16. See *tit. Mortgage.*

As to docketing of judgments signed by confession, &c., see 4 & 5 *W. & M.* c. 20. and *tit. Execution*, IV.



On judgments, a release of errors is usually entered into at the time of the warrant of attorney given, or judgment had. And in case of several judgments, if two are given in one term, and the last is first executed, that creditor hath the best title. *Litch.* 53. When a judgment is satisfied, it is to be acknowledged on record by attorney, &c. Acknowledging a judgment in the name of another, who is not privy or consenting to the same, is a felony by the 1 W. 4. c. 66. § 11.

As to how far an execution under a warrant of attorney is available in case of the defendant's bankruptcy, see tit. *Execution*, IV.

**JUDGMENTS IN CRIMINAL CASES.** See *Execution (criminal)*. When, upon a capital charge, the jury have brought in their verdict, *guilty*, in the presence of the prisoner, he is either immediately, or a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, either upon a capital or inferior conviction, he may, at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. 4 *Rep.* 45. None of the statutes of jeofails, for amendment of errors, extended to indictments or proceedings in criminal cases; and therefore a defective indictment was not aided by a verdict prior to the 7 G. 4. c. 64. as defective pleadings in civil cases were.

That statute (§ 20.) provides that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter necessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of the word "against the form of the statutes," or *vice versa*; nor for that any person or persons mentioned in the indictment or information is, or are, designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names; nor for

omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect *venue*, where the court shall appear by the indictment or information to have had jurisdiction over the offence.

And by § 21. no judgment after verdict, upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a *similiter*; nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion; nor for any misnomer or misdescription of the returning such process, or of any of the jurors; nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and where the offence charged has been created by any statute, subject to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describes the offence in the words of the statute.

A pardon may also be pleaded in arrest of judgment; and it has the same advantage when pleaded here, as when pleaded upon arraignment; viz. the saving the attainder, and of course the corruption of blood, which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible. See tit. *Pardon*.

Praying the benefit of clergy might also formerly be ranked among the motions in arrest of judgment; but now, by the 7 and 8 G. 4. c. 28. § 6. the benefit of clergy is, with respect to persons convicted of felony, abolished. See tit. *Clergy, Benefit of*.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime, for which reference may be made to the titles of the several offences in this Dictionary. Of these some are capital, which extend to the life of the offender, and consist generally of being hanged by the neck till dead; though, in very atrocious crimes, other circumstances of terror, pain, or disgrace, are superadded in the judgment, as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason, affecting the king's person or government, the head being severed from the body, and the body quartered (see tit. *Treason*, V. 3.); and in mur-

der, formerly, a public dissection. See *Execution of Criminals*. In cases of any treason committed by a female, the judgment at common law was, to be burned alive. But now, by stat. 30 G. 3. c. 48. it is enacted, "That in all cases of conviction of any woman for high treason, the judgment shall be, that she shall be drawn and hanged, and not burned." Indeed, the humanity of the English nation ever authorised, by a tacit consent, an almost general mitigation of such part of these judgments as savoured of torture or cruelty; a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there having been very few instances (and those accidental, or by negligence) of any person being embowelled (while that remained part of the judgment for high treason), till previously deprived of sensation by strangling.

Previous to the 4 G. 4. c. 48. judgment of death was always obliged to be given for all capital offences, even when there was no intention of putting the sentence into execution; but by the statute, in all felonies except murder, when the court shall think the offender a proper subject for the royal mercy, it may abstain from pronouncing, and, instead, order judgment of death to be recorded in the usual form, which judgment (by § 2.) is to have the same effect as if pronounced and the party relieved.

Some punishments consist in exile or banishment, by abjuration of the realm, or transportation, others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasioned formerly a mutilation or dismembering, by cutting off the hand or ears; others fixed a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek; but most of these are now abolished.

Some are merely pecuniary, by stated or discretionary fines; and, lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes as either arise from indigence, or render even opulence disgraceful, such as whipping [now abolished as to female offenders,] hard labour in the house of correction, or otherwise, the pillory [now inflicted only in cases of perjury,] the stocks, and the ducking-stool. Disgusting as this catalogue may seem, it will afford pleasure to the English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes

of almost every other nation in Europe. And it is, moreover, one of the glories of our English law, that the species, though not always the quantity or degree, of punishment, is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment which the law has beforehand ordained for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates, and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of impunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in the law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions. 4 *Comm.* 375, &c.

The discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, viz. by fine and imprisonment, in these cases, is fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravation or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines, neither can, nor ought to be, ascertained by any invariable law. The value of money changes from a thousand causes; and, at all events, what is ruin to one man's fortune may be a matter of indifference to another's. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum; which is fully sufficient, when we consider that, however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. 4 *Comm.* 378. See tit. *Fines for Offences*.

No man can be attainted of treason or felony, but on judgment by express sentence, or by outlawry, or abjuration. 2 *Hawk. P. C. c.* 48. § 25. And a person shall not have two judgments for one offence; for in outlawry, which is a judgment, execution shall be awarded against the offender, but no sentence pronounced. *Finch*, 389. 467. But one convicted of a scandalous libel, had judgment to pay a fine, and to go to all the courts in Westminster-Hall, with a paper in his hat signifying his crime; and on his behaving impudently, his

punishment was increased. 1 *Salk.* 401. No judgment or punishment can be inflicted unknown to our laws, but only by act of parliament. *Dalis.* 20. And the law makes no distinction, in fixed and stated judgments, between a peer and a commoner, or between a common and ordinary case, and one extraordinary. 2 *Hawk. P. C. c.* 48. § 2.

Judgment cannot be given for a corporal punishment in the absence of the party. 1 *Salk.* 400. Though persons may have judgment to be fined in their absence, having a clerk in court to undertake for the fine. 1 *Salk.* 56. See *Wilkes's Ca. Bro. P. C.* But, to mitigate a fine, he must appear in person. 2 *Hawk. c.* 48. § 17: 3 *Salk.* 33: 4 *B. & C.* 329.

By the 11 *G.* 4. and 1 *W.* 4. *c.* 70. § 9 upon all trials for felonies or misdemeanors upon any record of the King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict was taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such person shall be present or not, except only in cases of information filed by leave of the King's Bench, or in cases of information filed by the attorney-general, where he prays that the judgment may be postponed; and the judgment so pronounced shall be indorsed on the *nisi prius* record, and afterwards entered upon the record of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to shew cause why a new trial should not be had, or the judgment amended; and such judge may either order an immediate commitment in execution, or may respite the execution until the sixth day of the next term.

JUDGMENT, OR TRIAL BY THE HOLY CROSS. A trial in ecclesiastical cases, anciently in use among the Saxons. *Cress. Church Hist.* 960. See *Ordeal*.

JUDICATORES TERRARUM. Persons in the county palatine of Chester, who, on a writ of error of Chancery, are to consider of the judgment given there, and reform it; and if they do not, and it be found erroneous, they forfeit 100*l.* to the king by the custom. *Dyer,* 348; *Jenk. Cent.* 71.

JUDICES FISCALES. So Polidore Virgil calls Empson and Dudley, who were employed by Hen. VII. for taking the benefit of penal statutes, and were put to death by Hen. VIII. See *Lord Herb. H. 8. fol.* 5, 6.

JUDICIAL ACTS. Numerous statutes, giving summary powers to justices of the peace, and that certain acts shall only be valid if done by two magistrates. In such case a distinction is made between what is only a

ministerial and what is a judicial act. In the former case, it is not requisite that the two magistrates should be together at the time of doing the act: in the latter case they must.

JUDICIAL DECISIONS, OPINIONS, OR DETERMINATIONS, are the sentiments of the judges delivered in a cause in court before them, and which form the decree or judgment of the court. See *Hale's Hist. Com. Law,* 68, 69. *Plowden,* 122—130, 140. &c.

An extra-judicial opinion, given in or out of court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion. *Vaugh.* 382.

So an opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion, had been broached, is no judicial opinion, nor more than a *gratulis dictum*. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath upon deliberation, which assures that it is, or was, when delivered, the opinion of the deliverer. *Vaugh.* 382.

The judges are not obliged to give their opinion to the House of Lords on an extra-judicial question, where no bill is depending. See 2 *Swanst.* 508. *n. (d.)* Also tit. *Judges*.

JUDICIAL POWER. See tit. *Judges*.

JUDICIAL PROCEDURE. See tit. *Practice*.

JUDICIAL WRITS. The *capias*, and all other subsequent to the original writ, not issuing out of Chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, were called *judicial*, not *original*, writs; they issued under the private seal of that court, and not under the great seal of England, and were tested, not in the king's name, but in that of the chief justice only. 3 *Connm.* 282.

Now, by the Uniformity of Process Act (2 *W. 4. c.* 39. § 31.) the only process for commencing *personal* actions, in the courts of law at Westminster, are the writs of summons, *capias*, and detainer thereby given, all of which issue out of the court where the action is brought. See tits. *Capias*, *Process*, *Writ*.

JUDICIUM DEL. The judgment of God; so our ancestors called those, now prohibited, trials of ordeal, and its several kinds. *Legis Edw. Conf. c.* 16.

See *Spelman's Glossary* on this word, and *Dr. Brady* in his *Glossary*, at the end of his *Intro. to Eng.* And this Dict. tit. *Ordeal*.

JUDICIUM PARIUM. See *Jury*.

JUG. A watery place. *Domesday.*

JUGGLERS. See *Vagrants*.



**JUGULATOR.** A cut-throat, or murderer. *Thom. Walsingham, p. 343.*

**JUGUM TERRÆ.** A yoke of land, in *Domesday*, contains half a plow-land. So also 1 *Inst. fol. 5. a.* So in *Domesday*, *Unum jugum de ora, et unum jugum de herce*; i. e. the rent of a yoke of land, and another yoke of land to plough. *Gale, 760.*

**JUNCARE.** To strew rushes, as was of old the custom, for accommodating the parochial church, and the very bed-chamber of princes. *Pat. 14 Ed. 1.*

**JUNCARIA, or JONCARIA,** from *juncus*, the Latin word for a rush.] A soil or place where rushes grow. *Cro. Lit. fol. 5: Pat. 6 Ed. 3. p. 1. m. 25.*

**JUNCTUM, JUNCTA.** A measure of salt. 2 *Mon. Ang. p. 99.*

**JURA REGALIA.** See tit. *King, Regalia.*

**JURATORY CAUTION.** A proceeding in Scotch law. See *Bell's Scotch Law Dict.*

**JURATS, jurati.]** Officers in nature of aldermen, sworn for the government of many corporations. As Romney Marsh is incorporate of one bailiff, twenty-four jurats, and the commonalty thereof, by *Chart. 1 Ed. 4.* And we read of the mayor and jurats of Maidstone, Rye, Winchelsea, &c. Also Jersey hath a bailiff, and twelve jurats, or sworn assistants, to govern that island. See 2 and 3 *Ed. 6. c. 30: 13 Ed. 1. c. 26.*

**JURE-DIVINO** Right to the throne. See tit. *King.*

**JURE-DIVINO** Right to tithes. See tit. *Tithes.*

**JURIDICAL DAYS, dies juridici.]** Days in court on which the law was administered. See *Day.*

**JURISDICTION, jurisdictio.]** An authority or power, which a man hath to do justice in causes of complaint brought before him; of which there are two kinds; the one which a person hath by reason of his fee, and by virtue thereof doth right in all complaints concerning the lands within his see; the other is a jurisdiction given by the prince to a bailiff, as divided by the Normans; and by him whom they called a bailiff we may understand all who have commission from the king to give judgment in any cause. *Custom. Normand. cap. 2.* The court and judges at Westminster have jurisdiction all over England; and are not restrained to any county or place; but all other courts are confined to their particular jurisdictions, which, if they exceed, whatever they do is erroneous. 2 *Lil. Abr. 120.*

Where a party is convicted by an inferior court or judges, who exceed their jurisdiction, the conviction, and all the proceedings, may be removed into the Court of King's Bench by

*certiorari*, in order that they may be quashed. See tit. *Certiorari.*

And where a party is in prison under the sentence of an inferior jurisdiction which has exceeded its authority, his remedy is to apply for a *habeas corpus*. See tit. *Habeas Corpus.*

A court shall not be presumed to have a jurisdiction where it doth not appear to have one. 2 *Hawk. c. 10.* If an action is brought in a corporate town, and the plaint sheweth not that the matter arises *infra jurisdictionem* of the court, it will be wrong, though the town be in the margin; but the county serves in the margin for the superior courts. *Jenk. Cent. 422.* The declaration in a base court must allege, that the goods were sold and delivered within the jurisdiction thereof, as well as that the defendant promised within it. 1 *Wils. par. 2. p. 15.*

Where a court is established for the public benefit, its jurisdiction is not lost by even 50 years non-user. 5 *B. and A. 691: Ib. 692.*

After a verdict for the plaintiff in C. B. for less than 40s. the defendant may enter a suggestion on the roll, that he resided in Middlesex, which, if true, the Court of C. B. hath no jurisdiction by stat. 22 *G. c. 33.* See tit. *County Courts, Courts of Conscience.*

Where commissioners or inferior jurisdictions, whose powers are limited, assume a jurisdiction they have not, the law gives an action against them. 2 *Wils. 382.*

Although a case be debated and have judgment in the Spiritual Courts, yet the King's Courts may afterwards discuss the same matter. *Artic. Cleri. stat. 9. Ed. 2. c. 6.*

In some causes, the Spiritual and Temporal Courts have a concurrent jurisdiction. See tit. *Prohibition*: further on this subject, tit. *Abatement, Cognizance, Courts, King's Bench, Venue.*

**JURIS UTRUM.** A writ which lies for the parson of a church, whose predecessor hath alienated the lands and tenements thereof. *F. N. B. 48.* When a clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass (as the case may happen), which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him the entire fee and right (*F. N. B. 49.*); but he is entitled to a special remedy, called a writ of *juris utrum*, which is sometimes styled the *parson's writ of right* (*Booth, 221.*), being the highest writ of which he can have. *F. N. B. 48.* This lies for a parson and a prebendary at common law, and for a vicar by stat. 14

*Ed. 3. st. 1. c. 17.* and is in the nature of an assize, to inquire whether the tenements in question are frank-almoign, belonging to the church of the demandant, or else lay-fee of the tenant. *Registr. 32.* And thereby, the demandant may recover lands and tenements belonging to the church, which were aliened by the predecessor, or of which he was disseised, or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary, or on which any person has intruded since the predecessor's death. *F. N. B. 48, 49.* But since the restraining statute of 13 *Eliz. c. 10.* whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deposed for more than twenty years. *Booth, 221.* For the successor, at any competent time after his accession to the benefice, may enter or bring an ejectment. *3 Comm. 252, 253.*

A vicar shall have a *juris utrum* against a person for the glebe of his vicarage, which is part of the same church; and the plaintiff ought to be named parson or vicar, or such name in right of which he bringeth his action. *New Nat. Br. 111.*

By the 3 and 4 *W. 4. c. 27. § 36.* the above writ is abolished after the 31st of December, 1834.

**JURNALE**, from *jour*, or *journée*, Fr. a day.] The journal or diary of accounts in a religious house. *Paroch. Antiq. p. 571. Cowell.*

**JURNEDUM**. A journey, or a day's travelling. *Cowell.*

**JUROR**, *jurator*.] One of those persons who are sworn on a jury. See tit. *Jury.*

**JURY**; **JURATA**: from Lat. *jurare*, to swear.

A certain number of men sworn to inquire of, and try, a matter of fact, and declare the truth, upon such evidence as shall be delivered them in a cause; and they are sworn judges upon evidence in matters of fact.

The privilege of trial by jury is of great antiquity in this kingdom; some writers will have it that juries were in use among the Britons: but it is more probable that this trial was introduced by the Saxons, yet some say that we had our trials by jury from the Greeks; the first trial by a jury of twelve being in Greece. By the laws of King Ethelred, it is apparent that juries were in use many years before the Conquest; and they are, as it were, incorporated with our constitution, being the most valuable part of it. *Wilk. Ll. Angl. Sax. 117.*

The truth seems to be, that this tribunal

was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one gives us also some traces of the other. Its establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *Magna Charta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; "*nisi per legale judicium parium suorum, vel per legem terræ.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

This mode of trial was not extended to Scotland in civil cases, until very lately. See tit. *Scotland, Session Court of. Stat. 1 W. 4. c. 69.*

Trials by jury in civil causes are of two kinds; extraordinary and ordinary. The extraordinary shall be only briefly hinted at. The first species of extraordinary trial by jury is that of the *grand assise*, which was instituted by King Henry VII. in parliament, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ *de magnâ assisâ eligendâ* is directed to the sheriff, to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by *Glanville (l. 2. c. 11. 21.)*; who, having probably advised the measure himself, is more than usually copious in describing it: and these altogether form the grand assize, or great jury, which is to try the matter of right, and must now consist of sixteen jurors. *F. N. B. 4: Finch. L. 412: 1 Leon. 303.* It seems not, however, to be ascertained, that any specific number above twelve is absolutely necessary to constitute the grand assize; but it is the usual course to swear upon it the four knights, and twelve others. *Vin. Ab. tit. Trial, X. c.* See the proceedings upon a writ of right before the sixteen recognitors of the grand assize, in 2 *Wils. 54.* The trial by grand assize has been rarely resorted to of late years, and will shortly be abolished, by virtue of the provisions of 3 and 4 *W. 4. c. 27.* See further tit. *Writ of Right.*

Formerly another species of extraordinary juries was, the jury to try an *attaint*; which was a process commenced against a former jury for bringing a false verdict. It is sufficient here to observe that this jury was to consist of twenty-four of the best men in the county, who were called the grand jury in at,

taint, to distinguish them from the first or *petit jury*; and these were to hear and try the goodness of the former verdict. This writ of attaint was abolished by the 6 G. 4. c. 50. § 60. See tit. *Attaint*.

With regard to the ordinary trial by jury, it may be considered, according to the following divisions; first, premising that these juries are not only used in the circuits of the judges, but in other courts and matters: as, if a coroner inquire how a person killed came by his death, he doth it by jury; and the justices of peace in their quarter-sessions, the sheriff in his county court, the steward of a court-leet or court-baron, &c., if they inquire of any office or decide any cause between party and party, they do it in like manner. *Lamb. Eren.* 384.

- I. *Of the Summoning, Qualifications, and Challenging of Jurors in civil Cases.*
- II. *Of the Verdict of a Jury in civil Cases;* and see tit. *Verdict*.
- III. 1. *Of Juries in criminal Cases; and*  
2. *How far they are Judges of Law, as well as Fact.*
- IV. *Of the Indemnity and Punishment of Jurors.*

I. When an issue is joined between the parties in a suit, by these words, "and this the said A. prays may be inquired of by the country," or, "and of this he puts himself upon the country, and the said B. does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff, that he cause to come here, on such a day, twelve free and lawful men (*liberos et legales homines*) of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A., nor the aforesaid B., to recognise the truth of the issue between the said parties." And such writ is accordingly issued to the sheriff.

Thus the cause stands ready for a trial at the bar of the court itself: for all trials were there anciently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence; all trifling suits being ended in the court-baron, hundred, or county courts; and indeed all causes of great importance or difficulty are still frequently retained upon motion, to be tried at the bar in the superior courts. (See tit. *Trial*.) But when the usage began, to bring actions of any trifling nature in the courts of Westminster-hall, it was found to be an intolerable burthen to compel the parties, witnesses, and jurors, to come from Westmorland, perhaps, or Cornwall, to try an action of assault at Westminster. A practice, therefore, very early obtained, of *continuing* the cause

from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if it appeared that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices in Westminster to that of the justices in eyre. *Bract. l. 3. tr. 1. c. 11. § 8.* Afterwards, when the justices in eyre were superseded by the modern justices of assise (who came twice or thrice in the year into several counties, *ad capiendas assisas*, to take or try writs of assise, of *mort d'ancestor*, *novel disseisin*, *nuisance*, and the like), a power was superadded by stat. *Westm. 2. 13 Ed. 1. c. 30.* to these justices of assise to try common issues in trespass, and other less important suits, with directions to return them (when tried) into the court above; where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now intended to be had in the court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before-mentioned, and was directed by the statute to be inserted in the writs of *venire facias*: "that is, that the sheriff should cause the jurors to come to Westminster (or wherever the king's court should be held), on such a day in Easter and Michaelmas terms; *nisi prius*, unless before that day the justices assigned to take assises shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assise which was sure to be held in the vacation before Easter and Michaelmas terms, and there the trial was had. See tit. *Justices of Assise*.

An inconvenience attended this provision: principally because as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by stat. *42 Ed. 3. c. 11.* the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assise and gaol-delivery) should be taken by writ of *nisi prius* till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to warn the jury; and is inserted in another part of the proceeding: for now the course is, to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz. Hilary or Trinity terms; which, from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and there-



fore not appearing at the day, must unavoidably make default; for which reason, a compulsive process is now avoided against the jurors, called in the Common Pleas, a writ of *habeas corpora juratorum*, and in the King's Bench, a *distringas*, commanding the sheriff to have their bodies, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record is, "that the jury is respited, through the defect of the jurors, till the first day of the next term, then to appear at Westminster; unless before that time, viz. on Wednesday the 4th of March, the justices of our lord the king, appointed to take assises in that county, shall have come to Oxford" (that is, to the place assigned for holding the assise); and thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assise, if before that time they come to Oxford; viz. on the 4th of March aforesaid. And as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons this jury to appear at the assises, and there the trial is had before the justices of assise and *nisi prius*: among whom are usually two of the judges of the court at Westminster, the whole kingdom being divided into six circuits for this purpose. (See *tits. Assise, Circuits*. Thus it may be observed, that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assise is now, by the various revolutions of practice, become their principal civil employment; hardly any thing remaining in use or the real assises but the name.

Although the regular course of proceedings in summoning the jury is as above described, in practice the *venire* and *distringas* are sued out at the same time.

If the sheriff be not an indifferent person, as if he be a party in the suit, or be either related by blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners, who, in this, as in many other instances, are the substitutes of the sheriff, to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or to two persons of the county named by the court and sworn. And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final; no challenge being allowed to their array. *Fortess. de Ll. c. 25: Co. Lit. 158. See 3 Comm. c. 23.*

When a cause is ready for trial, the jury is called and sworn. To this end the sheriff re-

turns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel jurors annexed to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors.

SPECIAL JURIES were originally introduced in trials at bar, when the causes were of two great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him.

No mention is made of special juries in the oldest book of practice (*Powell's*) printed in 1628. The first rule of court is 23 *Car. 2*—"That upon motion and affidavit, that the cause to be tried at the bar is of very great consequence, the court will, if they see cause, make a rule for the secondary to name forty-eight freeholders."

The 6 *G. 4. c. 50. § 30.* declares it lawful for the judges of the supreme court at Westminster, &c., on motion made on behalf of the king, or of any prosecutor, plaintiff, or defendant, in any case whatsoever, whether civil or criminal, or on any penal statute (excepting only on indictments for treason or felony), to order and appoint special juries to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases and triable by a jury, in such manner as the said courts have usually ordered the same, and that every jury so struck shall be the jury returned for the trial of such issue.

By § 31. every man described in the jurors' book, as an esquire, or persons of higher degree, or as a banker or merchant, is qualified and liable to serve on special juries, and his name is to be inserted in a separate list to be subjoined to the jurors' book, such list to be called "the Special Jurors' List."

By § 32. the officer of the court is to appoint the time and place for nominating the special jury, where the under-sheriff or his agent is to attend with the special jurors' list. The officer is to draw forty-eight out of a box, any of which may be objected to by the parties on each side, by showing the officer they are incapacitated; and a list of forty-eight names is to be delivered to each party to be reduced as theretofore, namely, by each party striking off twelve, whereupon the remaining twenty-four are to be returned upon the panel.

A common jury is one returned by the sheriff according to the directions of the 6 *G. 4. c. 50. § 15.* of § 26. which appoints that the sheriff or officer shall not return a separate panel for every separate cause, as formerly, but one and the same panel for every cause to be tried at the same assises, containing not less than forty-eight, nor more than seventy-two, jurors: and (§ 26.) that their names being

written on a card, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the court; in which case it is provided, by § 23. of the same act, that six or more of the jurors returned, to be agreed on by the parties, or named by a judge, or other proper officer of the court, shall be appointed by special writ of *habeas corpora*, or *distringas*, to have the matters in question shown to them by two persons named in the writ; and then (§ 24.) such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors. See this Dict. tit. *View*.

The first section of the above statute defines the qualifications of jurors in England in the superior courts, assises, and sessions of the peace; and allows persons in Wales, being there qualified to the extent of three-fifths of the qualification required in England, to serve on juries in Wales: viz. every man between twenty-one and sixty years of age (if not expressly excepted) who shall have 10*l.* per annum above reprises in lands or tenements, freehold, copyhold, customary, or of ancient demesne, or in rents issuing out of such lands, tenements, and rents, taken together in fee-simple, feetail, or for the life of himself or any other; or 20*l.* in lands or tenements held by lease for twenty-one years or longer, absolutely, or for any term determinable on life; or who, being an householder, shall be rated or assessed to the poor rates (or to the inhabited house duty) in Middlesex upon a value of not less than 30*l.*, and in any other county not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows. All such persons are declared to be *qualified and liable* to serve on juries, for the trial of all issues in the courts of record in Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, Chester (now abolished), Durham and Lancashire, and in all courts of assise, *nisi prius*, oyer and terminer, and gaol delivery; such assises being respectively triable in the county in which every man so qualified shall reside; and on grand juries in courts of session of the peace, and on petty juries for the trial of all issues joined in such courts of session of the peace, and triable in the county, riding, or division where the person so qualified resides.

§ 2. The following persons are *exempted*: peers, judges of the courts of Westminster, &c., clergymen, Roman Catholic priests, Protestant dissenters, and preachers duly registered, &c.,

and not following any secular occupation except that of school-master, practising serjeants, barristers, doctors, and advocates of the civil law, attornies, solicitors, and proctors; officers of all courts of justice, coroners, gaolers, physicians, and licentiates; surgeons of the royal colleges of London, Edinburgh, and Dublin; apothecaries, officers in the navy or army on full pay, licensed pilots, &c.; the king's household servants, officers of customs and excise, sheriffs' officers, high constables, and parish clerks. All these are absolutely freed and exempted from being returned, and from serving upon any juries or inquests whatever, and are not to be inserted in the lists required by the act.

Proviso is also made for all persons exempted by any prescription, charter, grant, or writ.

By § 48. no justices of peace are to be summoned as jurors at sessions, nor (by § 49.) any inhabitants of Westminster, at the Middlesex sessions.

The mode of summoning aliens, in case of the trial of any alien indicted, or impeached of any felony or misdemeanor, is directed by § 47. of this act, which provides that such aliens shall not be challenged for want of freehold or qualification required by the act, but they may for any other crime.

The act contains a multiplicity of directions as to the making out yearly lists of persons qualified to serve on juries by the churchwardens, &c. of every parish, under the warrant of the clerk of the peace, and the precept of the high constable.

These lists are to be kept by the clerk of the peace in a book, called the *jurors' book*, from which the juries are to be returned by the sheriff. Power is reserved to the Court of King's Bench, and all other courts of criminal jurisdiction, to call a jury, or to amend or enlarge the panel returned by the sheriff. In certain cases of treason, a copy of the panel is to be delivered to the parties indicted. But this does not extend to treason in conspiring the king's death, nor to offences relating to counterfeiting the coins. Special reservations are made as to qualification of jurors in London and other cities and liberties, and as to inquests before sheriffs and coroners.

By § 22. the justices of assise, &c. may direct the sheriff to summon the same panel not exceeding 144 jurors, for the criminal and civil side, and order two sets of jurors to be summoned, one to serve during the former part (usually the first week) of the assises, and the other for the residue of the time.

By the 18 *Eliz. c. 5.* § 2. (which is not repealed by the act 6 *G. 4.*) no jury is to appear at Westminster for a trial, when the offence was committed thirty miles off; except the attorney general require it.

Either the plaintiff or defendant may use their endeavours for any jurymen to appear; but one who is not a party to the suit may not; and an attorney was thrown over the bar, because he had given the names of several persons in writing to the sheriff, whom he would have returned on the jury, and the names of others whom he would not have returned. *Moor*, 882. If a jurymen appear, and refuse to be sworn, or refuse to give any verdict, if he endeavours to impose upon the court, or is guilty of any misbehaviour after departure from the bar, he may be fined, and attachment issue against him. 2 *Hawk. P. C. c.* 22. § 15—18.

If, by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of such men as are summoned upon the first panel, in order to keep up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assises, or *nisi prius*, by the 6 *G. 4. c.* 30. § 37. the judge is empowered, upon request made on the part of the king, or at the prayer of either party, to award a *tales de circumstantibus* of such persons present in the six courts, as are duly qualified, to be joined to the other jurors to try the cause, who are liable, however, to the same challenges as the principal jurors. This is usually done till the legal number of twelve be completed. But where a special jury has been struck, the talesmen shall be taken from the common jury panel in the same court.

Upon a trial at bar, if the jury do not appear full, the court cannot grant a *tales de circumstantibus*, but it will grant a *decem tales*, returnable in some convenient time the same term, to try the cause. 2 *Lil. Abr.* 552. Previous to the above statute a plaintiff or defendant might have had a *tales de circumstantibus*; and the statutes which authorized justices of *nisi prius* to award a *tales circumstantibus*, extended as well to capital cases as to others; but such a *tales* could not be prayed for the king upon an indictment or criminal information, without a warrant from the attorney general, or an express assignment from the court before which the inquest was taken, thought it might be awarded on an information *qui tam*, &c., because of the interest which the prosecutor had in such prosecutions. 2 *Hawk. P. C. c.* 41. § 18: 3 *Salk.* 339.

In mere commissions, however, of gaol delivery, no *tales* could be awarded; but the judge might *ore tenus* order a new panel to be

returned *instantanter*. 4 *Inst.* 68: 4 *St. Tr.* 7283: *Salk.* 336.

A *tales* is not to be granted where the whole jury is challenged, &c., but the whole panel, if the challenge be made good, is to be quashed, and a new jury returned; for a *tales* consists but of some persons to supply the places of such of the jurors as were wanting of the number of twelve, and is not to make a new jury. 2 *Lil. Abr.* 252.

When a sufficient number of persons impanelled, or *talesmen* appear, they are then separately sworn "well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence," and hence they are denominated the jury, *jurator*; and jurors, *sc. juratores*.

As the jurors appear, when called, they shall be sworn, unless challenged by either party. Challenges are of two sorts, challenges to the *array*, and challenges to the *polls*.

*Challenges to the array* are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made on account of partiality, or some default in the sheriff, or his under officer, who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coronors or elisors, will also be sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array. *Co. Lit.* 156: *Selden Baronage*, II. 11. But an unexpected use having been made of this dormant privilege by a spiritual lord (the Bishop of Worcester, *M.* 23 *G. 2 B. R.*) it was first abolished by the stat. 24 *G. 2. c.* 18. (25 *G. 3 c.* 31. *Ir.*); and by the 6 *G. 4. c.* 50. § 28. it is declared that no challenge shall be taken to a panel for want of a knight's being returned thereon.

Also by the policy of the ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration, and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. For, living in the neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed



to know before-hand the characters of the parties and witnesses, and therefore they knew better what credit to give to the facts alleged in the evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors coming out of the immediate neighbourhood would be apt to intermix their prejudices and partialities in the trial of right. And thus our law was so sensible of, that it has for a long time been gradually relinquishing this practice; that judges and justices cannot be challenged, the number of necessary jurors in the whole panel, which, in the reign of Edward III. were constantly six, being in the time of *Fortescue* reduced to four. *Gilb. Hist. C. P. c. 1: Fortesc. de Laud. Ll. c. 25.* Afterwards, indeed, stat. 35 *H. 8. c. 6.* restored the ancient number of six; but that clause was soon virtually repealed by stat. 27 *Eliz. c. 6.* which required only two. Also *Sir Edward Coke* also gives us such a variety of circumstances, whereby the courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. 1 *Inst.* 157. At length, by stat. 4 and 5 *Anne, c. 16.* it was entirely abolished upon civil actions, except upon penal statutes; and upon those also by stat. 24 *G. 2. c. 18.* the jury being, under that statute, only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood.

Those two acts have both been repealed by the 6 *G. 4. c. 50.* But that statute by § 13. directs the jury to be summoned from the body of the county, and not from any hundred, or any particular venue, within the county, and that want of hundredors shall be no cause of challenge.

The array, by the ancient law, might also be challenged, if an alien were party to the suit, and, upon a rule obtained by his motion to the court for a jury *de medietate linguæ*, such a one was returned by the sheriff, pursuant to the stat. 28 *Ed. 3. c. 13.* enforced by stat. 8 *H. 6. c. 29.* which enacted that where either party was an alien born, the jury should be one-half denizens, and the other aliens (if so many were forthcoming in the place), for the more impartial trial,—a privilege indulged to strangers in no other country in the world, but which was as ancient with us as the time of King Ethelred. But when both parties were aliens, no partiality was to be presumed to one more than another; and therefore it was resolved soon after the stat. 8 *H. 6.* that where the issue was joined between two aliens (unless the plea were had before the mayor of the staple, and thereby subject to the restrictions of stat. 27 *Ed. 3. st. 2. c. 8.*) the jury should all be denizens. *Yearb.* 21 *H. 6. 4.*

The above acts are repealed by the 6 *G. 4.*

c. 50; but by § 3. it is declared, in affirmance of the common law, that no alien shall serve on any jury, except only on a jury *de medietate linguæ*, which s. 47. is now restricted to trials for felonies or misdemeanors.

*Challenges to the Polls, in capita*, are exceptions to particular jurors. By the laws of England, in the time of *Bracton* and *Fleta*, a judge might be refused for good cause; but now the law is otherwise, and it is held, See *Bract. l. 5. c. 15: Fleta, l. 6. c. 37: Co. Lit.* 294.

Challenges to the polls of the jury (who are judges of fact) are reduced to four heads by *Sir Edward Coke*:—*propter honoris respectum; propter defectum; propter affectum; et propter delictum.*

*Propter honoris respectum*, as if a lord of parliament be impanelled on a jury, he may challenge himself; or have a writ of privilege for his discharge. *Co. Lit.* 156: 3 *Comm.* 361. But it seems doubtful if either party can challenge him, or any other person, who is merely exempt from serving by the 6 *G. 4. c. 50. § 2*: and see 2 *Hawk. c. 43. § 26.*

*Propter defectum*, as if a jurymen be an alien born this is defect of birth: if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo*. Under the word *homo* also, though a name common to both sexes, the female is, however, excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question, 'whether with child or not.' *Cro. Eliz.* 566. See this *Dict. tit. Ventre inspiciendo.*

But the principal deficiency is a defect of estate sufficient to qualify him to be a juror. See *ante*.

By 6 *G. 4. c. 50. § 27.* want of the qualification thereinbefore specified is a good cause of challenge; but the want of freehold (if the party is qualified in any other respects) shall not be a good cause of challenge in any case, civil or criminal, either by the crown or the party, nor as cause for discharging the juror on his own application.

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour; as, that a juror is of kin to either party within the ninth degree. *Finch. L.* 401. Or, according to *Lord Coke*, however remote the period (*Co. Lit.* 157), that

he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the parties' master, servant, counsellor, steward, or attorney, of the same society or corporation with him: all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. See further, 1 *Arch. Pr.* 294.

Challenges to the favour are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like, the validity of which must be left to the determination of triers, whose office it is to decide whether the juror be favourable or unfavourable. The triers, in case the first man called be challenged, are two indifferent persons named by the court, and, if they try one man, and find him indifferent, he shall be sworn; and then he and the two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest. *Co. Lit.* 158.

Challenges *propter delictum* are for some crime or misdemeanor, that affects the juror's credit and renders him infamous. As that he has been attainted of treason or felony, or convicted of some infamous crime, and has not received a pardon; 6 *G. 4. c. 50. § 3*; or endured the punishment for felony; 9 *G. 4. c. 32. § 3*; or that he is under outlawry or excommunication. 6 *G. 4. c. 50. § 3*.

A juror may himself be examined on oath of *voir dire, veritatem dicere*, with regard to such causes of challenge as are not to his dishonour or discredit, but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. *Co. Lit.* 158. *b.*: and see the notes there.

A principal challenge being found true, is sufficient without leaving it to triers; but if some of the jury are challenged for favour, they shall be tried by the rest of the jury whether indifferent. *Co. Lit.* 158. Where a challenge is made to the array, the court appoints the two triers, who are sworn, and then the cause of favour is showed to them, which may be called the issue they are to try; and if it is proved, then they give their verdict that they are not indifferently impanelled, and this is entered of record; but if the favour is not proved, then they say the jury were indifferently impanelled, and so the trial goes on, without making any entry of the matter. 1 *Bulst.* 114.

If one take a principal challenge against a juror, he cannot afterwards challenge that juror for favour, and waive his former challenge; but a challenge may be made to the polls after it has been made to the array. *Wood*, 592. A new jury is to be impanelled by the coroner, where the array is quashed for partiality, &c. of the sheriff. *Trials per pais*, 15.

If a plaintiff or defendant have action of battery, &c. against the sheriff, or the sheriff against them, it is cause of challenge; and if either of the parties have action of debt against the sheriff; or if the sheriff hath any parcel of land depending on the same title as the parties; or if he, or his bailiffs who returned the jury, be under the distress of either party, &c., these are good causes of challenge. Where one of the jurors hath a suit at law depending with the plaintiff, it is good challenge. *Stile*, 129. An action depending betwixt either of the parties and a juror implying malice, is cause of challenge; and a juror may be challenged for holding lands by the same title as the defendant. 2 *Leon.* 40. If a person owes suit of court, &c. to a lord of a hundred who is a plaintiff, it is a principal challenge, as he is within the distress of the plaintiff. *Dyer*, 176. But it is said to be no challenge, that a person is in debt to either party. 1 *Nels. Ab.* 426. A juror returned by a wrong name may be challenged and withdrawn, so that the jury shall not be taken; yet a *tales* may be granted. 1 *Lil. Ab.* 260. And if a juror declares the right of either of the parties, &c. it is cause of challenge; though it hath been ruled that it is not sufficient cause of challenge, that a juror delivered his opinion touching the title of the land in question, because his opinion may be altered on hearing the evidence. *Pasch.* 23 *Car. B. R.*

If one challenge a juror, and the challenge is entered, he may not have him afterwards sworn on the jury. And if the defendant do not appear at the trial when called, he loseth his challenge to the jurors, though he afterwards appear. 1 *Lil. Abr.* 259. When the jury appear at the trial, before the secondary calls them to be sworn, he bids the plaintiff and defendant to attend to their challenges, &c.

In a case where a person, not summoned on the jury, was sworn on the jury at *nisi prius* in the name of a person for whom a summons to serve on that jury was delivered, and to whose house the juror had succeeded, the irregularity being noticed before verdict, the court awarded a *venire de novo*. 6 *Taunton*, 460.

II. The Jury, after the proofs in a case are summed up, unless the case be very clear, withdraw from the bar to consider of their

verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If they eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. *Cro. Jac.* 21.

It has been lately decided that the delivery of refreshments to a jury while they are shut up to consider their verdict, affords no ground for setting the verdict aside, unless it were supplied by a party to the cause or to a jurymen whose holding out decided the verdict. *4 B. & Ad.* 681.

Also if the jury speak with either of the parties, or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. *Mirr. c. 4. § 24: Lib. Ass. fol. 40. pl. 11.* This necessity of a total unanimity seems to be peculiar to our own constitution. See *Barrington on the Statutes*, 19, 20, 21: *3 Comm. c. 23.* and *Mr. Christian's* notes there; and *post*, IV.

On the trial of a cause, after fifteen hours' consultation among the jury, the judge told them he thought "concession ought to be made by the minority to the majority." Three of the jury in consequence gave up their opinion, and a verdict was returned for the defendant: held no ground for a new trial. *4 B. & Ad.* 681: *1 N. & M.* 531.

After a juror is sworn he may not go from the bar until the evidence is given, for any cause whatsoever, until leave of the court; and with leave he must have a keeper with him. *2 Lil.* 123. 127. A witness may not be called by the jury to recite the same evidence he gave in court, when they are gone from the bar. *Cro. Eliz.* 189. Nor may a party give a brief or notes of the cause to the jury to consider of; if he doth, he and the jurors may be fined. *Moor.* 815.

If they agree to cast lots for their verdict, or to bring in guilty or not guilty, as the court shall seem inclined, they may be fined. *2 Lev.* 205: *Cro. Eliz.* 779.

The jury are to judge upon the evidence given, but the jurors may not contradict what is agreed in pleading between the parties; if

they do, it shall be rejected; and where the jury find the fact, but conclude upon it contrary to law, the court may reject the conclusion. *1 And.* 41: *10 Rep.* 56: *Co. Lit.* 22: *Hob.* 222. The jury may find a thing done in another county upon a general issue; and foreign matters done out of the realm, &c. *Moor. c. 238: Godh.* 33. Jurors having once given their verdict, although it be imperfect, shall not be sworn again in the same issue, unless it be in assise. *2 Cro.* 210.

A jury sworn and charged in case of life and member, cannot be discharged till they give a verdict. In civil cases it is otherwise: as where nonsuits are had, &c. And sometimes when the evidence has been heard, the parties doubting of the verdict, do consent that a juror shall be withdrawn or discharged. *1 Inst.* 154. 227.

A verdict, *vere dictum*, is either privy or public. A privy verdict is when the judge hath left or adjourned the court, and the jury being agreed, in order to be delivered from their confinement, obtain leave (in civil cases) to give their verdict privily to the judge out of court, which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, and therefore very seldom indulged, and cannot be given in treason and felony. *2 Bro. P. C.* 300: see *post*, IV. But the only effectual and legal verdict, is the only verdict; in which they openly declare to have found the issue for the plaintiff or for the defendant; and if for the plaintiff, they assess the damage also sustained by him. Sometimes if there arise in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdict attained, will find a special verdict, which is grounded on *stat. Westm. 2. 13 Ed. 1. c. 30. § 2.* And herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action they then find for him; if otherwise, then for the defendant. This is entered at length on record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried. Another method of finding a species of special verdict is where the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law. But in both these instances the jury may, if they think proper,



take upon themselves to determine, at their own hazard, the complicated question of fact and law; and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or the defendant. *Litt.* § 386: 2 *Comm. c.* 23. It may be sufficient in this place to remark, that in case the jury find against what in the opinion of the court above is law, such court will repeatedly grant a new trial, till what they consider to be a proper verdict is found. This might alone be an answer as to the juries being judges of law in civil cases; but see *post*, IV. 2. and this Dict. tit. *Trial* (*New Trial*.)

It was an ancient doctrine, that such evidence as the jury might have in their own consciences, by their private knowledge of facts, had as much right to sway their judgment, as written or parol evidence delivered in court. And therefore it hath been often held, that though no proofs be produced on either side, yet the jury might bring in a verdict. *Yearb.* 14 *H.* 7. 29: *Plowd.* 12: *Hob.* 227: 1 *Lev.* 87. For the oath of the jurors, to find according to their evidence, was construed to be, to do it according to the best of their own knowledgo. *Vaugh.* 148, 149. This seems to have arisen from the ancient practice in taking recognitions of assise, at the first introduction of that remedy; the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence, or receiving any direction from the judge. *Bract.* l. 4. tr. 1. c. 19. § 3: *Fleta*, l. 4. c. 9. § 2. And the same doctrine (when attaints came to be extended to trials by jury, as well as to recognitions of assise) was also applied to the case of common jurors; that they might escape the heavy penalties of the attainit, in case they could show, by any additional proof, that their verdict was agreeable to the truth, though not according to the evidence produced; with which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was again explored, when attaints began to be disused, and new trials introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, *viz.* that the verdict was given without, or contrary to, evidence. And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court. See

*Styl.* 233: 1 *Sid.* 133. See further, *tit.* *Trial*. *Verdict*, and *post*.

III. 1. THE TRIAL BY JURY, in criminal cases, is more peculiarly the grand bulwark of the liberties of every subject of Great Britain; and is secured, as has already been mentioned, by the great charter. 9. *H.* 3. c. 29.

The antiquity and excellence of this trial, in civil cases, has already been explained at length. The arguments in its favour hold much stronger in criminal cases. Our laws has therefore wisely and mercifully placed the strong twofold barrier of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It has, with excellent forecast, contrived, that no man should be called to answer for any capital crime, unless on the preparatory accusation of twelve or more of his fellow-subjects, the grand jury: and that the truth of every accusation should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; unawed by the power of the monarch, and unstained by the weakness or wickedness of those who are called upon to exercise this invaluable privilege.

The grand jury generally consists of twenty-four men of greater quality than the other, chosen indifferently out of the whole county by the sheriff; and the petit jury consisteth of twelve men, of equal condition with the party indicted, impanelled in criminal cases, called the jury of life and death: the grand jury find the bills of indictment against criminals, and the petit jury convict them by verdict, in the giving whereof all the twelve must agree: and according to their verdict the judgment passeth. 3 *Inst.* 30, 31. 221. See *tit.* *Grand Jury*, *Indictment*.

When a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon his country, which country the jury are, the sheriff of the county must return a panel of jurors.

The petit jury of the trial of prisoners must be returned by the sheriff according to the provisions of the 6 *G.* 4. c. 30., which applies equally to criminal as to civil cases, the same panel being returned for both. See *ante*, I.

*Challenges* may be made in criminal cases, either on the part of the king, (the prosecution,) or on that of the prisoner; and either to the whole array or to the separate polls, for the very same reasons that they may be made

in civil causes. For it is here at least as necessary as there, that the jury be liable to no objection; that the sheriff or returning officer be totally indifferent; and that where an alien is indicted, the jury should be half foreigners, if so many are found in the place: this latter privilege, however, does not hold in treasons, aliens being very improper judges of the breach of allegiance. See 2 *Hawk. P. C. c. 43. § 37*: 2 *Hal. P. C. 271*: and *ante*, I.

If a sheriff return a jury to try an indictment in which he is prosecutor, it is good cause to challenge the jury: but after conviction it cannot be moved in arrest of judgment. *Leach*, 119.

To say of a person to be tried for any crime, that he is guilty, or will be hanged, &c. is good cause of challenge; but the prisoner must prove it by witnesses, and not out of the mouth of the jurymen, who may not be examined; and though a jurymen may be asked upon a *voir dire*, whether he hath any interest in the case, or whether he hath a freehold, &c. yet a jurymen or witness shall not be examined whether he hath been convicted of felony, or guilty of any crime, &c. which would make a man discover that of himself which tends to make him infamous, and the answer might charge him with a misdemeanor. 1 *Salk*. 153.

Challenges for cause may be without stint in both criminal and civil trials. But in criminal cases, at least in capital ones, there is in favour of life allowed to the prisoner an arbitrary and capricious species of challenge, to a certain number of jurors, without showing any cause at all: a provision full of that tenderness and humanity to prisoners for which the English laws are justly famous. This is grounded on two reasons, viz. the sudden impressions and unaccountable prejudices, which every one is apt to conceive on the bare looks and gesture of another; and the consideration that the very questioning a person's indifference may provoke resentment;—a juror therefore challenged for insufficient cause may afterwards be peremptorily challenged.

This privilege of peremptory challenges, though allowed to the prisoner, was denied to the king, by the 33 *Ed. 1. st. 4*. And by the 7 *G. 4. c. 50. § 29*. the king shall challenge no jurors without assigning a cause certain, to be inquired of according to the custom of the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged: and then, and not sooner, the king's counsel must show the cause, otherwise the jurors shall be sworn. 2 *Hawk. P. C. c. 43. § 3*: 2 *Hal. P. C. 271*: *Raym.* 473.

And this practice is the same both in trials for misdemeanors, and for capital offences. 3 *Harg. St. Tr.* 519.

The peremptory challenges of the prisoner to the jury were settled by the common law at the number of thirty-five, that is, one under the number of three full juries: and if a prisoner peremptorily challenged above that number, and would not retract his challenge, he was formerly to be dealt with as one who stood mute, or refused his trial, by sentencing him, in cases of felony, to the *peine forte et dure* (pressing to death, now totally abolished. See that tit. and tit. *Trial*), and by attaining him in treason. And so the law stands at this day, in England, with regard to treason of any kind.

But by the 6 *G. 4. c. 50. § 29*. no prisoner shall be admitted to any peremptory challenge above the number of twenty in murder or felony.

By the stat. 7 and 8 *G. 4. c. 28. § 3*. if any one indicted for treason, felony, or piracy, shall challenge peremptorily a greater number of the jury than he is entitled by law to do, such challenge shall be entirely void, and the trial shall proceed as if no such challenge was made.

On issue joined on the republican of *nul tiel record* in a counterplea of felony, the prisoner is entitled to challenge any of the jurors before they are sworn upon that issue. *Leach*. 450.

In a collateral issue (as of identity, &c.) the prisoner is not allowed any peremptory challenge, because his life is not in jeopardy. *Bl. Rep.* 6.

Upon the trial of three persons for high treason, *Holt, C. J.* told them, that each had liberty to challenge thirty-five of the jury peremptorily, but if they intended so to do, they must be tried separately and singly, and as not joining in the challenges: but if they intended to join in challenges, they could challenge but thirty-five in the whole, and might be tried jointly on the same indictment. 3 *Salk.* 81.

If, by reason of challenges, or the default of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded, as in civil causes.

When at length the number of twelve is completed, they are sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give according to their evidence." 4 *Comm.* 27.

In criminal cases, as in forgery, perjury, and the like, the prosecutor cannot (after the jury is once charged with the prisoner) withdraw a juror, by reason of being unprepared with

any necessary evidence in support of the prosecution; though it seems this may be done where the case is somewhat of a civil nature, as an indictment for non-payment of money pursuant to a judge's order, or for the non-repair of a road, &c. 2 *Str.* 984.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict; but they are to consider of it, and deliver it in with the same form as upon civil causes; only they cannot, in a criminal case, which touches life or member, give a privy verdict. See 1 *Inst.* 227: 3 *Inst.* 110: *Fost.* 27: 2 *Hal. P. C.* 300: 2 *Hawk. P. C. c.* 47. § 1, 2. But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court. 3 *St. Tr.* 731: 4 *St. Tr.* 231. 455. 485.

On the state trials for high treason, at the sessions-house in the Old Bailey, London, under a special commission in 1794, against several persons charged with having formed the destructive project of a Convention of the people, to overthrow the monarchy and the constitution, the jury on each prisoner were kept together in the custody of the sheriff or his bailiffs night and day, for several days successively, during the whole of the proceedings on each trial, and till they gave their verdicts. The court adjourned from evening till morning; and also once in the day for the purpose of refreshment, and from Saturday evening till Monday morning, when Sunday intervened. The sheriff was charged to see that no improper communication was had with the jury during these intervals. And the first jury having been sent several nights to an hotel in Covent Garden, at some distance from the court, a slight suspicion arising that they were not kept quite free from extraneous information, the subsequent juries were accommodated with beds in rooms nearly adjoining the court.

Similar precautions have been taken on subsequent important occasions.—But in a case where, on the trial of an indictment for a misdemeanor, which continued more than one day, the jury, without the knowledge or consent of the defendants separated at night, the Court of K. B. held that the verdict was not, therefore, void, and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communication having taken place. 2 *B. & A.* 462.

A culprit was indicted for murder. The jury were sworn, and part of the evidence given, but before the trial was over, one of the jurymen was taken ill, went out of the court with the judge's leave, and presently

after died. The judge, doubting whether he could swear another jury, discharged the eleven, and left the prisoner in gaol. The court was moved for a writ of *habeas corpus*, to bring up the prisoner that he might be discharged, having been once put upon his trial. This being a new case, the court said they would advise with the other judges upon it; and afterwards they all agreed that the prisoner might be tried at the next assises, or the judge might have ordered a new jury to have been sworn immediately. *Mich. 1. 67.* 3. *R. v. Gould*, 4 *Taunt.* 309: 3 *Camph.* 207. But the usual course seems to be to re-swear the remaining eleven, together with the new juror, in which case, however, the prisoner should be offered his challenges over again as to the eleven. *Russ. & R.* 224: 2 *Leach*, 620.

So if a prisoner (with whom the jury are charged) be by sudden illness during the trial rendered incapable of remaining at the bar, the jury may be discharged from the trial of that indictment, and the prisoner on his recovery tried by another jury. 2 *Leach*, 546.

A jurymen may act on his own knowledge previously acquired, in forming his mind to a particular verdict; but the proper course is in such case to inform the court (before he is sworn on the jury) that he has material evidence to give, either for or against the prisoner, in order that he may be sworn as a witness instead of a juror. Should he be sworn on the jury without making this communication, he cannot state facts within his own knowledge to the court, or to his brother jurymen without being sworn. 1 *Salk.* 405.

The verdict in a criminal case publicly and openly given may be either general, guilty, or not guilty; in which precise terms alone a general verdict must be given; or special, when it must set forth all the circumstances of the case, and pray the judgment of the court whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all.

This special verdict is where the jury doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict if they think proper so to hazard a breach of their oaths: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attainat at the suit of the king, but not at the suit of the prisoner. 2 *Hal. P. C.* 310: 4 *Comm.* 361. c. 27. See *post*, IV. 2.

The instances which formerly happened of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the di-



rection of the judge, were arbitrary, unconstitutional, and illegal; and indeed it would be a most unhappy case for the judge himself, if the indictment, they must find the defendant the prisoner's fate depended on his directions; guilty; see *R. v. St. Asaph, Dean*, and *R. v. Withers*, 3 Term Rep. 428; without adverting judge's opinion must rule the verdict, the trial to any other circumstances, such as whether by jury would be useless. 2 Hal. P. C. 313, the paper were in their opinion a libel, or published with a malicious, seditious, &c. intention.

Yet in many instances where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench; for in such cases it cannot be set right by attain; 1 Lev. 9: *T. Jones*, 163: 10 St. Tr. 416; as the party is found guilty in fact, by twenty-four. 1 Rol. 280. l. 2. 7. But the court have never interfered even to grant a new trial where a prisoner is once acquitted; however contrary the verdict might be to the opinion of the judge, or to what, in the eyes of all but the jury, might be deemed the real justice of the case. See 2 Hawk. P. C. c. 47. § 11, 12; where it is positively stated as settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal. See this Dict. tit. Trial. (New Trial.)

A jury have been permitted to recal their verdict; as where one was indicted of felony. the jury found him not guilty, but immediately before they went from their bar, they said they were mistaken, and found him guilty, which last was recorded for their verdict. *Plowd.* 211.

2. The question whether juries are, or are not, judges of law as well as of fact, has been long agitated with great zeal and energy.

Juries may, by a general verdict of acquittal in criminal prosecutions, prevent the case from coming under the final consideration of the court; who, in that event, have no opportunity of deciding on the question of law. But in cases of conviction, it is the established rule, that the judges of the court in which the prosecution is carried on, may arrest the judgment, or grant a new trial, where they are of opinion that the offence is not such as is charged in the indictment; that the indictment is defective in charging it; or, that the verdict is against evidence. See *Brown's Ca.* *Leach's Crown Law*, p. 135. c. 77. Thus much, therefore, appears indisputable, that in one event the court are the acknowledged judges of the law, as the jury are of the fact. and that the latter have the absolute power of acquittal in criminal cases; but not of conviction; a provision, indeed, full of that wisdom and mercy which so eminently characterise the English laws.

This litigated question has principally arisen on prosecutions for libels; in which it had for a long time been the usage of the judge to direct the jury, that if the fact of the publica-

The stat. 32 G. 3. c. 60. (extended to Ireland by 33 G. 3. c. 43. *Irish*), after reciting that "doubts had arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant, on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same, to give their verdict upon the whole matter in issue;" enacts, that "on every such trial, the jury, sworn to try the issue, may give a general verdict of guilty or not guilty, upon the whole matter put in issue, upon such indictment or information; and shall not be required or directed, by the court or judge, before whom the indictment, &c. shall be tried, to find the defendant guilty, merely on the proof of the publication, by such defendant, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment." § 1.

But it is provided by the said statute, that the court or judge shall, according to their discretion, give their opinion and directions to the jury on the matter in issue, as in other criminal cases; that the jury may also find a special verdict: and that in case the jury shall find the defendant guilty, he may move in arrest of judgment, as by law he might have done before the passing of the act. § 2, 3, 4.

It is observable, that as the rule on this subject laid down by Lord Coke, 1 Inst. 155, b. is in a negative way: "*ad questionem facti non respondent, iudices, ad questionem juris non respondent juratores*—judges are not to answer to the question of fact; juries are not to answer to the question of law;" so that the statute 32 G. 3. in the same kind of language provides, that "the jury shall not be required or directed to find a verdict of guilty, merely on the proof of publication, and the sense ascribed to the paper." The statute does not proceed any further to state what matters may or may not be given or produced in evidence in such trials: nor does it say one word positively as to the right or province of the jury to decide the question of law. The doubt expressed by the act to have been entertained is, whether it were competent to the jury to give their verdict upon the whole matter in issue. Now, wherever the question of law is in issue, it is always tried by the court on a demurrer,

and is never submitted at all to a jury. On an issue of fact (such as that joined on all indictments is) the law is never in dispute.

The provision in the act, "that in cases where the jury shall find a verdict of guilty, the defendant may move in arrest of judgment, as by law he might have done before the passing of the act," seems as express a denial of the right of the jury to determine the question of law as could possibly be framed; since that question can never arise on a verdict of not guilty. It was doubtless, adopted in *mayorem cautelam*; lest by any forced construction, the statute should have been interpreted as taking into consideration the question how far the jury could act as judges of law.

The whole fallacy of the controversy seems to have originated, first, from the complication of fact and law, which is more apparent in prosecutions for libel than in other criminal cases; and, secondly, from confounding the terms *power* and *right* as synonymous; faculties frequently so similar in their operation, that it requires the discrimination of a penetrating mind to assign the effects arising from either to their proper source. The jury have the power of acquittal, absolute and uncontrolled; except heretofore, by the tedious and now repealed process of attain: which, though it might punish the jury for their verdict, yet could not convict the defendant whom they had acquitted; and it was even doubted whether such attain could be maintained, in a criminal case, against a jury.

There is no doubt that before the passing of the 32 G. 3. c. 60. if a jury were convinced either that the paper alleged to be a libel was not such in law, or that the defendant published the same through an innocent negligence, or inadvertence, they had always the power of giving a verdict of acquittal, which could never be called in question. Whether that statute has conferred any further privilege on them is left for the reader to determine, after considering the foregoing observations, and those which follow, extracted from two most learned, ingenious, and constitutional writers.

On the trial of John Li. burne for treason, in 1649, high words passed between the court and him, in consequence of his stating that the jury were judges both of law and fact, and citing passages in 1 *Inst.* 228. a. to prove it. 2 *St. Tr.* 4. ed. 69. In the case of *Penn* and *Meade*, who, in 1670, were indicted for unlawfully assembling the people, and preaching to them, the jury gave a verdict against the directions of the court in point of law, and for this they were committed to prison. But the commitment was questioned, and on a *habeas corpus* brought in the Court of Common Pleas, it was declared illegal, *Vaughan*, chief

justice, distinguishing himself on the occasion by a conclusive argument in favour of the rights of a jury. He said, "that as every issue of fact must be supported by testimony, upon the truth of which the jury are exclusively to decide, they cannot be guilty of any legal misdemeanor in returning their verdict, though apparently against the direction of the court in point of law; since it can never be proved that they did believe the evidence upon which the direction of the court must have rested." *Vaugh.* 164. See *Phillipps's State Trials*, *Bushel's Ca.*: 1 *Freem.* 1: *Vaugh.* 135. However, the contest did not cease, as appears by *Sir John Hawles's* famous "Dialogue between a Barrister and a Juryman," which was published in 1680, to assert the claims of the latter, against the then current doctrine, decrying their authority. Since the revolution also many cases have occurred, in which there has been much debate on the like topic. See *Hardw.* 23: *Franklyn's Ca.* 9 *St. Tr.* 275: *Peter Zenger's ib.*: *Owen's Ca.* 10 *St. Tr.* 196. *App.*: *Woodfall's Ca.*: 5 *Burr.* 261. *R. v. Shipley, Dean of St. Asaph.* By attending to the cases before referred to, it will be easy to trace the progress of the controversy on the limit of the jury's province. 1 *Inst.* 155. b. *in n.*

*Mr. Hargrave*, in one of his notes to *Coke* upon *Littleton*, gives the following as his opinion, which, from the known learning and probity of the writer, is deserving very serious attention.

"On the one hand," says he, "as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact; such a verdict necessarily involving both. For this there is the authority of *Littleton* himself, who writes, that, 'If the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.' § 368. 288. a. But, on the other hand, it seems clear, that questions of law generally and more properly belong to the judges, and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations:—*First.* If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, apparently without exception, that issues of law are ever determined by the judges, and only issues of fact are tried by a jury. 1 *Inst.* 71. b. *Secondly.* Even when an issue of fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact, to which the evidence applies, may so far draw the cause

from the cognizance of the jury; for in that case, the law is referred for the decision of the court, from which the issue of fact comes; and the jury is either discharged, or, at the utmost, only ascertains the damages. 1 *Inst.* 72. a.: *Cocksedge v. Fanshawe*, Dougl. 119. 134: *Cort v. Birkbeck*, Dougl. 218. 225: *Bull. N. P.* 2d ed. 313. *Thirdly*. The jury is supposed to be so inadequate to finding out the law, that it is incumbent on the judge who presides at the trial to inform them what the law is; and as a check to the judge in the discharge of his duty, either party may, under *stat. Westm.* 2. c. 31. make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See 2 *Inst.* 426: *Trials per pais*, 8 ed. 222. 466: *Fabrigas v. Mostyn*, 11 *St. Tr.*: *Money v. Leach*, 3 *Burr.* 1742: *Bull. N. P.* 2d ed. 315. [This Dict. tit. *Bill of Exceptions*.] *Fourthly*. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly, indeed, it was doubted whether, in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict: but the contrary was settled in *Downman's Ca.* 9 *Co.* 11 b.; and the rule now holds both in criminal and civil cases without exception. See 1 *Inst.* 227. b.: *Staunf. P. C.* 165. a.: 2 *Ld. Raym.* 1494. *Fifthly*. Whilst attaints, which still subsist in law (see *ante*), were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprised of it by the judges; because if they mistook the law (against the direction of the judge), they were in danger of an attaint. 1 *Inst.* 223. a.: *Hob.* 227: *Vaugh.* 144: 2 *H. H. P. C.* 310: *Gibb. C. P.* 2d edit. 128. *Sixthly*. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to control the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. *Staunf. P. C.* 165. a.: *Plowd.* 114. a. b.: 4 *Co.* 42. b.: *Hal. H. P. C.* i. 471. 476, 477; ii. 302. [See *ante*, III.] *Lastly*. The courts have long exercised the power of granting new trials in civil cases, where the jury finds against that which the judge, trying the cause, or the court at large, holds to be law; or where the jury finds a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. *Hardw.* 26. [And the court will grant such new trial, even a second and a third time, till the jury give a general verdict

consonant to law; or a special verdict, on which the court may pronounce the law. See *Tindul v. Brown*, 1 *Term Rep.* 167. and this Dict. tit. *Trial* (*New Trial*.)] Though too in criminal and penal cases the judges do not claim such a discretion against persons acquitted, the reason presumed is in respect of the rule, *nemo his punitur aut vexatur pro eodem delicto*; or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence: and if this be so, it only shows, that on that account an exception is made to a general rule. 4 *Comm.* 361: 2 *Ld. Raym.* 1585: 2 *Str.* 899: 4 *Co. a.*: *Wingate's Maxims*, 695. Upon the whole (says *Mr. Hargrave*), the result is, that the immediate and direct right of deciding upon questions of law is entrusted to the judges; that in a jury it is only incidental. That in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them: and therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a crime is enabled, by the general plea of not guilty, to have the benefit of a trial, in which the judge and jury are a check upon each other. 1 *Inst.* 155. a. &c. in n.

It will be perceived from the above extract, that *Mr. Hargrave* admits the incidental right of the jury to determine questions of law; in which he goes further than the writer from whom the subsequent long quotation is introduced.

*Mr. Wynne*, in his *Eunomus*, or Dialogues concerning the Law and Constitution of England, *Dial.* 3. § 53. *et. seq.* examines the dispute, very elegantly, in the following manner:—

"All that may here be said upon the subject of juries is agreeable to the established maxim above recognised, *ad questionem facti*, &c. This is the fundamental maxim acknowledged by the constitution; and yet this is the maxim which those who have advanced doctrines against the constitution have ever in their mouths.

"Fundamental maxims of law or government are so plain and intuitive, that every body understands them; those of the lowest capacity make them the standard in their own breasts to judge by. And therefore they who would lead a party in a wrong cause with success, must do it not by disputing fundamentals, but by avowing and afterwards perverting them. This seems to be much the case in the present contested question.



"It is undoubtedly true that the jury are judges, the only judges of the fact: is it not equally within the spirit of the maxim, that judges only have the competent cognisance of the law? Can it be contended that the jury have, in reality, an adequate knowledge of law; or that the constitution ever designed they should? Every country village has its jurors, whom nobody will suppose to be lawyers: and it is from the generality that we are to form our notions of the nature of a jury, as the law has prescribed it; not from the abilities of any particular man, or any particular jury. But it is said, and it is an argument not a little insisted upon, that the law and the fact are often complicated. Then it is the province of the judge to distinguish them; to tell the jury, that supposing they believe that such and such facts were done, what the law is in such circumstances. This is an unbiassed direction: this keeps the province of judge and jury distinct: the facts are left altogether to the jury, and the law does not control the fact, but arises from it. If the law is thought to be mistaken, the direction of the judge that gave it may be considered in another court; and if it is mistaken, the verdict in conformity to it will be of no effect. But a verdict cannot be complained of as contrary to the direction of law given; it can scarcely be concluded it is: and the reason is, because the law arises only from the fact; and the jury previously find the fact in their own mind, before they couple it with the law pronounced from the bench to make up their verdict. Every verdict is compounded of law and fact; but the law and the fact are always distinct in their nature. See *Vaugh.* 146. 152.

"Littleton and his commentator have been made advocates on this occasion; and have thought to say, though at the peril of contradicting themselves an hundred times, that jurors are the judges of the law as well as of the fact, in the passage already repeatedly cited and alluded to. 1 *Inst.* 228. a.—'If they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge.' See 2 *Ld. Raym.* 1424: *Hardw.* 16. But does not the judge betray his trust in not telling them how the law is? If he does not tell them, it is true they may suppose it to be so, and find accordingly: if he does tell them how the law is, they are to compare the fact by the law; but cannot of their own head say what the law is. The law is never submitted to them, as part of their inquiry. *Vaugh.* 143. No finding can in general be complained of, as against a judge's direction; but as against the weight of evidence, and in that case the remedy is well known. The warrant of com-

mitment, as stated in the return in *Bushell's* case, was nevertheless expressly granted against the jury, for finding contrary to the direction of the judge in a matter of law. Which part of the return, *Vaughan, C. J.*, said, literally taken, was insignificant and not intelligible; and if it had any meaning, stripped of the veil and cover of words, was a direct argument for the abolition of the form of trial by jury; because the judge in such cause must resolve both the law and the fact. True it is, the chief justice does there put a particular case of a jury finding against a judge's direction, which in general, for the reason he has given, is impossible: and that case is, where a judge asks the jury, previous to the verdict, 'How they find such a particular thing propounded to them?' If on their giving an answer the judge adds, 'Then, as you agree to find the fact so, the law is for the plaintiff or defendant:' and if the finding is afterwards contrary to what he declares, they do in that case find contrary to the judge's direction in matter of law. But in that case, the regular order of proceeding is directly inverted; the judge makes them find a particular fact previous to his declaration of the law: whereas, what *Vaughan, C. J.*, calls the discreet and lawful assistance of a judge to a jury, is always to give an hypothetical direction to the jury; not by previously having their answer to the fact, and thereupon declaring the law to control their verdict; but to leave their verdict free, by saying, 'If you find the fact so and so, then the law is for the plaintiff; or you are to find for the plaintiff; or *vice versa*.' See *Vaugh.* 136. 143. 144.

"All this reasoning shows, that the province of judge and jury, as to law and fact, are separate and exclusive: that in the general and regular form of proceeding, it is impossible for a verdict to be said to be against a direction in law; but if the case should happen, the verdict must be rectified; for this plain reason, that it appears in such a case the jury have taken upon them the administration of the law, which is entirely out of their jurisdiction:

"Besides what has been already said, it seems undeniably to appear, that juries are designed by the constitution to be judges of the fact only, and not of the law, for these reasons:—*First*, Because the contrary supposition is against the plain tenor of their oath. The form of every oath administered in a court of justice is either according to common law, or as required by some act of parliament. 3 *Inst.* 165. An oath of office contains a summary description of duty; and the terms of a juror's oath are so strictly applicable to fact only, that they do by the

strongest implication exclude any cognizance of the law. Every juror, in a cause, is enjoined by his oath 'well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence.' Now to consider this by parts, 1. He is *well and truly to try*. How can one well and truly try any point but according to his knowledge? Either, as has been contended, according to his own previous knowledge, or according to the information he meets with at the time of the examination. A juror may have knowledge of both kinds as to the fact; but it is not requisite he should have either as to the law. 2. The oath directs the jury to try *the issue joined*. This issue is always a fact denied on one side, and affirmed on the other; where the law is directly in dispute, the issue (as has been repeatedly observed in the remarks on the stat. 32 G. 3. c. 60.) goes before the court, and not at all before a jury. And though during the trial of an issue of fact, points of law do very often incidentally arise, it does not follow from thence that they are under the cognizance of the jury; any more than disputes about practice, the competence of witnesses, or whether such and such evidence is admissible; which do as often arise in the course of a trial, and were never contended to belong to the jury. The law, therefore, because it arises out of the fact, and because in the end it is to govern it, does not, on that account, appertain to the jury, if from other considerations it appears to be improper. 3. What can be meant by a *true verdict*? Truth, both philosophers and lawyers will refer to fact, rather than opinion about law: when it is referred to opinion, we mean the agreement of a proposition with our own ideas, or the ideas of others. But how those who have such faint and imperfect ideas as jurors have of law, can discern this agreement, or judge of the truth in such a case, every reasoning man must be at a loss to determine. 4. But to exclude the possibility of a doubt in this question, their oath does not only direct them to find the truth, but tells them what rule or measure they are to go by in their inquiry. They are to find a true verdict according to the evidence. This branch of the oath, which governs the whole, can be applied only to the fact. The fact only is in evidence, and consequently the law not being in evidence is not before them. See *Vaugh.* 143. Thus in the clearest terms does the oath limit and define their duty.

"But, *secondly*, in the course and management of a trial, other persons are likewise under an oath, and have duties incumbent on them also. Now without looking into the oath of a judge, it will be easily understood to be inconsistent with his duty and his oath to be

a mere cypher on the bench. A judge, however, will be little more than a cypher, either if he sits and says nothing, or if what he does say goes for nothing. The jury's ignorance of law makes it necessary for the judge to tell them what the law is in the case before them: but he tells it them surely to very little purpose, if they think themselves afterwards at liberty to determine otherwise.

"Other arguments there are also which deserve to have weight on this question, drawn from the forms of pleading and the general frame of records; than which none perhaps can be produced more worthy to be relied on.

"1. It is well known in constant experience, that by the mode of drawing a demurrer, the matter in debate is referred altogether to the decision of the court, and in reality never does go before a jury. By a demurrer, the bare law is in question; the facts being constantly admitted, if clearly expressed. The reason of admitting the fact in that case seems to be, that without such confession of the fact the court have no ground to go upon; for the law in every case arises from the fact. The case then must really exist before the legality of it, as to circumstances can be determined. But if a matter where the law only is in question, is never, nor can in its nature be, sent to a jury, it proves almost to a demonstration, that the jury have nothing to do with bare law. 2. Nor is the argument to be drawn from the nature of a special verdict of less force on this occasion. The ignorance of the jury as to the law in the case, and their reference to the court, is the constant language of a special verdict. Not that the jury can in reality be supposed more ignorant of the law arising in such a case, than they are in a thousand others, where all is concluded under a general verdict. Indeed, in that light, the common juries are now much improved in their knowledge of the law, there being very few instances of their expressing their doubts in special verdicts at this day. The reason of having special verdicts was, at all times, in order to have the point of law solemnly determined, and remain on record, without which, in many cases, no writ of error could have been brought in former times, nor the point reserved for the consideration of the court. The usage of stating a case, and having a general verdict, subject to the opinion of the court afterwards on the circumstances of the case, is an invention of late times; and is found in practice to be less expensive, and to answer to the parties as well as a special verdict: But the case stated, and the special verdict, are equally proofs of what is here contended for, by expressly leaving the law to the court for their determination. See *ante*, III.

\* The professed patrons of the right of the jury to be judges of the law have principally applied their doctrine, as has been already remarked, to the case of libels; but they were aware that the conclusion would be general, though the case was particular; because the right of the juries to determine the law in the case of libels, could only be a consequence of their right to find the law in other cases. There seems to be this fatality that has in practice attended the case of libels, that the law and the fact have not been always accurately distinguished: and perhaps in feverish times, some particulars have been contended for as implications of law, which ought rather to have been considered as facts, and left to the jury. [An evil, and perhaps the only one, in some measure guarded against by the construction put on the stat, 32 G. 3. c. 60. mentioned at the beginning of this discussion.]

"It seems, however, generally, that any action, the *intention* of the agents, and every other circumstance under which that action was done, are equally facts, and as such cognizable by the jury; but whether that action, under all the circumstances in which it has been admitted or proved to have been done, is a crime or not, is what the law alone can determine; and the judges, whose breasts are the depositories of the law, alone can pronounce. Otherwise it is evident the quality of human actions, more especially of those that are in themselves indifferent, and have been defined by society alone, would be referred not only to a very variable standard, but an incompetent one. Apply this particularly to the case of libels, and the least reflection will be sufficient to show, that the power and province of juries is the same in case of libels as in every other case; and that in no case whatever a jury has, in its nature, a cognizance of law, though, by accident, the law may have been sometimes left to them."

To draw towards a conclusion of this long discussion, the very interesting nature of which must plead the editor's excuse for the foregoing multiplied extracts and observations.—There are some arguments in favour of the jury's right, as relates to criminal cases, which seem not answered by the remarks arising from the conduct of civil causes. In the first place, their oath is, that they shall "well and truly try, and a true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge, and a true verdict give according to the evidence." Now it is not expressed *what* they shall try; it is therefore inferred, that the whole of the case is submitted to their determination. But we must recollect that in this, as in all cases, an *issue* is joined, between the king and the

prisoner, of *Not Guilty* and *Guilty*. See this Dict. tit. *Pleading, Trial*. The verdict according to the evidence must be therefore on the issue, as in all other cases; and the fact only, not the law, is submitted to the consideration of the jury. Some doubts has arisen on the word *deliverance*; whether it applies to delivering the verdict; to the deliverance of the culprit from his charge and imprisonment; or whether it does not simply mean a true *deliverance* on, and consideration of, the evidence produced to them; which latter is the sense most approved by legal writers and historians on the subject. If, indeed, it does apply to the deliverance of the prisoner, still it must be a *true deliverance*, on proof of his innocence, or, rather, on failure in the proof of his guilt.

Another argument, which, at first, bears the appearance of more weight than those just mentioned, though it has not been frequently relied on, is this: That, from the very nature and words of the verdict, the jury are constituted judges of the law, as well as the fact, in criminal cases; that the words *Guilty*, or *Not guilty*, do not merely ascertain the commission or non-commission of any indifferent fact, but the commission of a *criminal* fact, or the being free from any crime, as the fact is not done, or as the fact though done were lawful, or performed without any illegal or criminal intention. That therefore the jury in terms decide, by their verdict, not only on the perpetration of the fact, but on the criminality annexed to it; since, if the fact be not criminal, no guilt is incurred; and therefore the verdict of *guilty* would be false, and of *not guilty* nonsensical; no guilt attaching to a praiseworthy, an indifferent, or an innocent act. Two answers suggest themselves; one, that the language in which alone the jury can deliver a general verdict, according to the rules positively prescribed to them by law, at all events allows the fact charged to be criminal, as far as the judgment or discretion of the jury on that question can be exercised, whatever may be the subsequent decision of the court. The second, that the language of the verdict, interpreted according to the rules of law, of practice, and of common sense, is this:—" *Guilty*, if the fact with which the prisoner is charged be sufficiently stated, and is a crime in the eye of the law." And that this is the true interpretation of the verdict of *guilty*, the right of the court to arrest the judgment, in case, on inspection of the record, they are of opinion that the fact charged is no crime, or, if a crime, is defectively charged, is undeniable proof. This right of the court to decide the law in the event of a verdict of *guilty* is recognized by stat, 32 G. 3. c. 60. already so often cited.

Still it may be objected that the jury by a



verdict of not guilty have a right to decide the law. But the fallacy of confounding the terms right and power has already been noticed; and it may be added that although several juries were successively to acquit several defendants on a charge of publishing the same libel, their verdicts could never be produced as precedents, in law, that another might not be indicted for the same libel, and found guilty by another jury; and this has actually happened. To put the case still stronger; it is by no means an uncommon circumstance, that where several criminals are included in the same indictment, they sever in their challenges, and are therefore tried separately; but it was never imagined that the conviction or acquittal of one, had the least effect upon the question of the guilt, or innocence of the others; whereas the decision of the court on an indictment, that the fact charged in it as a crime was not such, or was defectively charged, would quash the whole indictment against all; and be a precedent for arresting the judgment on any subsequent conviction, or indictment under the same circumstances. Why? Clearly because in one case the mere fact is decided, as relates to the individual accused; in the other the question of law, as relates to the crime charged.

IV. If a man assault and threaten a juror for giving a verdict against him, he is highly punishable by fine and imprisonment. 1 *Hawk. c. 21. § 3.*

No action can be maintained against a jurymen for a verdict, however wrongful and vexatious his conduct may have been. 1 *T. R. 513. 535.*

Neither is any one, either upon a grand or petit jury, liable to a prosecution in respect of a verdict given by him in a criminal matter. 1 *Hawk. c. 72. § 5: 1 Ld. Ray. 469.*

And it seems that jurors were not subject to any prosecution for false verdict, except by way of attain, which, as has been already mentioned, was abolished by the 6 *G. 4. c. 50. § 60.* But the following section declares that jurors consenting to embracery shall be still punishable as before by fine and imprisonment. See tit. *Embracery.*

The fining and imprisoning of jurors for giving their verdict bath several times been declared in parliament an illegal and arbitrary innovation, and of dangerous consequence to the government, and the lives and liberties of the subject. 2 *Keb. 180.* See also *Bushel's case, Vaugh. 135: 6 Howell's St. Tr. 999.*

By the common law, jurors returned and not appearing, shall lose and forfeit the issues returned upon them. See 35 *H. 8. c. 6. § 9.* And if a jurymen be called, and (being present) refuse to appear, or having appeared,

withdraw himself before he be sworn, the court may set a fine upon him at their discretion 2 *Hale, 309.*

And by the 6 *G. 4. c. 50. § 51. 53.* court of nisi prius, oyer and terminer, &c. held for the City of London, sheriffs, coroners, and commissioners upon any inquest or inquiry before them, may fine jurors for non-attendance. And by § 54. the same power is given to all inferior courts in any liberty, borough, &c.

For further matter incidental to the duty and office of a jury, see this Dict. tit. *Trial, Verdict.*

JURROCK. See *Jarrock.*

JUS. Law or right, authority and rule. *Lit. Dict.*

JUS ACCRESCENDI. Is the right of survivorship between joint-tenants. *Lit. 280: 1 Inst. 180.* See tit. *Joint-tenants*

JUS AD REM. An inchoate and imperfect right, such as a parson promoted to a living acquires by nomination and institution. 2 *Comm. 312.*

JUS ANGLORUM. The laws and customs of the West Saxons, in the time of the heptarchy, by which the people were for a long time governed, and which were preferred before all others, were termed *Jus Anglorum.*

JUS CORONÆ. The right of the crown; and it is part of the law of England, though it differs in many things from the general law relating to the subject. 1 *Inst. 15.* The king may purchase lands to him and his heirs, but he is seised thereof in *jura coronæ*; and all the lands and possessions whereof the king is thus seised, shall follow the crown in descents, &c. See tit. *King.*

JUS CURIALITATIS ANGLIÆ. See this Dict. tit. *Courtesy of England.*

JUS DELIBERANDI. The right of deliberating, which, by the law of Scotland, is given to an heir, who is not compellable to enter into the estate within a year and a day from the death of his ancestor.

JUS DUPLICATUM, is where a man hath possession as well as property of any thing. *Bract. lib. 4. tract. 4. c. 4: 2 Comm. 189.*

JUS GENTIUM, the law of nations. The law by which kingdoms and societies in general are governed. *Selden.* See tit. *Ambassador.*

JUS HABENDI ET RETINENDI. Right to have and retain the profits, tithes, and offerings, &c. of a rectory or parsonage. *Hughes's Parsons' Laws, 188.*

JUS HEREDITATIS. The right or law of inheritance. See tit. *Descent.*

JUS IN RE. Complete and full right. Such as a parson acquires, on promotion to a living, who, after nomination and institution, hath corporal possession delivered to him; for till

such delivery of corporal possession, he had only *Jus ad rem*. 2 *Comm*. 312.

**JUS MARITI**, is the right of a husband to his wife's goods and the rents of her heritage. *Scotch Dict*.

**JUS PATRONATUS**. A commission from the bishop directed to some persons, usually his chancellor, and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire who is the rightful patron of the church. If two patrons present their clerks, the bishop shall determine who shall be admitted by right of patronage, &c. on commission of inquiry of six clergymen and six laymen living near the church; who are to inquire on articles as a jury, whether the church is void? who presented last? who is the rightful patron, &c.? But if coparceners severally present their clerks, the bishop is not obliged to award a *jus patronatus*, because they present under one title; and are not in like case where two patrons present under several titles. 5 *Rep*. 102: 1 *Inst*. 116.

The awarding a *jus patronatus* is not of necessity, but at the pleasure of the ordinary, for his better information who hath the right of patronage; for if he will at his peril take notice of the right, he may admit the clerk of either of the patrons, without a *jus patronatus*. 1 *Leon*. 168. A bishop may award a *jus patronatus* with a solemn premonition to all persons, *quorum interest*, &c. where he knows not who is the patron, to give notice of an avoidance by deprivation, &c. *Hob*. 318. This inquiry by *jus patronatus* is to excuse the ordinary from being a disturber. See 3 *Comm*. 246. In whose name, and under what *teste* a *jus patronatus* is to issue, see stat. 1 *Ed*. 6. c. 2. § 3.

**JUS POSSESSIONIS**. A right of seisin or possession; and a parson hath the right to the possession of the church and glebe, for he hath the freehold; and is to receive the profits to his own use. *Pars. Law*, 188. See tit. *Parson*.

**JUS POSTLIMINII**. A right to a claim after re-capture, as applied in *maritime law*; derived from the Roman *Jus Postliminii*, which restored the citizen of Rome who had been made a slave to his threshold, i. e. his *franchise*. The term is, therefore, metaphorically used in our Admiralty Court as a resumption of an original inherent right to a re-captured British ship in the legal owners.

**JUS PRESENTATIONIS**. The right of the patron of presenting his clerk unto the ordinary to be admitted, instituted, and inducted into a church. See this Dict. tit. *Advowson*.

**JUS RECUPERANDI, ITRANDI, &c.** The right of recovering and entering lands, &c. All these rights following the relation of their objects, are the effects of the civil law. *Co. Lit*. 266.

**JUS RELICTÆ**. Is the right a wife hath after her husband's death, to a third of the moveables, if there be children; and one half if there be none. *Scotch Dict*.

**JUSTA**. A certain measure of liquor, *quasi justa mensura*; being as much as was sufficient to drink at once. *Mon. Aag. tom*. 1. pag. 149.

**JUSTICE, justitia.**] Is defined to be a constant, righteous inclination to give every one his due; or the act of doing what is right and just. *Chamb. Johnson, Locke, Instit*. The delaying justice is an obstruction to and kind of denial thereof; but this is understood of unnecessary and unjust delay, for sometimes it is convenient for the better finding out the truth, and preparation of parties, that they may not be surprised.

Justice and right shall not be sold, denied, or delayed. *Mag. Chart*. 9 *H*. 3. c. 29. Right shall be done to all without respect. *Stat. West*. 1. 3 *Ed*. 1. c. 1. Justice shall not be delayed for any command under the great seal, &c. 2 *Ed*. 3. c. 8: 14 *Ed*. 3. st. 1. c. 14: 11 *R*. 2. c. 10. See tit. *Habeas Corpus, Liberties*.

**JUSTICEMENTS**, from *justitia*, All things belonging to justice. *Co. on Westm*. 1. fol. 225. Also the effects or execution of justice or of jurisdiction.

### JUSTICES; *Justiciarii*.

Officers deputed by the king to administer justice, and do right by way of judgment. These are called justices because in ancient time the Latin word for a judge was *justitia*, and for that he hath his authority by deputation, and not *jure magistratus*. *Glanvil. lib*. 2. c. 6. See tit. *Judges*.

Of these justices there are various sorts, with various powers and duties, as hereafter shortly set forth under the subsequent titles *Justices of Assize, &c.*; and see this Dict. tit. *Courts, Chancery, Equity, King's Bench, Common Pleas, &c.*

**JUSTICES OF ASSIZE, justiciarii ad capiendas assisas.**] Such as were wont by special commission to be sent (as occasion was offered) into this or that country, to take assizes for the ease of the subjects; for, as these actions pass always by jury, many men could not, without damage and charge, be brought to London, therefore justices for this purpose, by commission particularly authorised, were sent to them. For it seems that the justices of the common Pleas had no power to take assizes till the stat. of 2 *R*. 2. c. 2. by which they were enabled to do it, and to deliver gaols. And the justices of the King's Bench have by that statute such

power affirmed unto them, as they had one hundred years before.

These commissions *ad capiendas assisas*, derived from the stat. West. 2. 13 Ed. 1. c. have of late years been settled and executed only in Lent, and the long vacation (called the king's sworn justices, associating to them now the Lent and Summer Assizes), when selves one or two discreet knights of each the justices and other learned lawyers are county. By stat. 27 Ed. 1. c. 1. (explained by at leisure to attend those controversies; 12 Ed. 2. c. 3.) assizes and inquests were all-whereupon it also falls out, that the matters loved to be taken before any one justice of the that were wont to be heard by more general court in which the plea was brought; associa-commissions of justices in eyre, are heard all ting to him one knight, or other approved man at one time with the assizes, which was not of the county. And, lastly, by stat. 14 Ed. 3. so of old, as appears by *Bracton*, lib. 3. c. 7. c. 16, inquests of *nisi prius* may be taken be-mum. 2. And by this means the justices of fore any justice of either bench (though the both benches, being worthily accounted the plea be not depending in his own court, or fittest of all others, and their assistants were before the chief baron of the Exchequer, if he employed in these affairs. That justices of be a man of law; or otherwise before the jus-assize and justices in eyre did anciently differ, tices of assize, so that one of such justices be appeareth by stat. 27 Ed. 3. st. 2. c. 5. And a judge of King's Bench or Common Pleas, or that the justices of assize and justices of gaol-delivery were different, is evident by stat. 4. their circuits in the respective vacations after Ed. 3. c. 3. The oth taken by the justices of Hilary and Trinity terms; assizes being allow-assize is all one with that taken by the justices ed to be taken in the holy time of Lent by of the King's Bench. Old abridgment of sta- consent of the bishops at the request of the tutes, tit. *Sacramentum Justiciorum*, Cowell. king, as expressed in stat. Westm. 1. 3 Ed. 1. See further tit. *Assize*, *Circuits*.

To what is said under this Dict. tit. *Assize*, may be added, that—

The courts of assize and *nisi prius* are composed of two or more commissioners, who are sent twice in every year, by the king's special commission, all round the kingdom (except London and Middlesex, where courts of *nisi prius* are holden in and after every term, before the chief or other judge of the several superior courts), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in Westminster Hall. See *Circuits*. These judges of assize came into use in the room of justices in eyre, *justiciarii in itinere* (or *itinerantes*); who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176, 22 H. 2. with a delegated power from the king's great court, or *aula regia*, being looked upon as members thereof; and they afterwards made their circuit round the kingdom once in seven years for the purpose of causes. *Co. Lit.* 293. They were afterwards directed by *Magna Charta*, c. 12. to be sent into every county twice a-year, to take (or receive the verdict of the jurors or recognitors in certain actions then called, recognitions in assizes; the most difficult of which they are directed to adjourn into the Court of Common Pleas, to be there determined. The itinerant justices were sometimes mere justices of assize, or of dower, or of gaol-delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita*.

*Bract. l. 3. tr. 1. c. 11.* But the present justices of assize and *nisi prius* are more immediately of assize and *nisi prius* are more immediately 30. which directs them to be assigned out of the king's sworn justices, associating to them now the Lent and Summer Assizes), when selves one or two discreet knights of each the justices and other learned lawyers are county. By stat. 27 Ed. 1. c. 1. (explained by at leisure to attend those controversies; 12 Ed. 2. c. 3.) assizes and inquests were all-whereupon it also falls out, that the matters loved to be taken before any one justice of the that were wont to be heard by more general court in which the plea was brought; associa-commissions of justices in eyre, are heard all ting to him one knight, or other approved man at one time with the assizes, which was not of the county. And, lastly, by stat. 14 Ed. 3. so of old, as appears by *Bracton*, lib. 3. c. 7. c. 16, inquests of *nisi prius* may be taken be-mum. 2. And by this means the justices of fore any justice of either bench (though the both benches, being worthily accounted the plea be not depending in his own court, or fittest of all others, and their assistants were before the chief baron of the Exchequer, if he employed in these affairs. That justices of be a man of law; or otherwise before the jus-assize and justices in eyre did anciently differ, tices of assize, so that one of such justices be appeareth by stat. 27 Ed. 3. st. 2. c. 5. And a judge of King's Bench or Common Pleas, or that the justices of assize and justices of gaol-delivery were different, is evident by stat. 4. their circuits in the respective vacations after Ed. 3. c. 3. The oth taken by the justices of Hilary and Trinity terms; assizes being allow-assize is all one with that taken by the justices ed to be taken in the holy time of Lent by of the King's Bench. Old abridgment of sta- consent of the bishops at the request of the tutes, tit. *Sacramentum Justiciorum*, Cowell. king, as expressed in stat. Westm. 1. 3 Ed. 1. c. 31. And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of assize to administer oaths in holy times; for oaths being of a sacred nature, the logic of those ages concluded that they must be of ecclesiastical cognizance. Instances thereof may be met with in the appendix to *Spalman's Original of the Terms*, and in *Parker's Antiquities*, 209. 'The prudent jealousy of our ancestors ordained that no man of law should be judge of assize in his own county wherein he was born or doth inhabit. *Stats. 4 Ed. 3. c. 2: 8 Rich. 2. c. 2: 33 H. 8. c. 24.* But this restraint is now taken off, as to justices of *oyer and terminer*, by stat. 12 G. 2. c. 27. See *post*, that title; and for further information on this head, this Dict. tit. *Assize*.

The courts of *nisi prius* in London and Middlesex are called sittings; and those for Middlesex were established by the legislature in the reign of Queen Elizabeth. In ancient times all issues in actions brought in that county were tried at Westminster in the terms, at the bar of the court in which the action was instituted; but when the business of the courts increased, these trials were found so great an inconvenience, that it was enacted by stat. 18 Eliz. c. 12. that the chief justice of the King's Bench should be empowered to try within the term, or within four days after the end of the term, all the issues joined in the Courts of Chancery and King's Bench; and that the chief justice of the Common Pleas, and the chief baron of the Exchequer, should in like manner try the issues joined in their respective courts. In the absence of any



one of the chiefs, the same authority was given to two of the judges or barons of his court. The stat. 12 G. 1. c. 31. extended the time to eight days after term; and empowered one judge or baron to sit in the absence of the chief. Stat. 24 G. 2. c. 18. extended the time after term still further to 14 days.

By the 1 W. 4. c. 70. § 7. twenty-four days and no more after Hilary, Trinity, and Michaelmas terms, and six days after Easter-term (exclusive of Sundays), are to be appropriated for sittings at nisi prius in London and Middlesex, but any other day after such twenty-four days may be appointed for trial of a cause with the consent of parties.

By the 3 and 4 W. 4. c. 71. § 3. his Majesty in council may direct at what places in any county assizes and sessions of gaol delivery, and other commissions for the dispatch of civil and criminal business, shall be holden, and may order them (as well as special commissions of oyer and terminer, &c.) to be holden at one or more places in the county. And by § 4. any county may be divided for the purpose of holding assizes in different divisions thereof.

JUSTICES OF BOTH BENCHES shall decide pleas commenced before other matters be arraigned. Stat. Westm. 1. 3 Ed. 1. c. 46. See this Dict. tit. *King's Bench, Common Pleas.*

JUSTICES IN EYRE, *justitiiarii itinerantes*. So termed of the old French word *eree*, as a *grand erre*, i. e. *magnis itineribus* proverbially spoken.] These, in ancient time, were sent with commission into divers counties to hear such causes especially as were termed pleas of the crown. And this was done for the ease of the people, who must else have been hurried to the King's Bench, if the case were too high for the county court; they differed from the justices of oyer and terminer, who were sent upon one or a few special causes, and to one place; whereas, the justices in eyre were senth through the provinces and counties of the land, with more indefinite and general commission, as appeareth by *Bracton, lib. 3. cc. 11, 12, 13.* and *Britton, cap. 2.*

And again, because the justices of oyer and terminer were sent uncertainly upon any uproar, or other occasion in the country; but these in eyre (as Mr. Gwin sets down in the *Preface to his Reading*) were sent but once in every seven years; with whom agrees *Horne* in his *Mirror of Justices, l. 2. c. Queux point estre actours, &c.* and *l. 2. cap. Des peches criminal, & al suit del Roy, &c.* and *lib. 3. cap. De justices in eyre*; where he also declares what belongs to their office. But according to *Orig. Juridicales* they went oftener. These

were instituted by the King Henry the Second, as *Camden*, in his *Brit. witnesseth, pag. 104. Hovedon. par. post. suor. Annal. fol. 113.* hath of them these words, *justitiiarii itinerantes, constituti per Henricum secundum qui divisit Regnum suum in six partes, per quarum singulas tres justitiosarios itinerantes, constituit, &c.*" In some respect they resembled our justices of assize at present, though their authority and manner of proceeding much differ. 1 *Inst.* 293: *Cowell.* See *ante*, tit. *Justices of Assize.*

Justice-ayres or *justiciary courts*. The circuits through Scotland for the distribution of justice. The form of the Justiciary Court, consisting of five of the lords of sessions, added to the justice general and justice clerk, of whom the justice general, and, in his absence, the justice clerk, is president, was settled by Scotch act 1672, c. 16. The quorum of the court consists of three judges, 1681. c. 22. Stat. 23 G. 3. c. 45. By stat. 20 G. 2. c. 43. it was directed that circuit courts should be held regularly twice a year; and by 30. G. 3. c. 17. that the spring circuit should be held between 12th March and 12th May. By 23 G. 3. c. 45. the lords of justiciary are directed to continue in each town in the circuit at least three days, and in no case to leave any trial that has been begun undecided. There are three circuits, the *South*, consisting of the boroughs of Jedborough, Dumfries, and Oyre; *West*, Glasgow, Inverary, and Stirling; *North*, Perth, Aberdeen, and Inverness. The jurisdiction of the Court of Justiciary extends to all crimes, and to civil cases by way of appeal to a certain value. See tit. *Scotland.*

JUSTICE OF THE FOREST, *justiciarius forestæ*.] Was a lord by his office; his office was to hear and determine all offences within the forest, committed against vert or venison; of these there were two, whereof one had jurisdiction over all forests on this side Trent, the other of all beyond it. The chief point of their jurisdiction consisted upon the articles of the *Charta de Foresta, 9 H. 3.* concerning which see *Camd. Brit. p. 214.* The courts where these justices sat were called the *justice seats of the forest*, held once every three years. *Munwood's Forest Laws, cap. 24.* These officers were also called justices in eyre of the forest; and were the only justices who might appoint deputies by the statute of 32 H. 8. c. 35. By stat. 57 G. 3. c. 61. the offices of these justices in eyre were declared to be abolished on the termination of the existing interests therein. See tit. *Forest.*

JUSTICES OF GAOL-DELIVERY, *justitiiarii ad gaolas deliberandas*.] Are those who are sent

with commission to hear and determine all causes appertaining to such who for any offence are cast into gaol; part of their authority is to punish such as let to mainprize those prisoners who are not bailable by law, nor by the statute *De Finibus*, cap. 3. *F. N. B.* fol. 151. These seem in ancient time to have been sent into the country upon several occasions; but afterwards justices of assize were likewise authorised to the like purposes. *Anno 1 Ed. 3. c. 3.* Their oath is all one with others of the king's justices of either bench. See stat. 2 *Ed. 3. c. 2*: *Old Abridgment of the Statutes*, tit. *Sacramentum Justiciariorum*: *Cowell*. Justices of assize, if laymen, shall deliver the gaols. *Stat. 27 Ed. 1. st. 1. c. 3.* The justices of peace shall deliver over their indictments to the justices of gaol delivery. *Stat. 4 Ed. 3. c. 2.* See post, *Justices of Oyer and Terminer*.

**JUSTICE OF THE HUNDRED**, *Justiciarius Hundredi*.] *Erat ipse hundredi Dominus, qui et centurio et centenarius, hundredique aldermanus appellatus est. Præerat omnibus hundredi friborgis, cognovitque de causis majusculis, quæ in eisdem finire non potuerant. Spelm.* See tit. *Hundred*.

**JUSTICES OF THE JEWS**, *Justitarii ad custodiam Judeorum assignati*.] King Richard I. after his return out of the Holy Land, anno 1194, appointed particular justices, laws, and orders, for preventing the frauds, and regulating the contracts and usury of the Jews. *Hoveden*, parte post, p. 745: *Claus. 3 Ed. 1. m. 19.* See further tit. *Jews*.

**JUSTICES OF LABOURERS**. Justices heretofore appointed to redress the frowardness of labouring men, who would either be idle or have unreasonable wages. See the old stats. 21 *Ed. 3. c. 1*: 25 *Ed. 8. c. 8*: 31 *Ed. 1. c. 6.*

**JUSTICES OF NISI PRIUS**, are all one at this time with justices of assize, for it is a common adjournment of a cause in the Common Pleas, to put it off to such a day, *nisi prius justiciarii venerint ad eas partes ad capiendas assisas*; unless the justices shall first come to a place named to take the assizes; which they are sure to do; and upon this clause of adjournment they are called justices of *nisi prius*, as well as justices of assize. Their commission you may see in *Crompt. Juris.* fol. 204; yet with this difference between them, that justices of assize have power to give judgment in a cause but justices of *nisi prius* only to take the verdict. But in the nature of both their functions, this seems to be the greatest difference, that justices of *nisi prius* have to deal

in causes personal as well as real; whereas justices of assize, in strictness, meddled only with the possessory writs, called assize. *Cowell*. See tit. *Justices of Assize*; and tit. *Assize, Judges, Jury*.

**JUSTICES OF OYER AND TERMINER**, *justitarii ad audiendum et terminandum*.] Were justices deputed upon some special or extraordinary occasions. Fitzherbert in his *Nat. Brev.* saith, that the commission *d'Oyer et Terminer* is directed to certain persons upon any great riot, insurrection, heinous misdemeanors, or trespasses committed. And because the occasion of granting this commission should be maturely weighed, it is provided by the statute made 2 *Ed. 3. c. 2.* that no such commission ought to be granted, but that they shall be despatched before the justices of the one bench or other, or justices errant, except for horrible trespasses, and that by the special favour of the king. The form of this commission, see *F. N. B.* f. 110.

The courts of oyer and terminer, and general gaol delivery, are of a general nature, and universally diffused over the kingdom; but yet are of a local jurisdiction, and confined to particular districts. These are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year, in every county of the kingdom, except in London and Middlesex, wherein they are held eight times. These were slightly mentioned under the foregoing article, *Justices of Assize*; and under title *Assize*, it is observed, that, at what is usually called the assizes, the judges sit by virtue of five several authorities; two of which, the commission of assize and its attendant jurisdiction of *nisi prius*, being principally of a civil nature, are there explained; to which may here be added, that these justices have, by virtue of several statutes, a criminal jurisdiction also in certain special cases. 2 *Hal. P. C.* 39: 2 *Hawk. P. C.* c. 7. As to another authority, the commission of the peace, see post, tit. *Justices of the Peace*. It may here be mentioned, that all the justices of the peace of any county wherein the assizes are held, are bound by law to attend them, or else are liable to a fine, in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the authority now to be explained is the commission of oyer and terminer, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the quo-

rum, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have besides all these a commission of general gaol delivery, which empowers them to try and deliver every prisoner who shall be in the gaol when the judges arrive at the circuit town, whenever, or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo*; 2 *Inst.* 43; but these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. So that one way or the other, the gaols are in general cleared, and all offenders tried, punished, or delivered over, twice in every year; a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the king issues a special and extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment, upon which the course of proceeding is much the same as upon general and ordinary commissions.

Formerly it was held, in pursuance of the statutes 8 R. 2. c. 2: 33 H. 8. c. 4. that no judge or other lawyer could act in the commission of oyer and terminer, or in that of gaol delivery within his own county where he was born or inhabited; in like manner as they are prohibited from being judges of assize, and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the stat. 12 G. 2. c. 27. to allow any man to be a justice of oyer and terminer and general gaol delivery within any county of England. 4 *Comm.* 269—271. In fine, as the justices of assize and *nisi prius* are appointed to try civil causes, so are the justices of oyer and terminer and gaol delivery to try indictments for crimes all over the kingdom, at what are usually denominated the circuits or assizes; and the towns where they come to execute their commissions are called the assize towns, and generally the county towns.

lionis.] Are certain judges of a pie powder court, of a most transcendent jurisdiction, held under the Bishop of Winchester at a fair on St. Giles's Hill near that city, by virtue of letters patent granted by Richard II. and Edw. IV. *Episcopus Wynton, et successores suos, à tempore quo, &c., Justiciarios suos, qui vocantur Justiciarii Paviliones, cognitiones placitorum et aliorum negotiorum eadem feria durante, necnon claves portarum et custodiam predictæ civitatis nostræ Wynton, pro certo tempore ferie illius, et nonnullas alias libertates, immunitates et consuetudines habuisse, &c.* See the patent at large in *Prynne's Animad.* on 4 *Inst.* fol. 191.

## JUSTICES OF THE PEACE.

Judges of record, appointed by the king's commission to be justices within certain limits; generally within the counties where they are resident; for the conversation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. *Dalt. c. 2.* See *Burn's J.*, tit. *Justices of the Peace*. The principal of these is the *Custos Rotulorum*, or keeper of the records of the county. 1 *Comm.* 349.

- I. *Of the origin of these officers.*
- II. *Of their commission and its determination.*
- III. *Of their qualifications.*
- IV. *Of their power, duty, and office.*
- V. *Of their liability, protection, and indemnity.*

I. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these, some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named *Custodes* or *Conservatores Pacis*. Those that were so *virtute officii* still continue; but the latter sort are superseded by the modern justices.

The King's Majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions, and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the King's peace. *Lamb Eirenarch.* 12. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, (when any such offices are in being,) and



all the justices of the Court of King's Bench (by virtue of their offices,) and the master of the rolls (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it. *Lamb.* 12. The other judges are so, only in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognisance or security of the peace. *Brit.* 3: *F. N. B.* 81. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them, till they find sureties for their keeping it. *Lamb.* 14. See tit. *Constable*.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription, or were bound to exercise it by the tenure of their lands; or, lastly, were chosen by the freeholders in full country-court before the sheriff; the writ for their election directing them to be chosen *de probioribus et potentioribus comitatûs sui in custodes pacis*. *Lamb.* 15—17. But when Queen Isabel, the wife of Edward II., had contrived to depose her husband, by a forced resignation of the crown, and had set up his son Edw. III. in his place, this being a thing then without example in England, it was feared would much alarm the people; especially as the old King was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings or other disturbances of the peace, the new King sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham, *Hist. A. D.* 1327; giving a plausible account of the manner of his obtaining the crown; to wit, that it was done *ipsius patris bene placito*; and withal commanded each sheriff, that the peace be kept throughout his bailiwick, on pain and peril of disheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, by stat. 1 *Ed.* 3. stat. 2. c. 16. that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil or barretors in the county, should be assigned to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the King, *Lamb.* 20; this assignment being constructed to be by the King's commission, stats. 4 *Ed.* 3. c. 2: 18 *Ed.* 3. stat. 2. c. 2. But still they were only called conservators, wardens, or keepers of the peace; till the stat. 34 *Ed.* 3. c. 1. gave them the power of trying felonies; and then

they acquired the more honourable appellation of justices. *Lamb.* 23.

Polidore Virgil says, that justices of the peace had their beginning in the reign of William I., called the Conqueror; but Sir Edward Coke was of opinion, that in the sixth year of King Edward I., *Prima fuit institutio Justiciariorum pro pace conservandâ*. Mr. Prynne affirms, that in the reign of King Henry III., after the agreement made between that king and his barons, guardians *ad pacem conservandam* were constituted: and Sir Henry Spelman differs from both these, being of opinion that they were not made until the beginning of the reign of King Edward III., when they were thought necessary for suppressing commotions, which might happen upon de-throning of King Edward II. It is certain the general commission of the peace, by statute, began 1 *Ed.* 3; though before that time there were particular commissions of peace, to certain men, in certain places; but not throughout England. 2 *Nels. Ab.* 1063.

To explain further what has been said above, as to the election of the conservators of the peace being taken from the people and given to the King, it should be remarked, that such election, when made, was by force of the King's writ; after which election so made and returned, the King directed a writ to the party so elected, to take upon him and execute the office until the King should order otherwise. 2 *Inst.* 558, 559.

Justices of the peace were formerly to be allowed 4s. a-day during their attendance at the quarter sessions, to be paid by the sheriffs of counties. See stats. 12 R. 2. c. 10: 14 R. 2. c. 11.

II. Justices of the peace are of three sorts:—

1st. By act of parliament, as the Bishop of Ely and his successors, and the Archbishop of York, and Bishop of Durham, by the 27 H. 8. c. 24. § 20, 21, 22. 2ndly. By charter or grant, made by the King, under the great seal, as mayors and other chief officers in corporate towns. See *post*, *Justices of the Peace within Liberties*. 3rdly. By commission under the great seal.

The last named justices are appointed by the King's special commission under the great seal, the form of which was settled by all the judges, A. D. 1590. *Lamb.* 43. 35. The power of constituting them is only in the King; though they are generally made at the discretion of the lord chancellor or lord keeper, by the King's leave; and the King may now appoint in every county in England and Wales as many as he shall think fit. 1 *Inst.* 174, 175. See *post*. III. And *semble*, that since the 21 H. 8. c. 24. § 2. the King cannot dele-

gate his power of creating justices of the peace. 3 B. & C. 762: 5 D. & R. 654: 1 C. & P. 459. 659.

Their commission appoints them all, jointly and severally, to keep the peace; and any two or more of them to inquire of and determine felonies and other misdemeanors; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*Quorum* (of whom) *aliquem vestrum*, A. B. C. D., &c. *unum esse volumus*, any one of you the aforesaid A. B. C. D., &c., we will shall be one;" whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one person for the sake of propriety: and no exception is now allowable for not expressing in the form of warrants, orders, &c., that the justice who issued them is of the *quorum*. Stat. 26 G. 2. c. 27. See also stat. 7 G. 3. c. 21. When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in Chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

As the offices of these justices is conferred by the King, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after. Stat. 1 Ann. c. 8. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification a-fresh; stat. 7 G. 3. c. 13; nor by reason of any new commission, to take the oaths more than once in the same reign. Stat. 7 G. 3. c. 9.—2. By express writ under the great seal, discharging any particular person from being any longer justice. Lamb. 67.—3. By superseding the commission by writ of *supersedas*, which suspends the power of all the justices, but does not totally destroy it, seeing it may be revived again by another writ called a *procedendo*.—4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once.—5. By accession of the office of sheriff or coroner. Stat. 1 Mar. stat. 2. c. 8. [A sheriff cannot act as a justice during the year of his office; but it has been observed, that neither this statute referred to by Blackstone, nor any other, disqualifies a coroner from acting as justice of

the peace: nor do the two offices in their nature seem incompatible. 1 Comm. c. 9. n. 14.]

Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission; but now by stat. 1 Ed. 6. c. 7. it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice. If a new commission is made and granted for justices of peace, out of which some of the justices in the old commission are omitted, yet what acts they do as justices are lawful till the next sessions, at which the new commission is published; and when the new commission is published, they are to take notice of it, and not act further. Moor. 187. Though by granting a new commission, discharge under the great seal, accession of another office, and by the demise of the King, the power and offices of justices of the peace determine, 4 Inst. 165; yet till then they are empowered to act in a great many particular cases by statute.

On renewing the commission of the peace (which generally happeneth as any person is newly brought into the same), there cometh a writ of *dedimus potestatem* directed out of Chancery, to some ancient justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed: and to certify the same into that court, at such a day as the writ commandeth. Unto which oath are usually annexed the oaths of allegiance and supremacy. Lamb. 53.

The form of which oath of office at this day is as followeth:—

"Ye shall swear, that as justice of the peace in the county of W. in all articles in the King's commission to you directed, you shall do equal right to the poor and the rich, after your cunning, wit, and power, and after the laws and customs of the realm, and statutes thereof made: and ye shall not be of counsel of any quarrel hanging before you: and that ye hold your sessions after the form of the statutes thereof made. And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures which shall fall before you, ye shall cause to be entered without any concealment (or embezzling) and truly send them to the King's Exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of justice of the peace in that behalf: and that you take nothing for your office of justice of the peace to be done, but of the King and fees accustomed, and costs limited by statute. And ye shall not direct, nor cause to be directed, any warrant (by you to be made) to the parties, but ye

shall direct them to the bailiff of the said county, or others the King's officers or ministers, or other indifferent persons, to do execution thereof. So help you God." *Burn J., tit. Justices of the Peace, III.*

Under the provisions of the 10 G. 4. c. 7. Roman Catholics may qualify as justices of the peace on taking the above oath of office and the oath in the act mentioned, instead of the oaths of allegiance and supremacy. See *Roman Catholics.*

III. Touching the number and qualifications of these justices: it was ordained by stat. 18 Ed. 3 stat. 2. c. 2. that two or three of the best reputation in each county should be assigned to keep the peace. But these being found rather too few for that purpose, it was provided by stat. 34 Ed. 3. c. 1. that one lord, and three or four of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices through the ambition of private persons, became so large, that it was thought necessary, by stats. 12 R. 2. c. 10. and 14 R. 2. c. 11. to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago) that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number.

And as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and stat. 13 R. 2 stat. 1. c. 7. orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also, by stat. 2 H. 5. stat. 2. c. 1. they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by stat. 18 H. 6. c. 11. that no justice should be put in commission, if he had not lands to the value of 20*l. per annum*. And the rate of money being greatly altered since that time, it was enacted by stats. 5 G. 2. c. 18 G. 2. c. 20. that every justice, except as is therein excepted, shall have 100*l. per annum*, clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification is almost an equivalent to the 20*l. per annum* required in Henry the Sixth's time; and of this the justice must now make oath. Stat. 18 G. 2. c. 20. Also, it is provided by the 5 G. 2. c. 18. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace for any county.

The said stat. 18 G. 2. c. 20. provides that no person shall be capable of being a justice of peace, or acting as such, who shall not have in law or equity, for his own use in possession, a freehold, copyhold, or customary estate for life, or some greater estate, or for years determinable upon a life or lives, or 21 years, in lands, &c. of the clear yearly value of 100*l.* over and above all incumbrances, rents, and charges; or entitled to the immediate reversion or remainder in lands, &c. of 300*l. per annum*, and who shall not take the oath in this act mentioned, under the penalty of 100*l.* to be recovered by action of debt, and the proof of the qualification to lie on the defendant; and if he insist on any lands not mentioned in the oath, he is to give notice of them; and lands not mentioned in the oath or notice are not to be allowed.

This act does not extend to corporation justices, or to the eldest sons of peers, and of gentlemen qualified to be knights of shires, the officers of the Board of Green Cloth, principal officers of the navy, under secretaries of state, heads of colleges, or to the mayors of Oxford and Cambridge; all of whom may act without any qualification by estate.

Though the above statute says no man without specified qualification shall be capable of being a justice, the acts which an unqualified person does are not therefore invalid. He exposes himself to the penalty, but the consequences would be most pernicious if these acts were void: if, for example, his warrant were of no authority, then all who acted under it, and as they supposed in the execution of the law, would be trespassers, resistance to them would be lawful, and aid afforded to them unlawful. 3 B. & A. 266.

IV. The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons, and other inferior criminals. It also empowers any two or more to determine all felonies, and other offences; which is the ground of their jurisdiction at the sessions. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office: they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate that, without sinister views of his own, will engage in this trouble-



some service. 1 *Comm. c. 9* : and see 4 *Comm. c. 20*.

They are justices of record, for none but justices of record can take a recognizance of the peace. Every justice of peace hath a separate power, and may do all acts concerning his office apart and by himself; and even may commit a fellow justice upon treason, felony, or breach of the peace: and this is the ancient power which conservators of the peace had at common law. But it has been held, that one justice of the peace cannot commit another justice, for breach of the peace, though the justices in sessions may do it. *Lamb. Just.* 385: *Jenk. Cent.* 174. By several statutes justices may act in many cases where their commission doth not reach, the statutes themselves being a sufficient commission. *Lamb. lib. 4: Wood's Inst.* 79, 80.

The stat. 4 *H. 7. c. 12.* (and stats. 33 *H. 8. c. 10*: 37 *H. 8. c. 7.*) give them a farther general power than is expressed either in their commission, or in any particular statute. The particular statutes are to be executed as they direct; wherein if no express power is given to any one justice, he can admonish only, and if not obeyed, may make presentment of the offence upon the statute, and with his fellow justices hear and determine it in sessions; or he may bind the offender to the peace, or the good behaviour: some statutes empower one justice of peace alone to act; some require two, three, four justices, &c. And where a special authority is given to justices of peace, it must be exactly pursued; or the acts of the justices will not be good. 2 *Salk.* 475.

If a justice of peace does not observe the form of proceeding directed by statute, it is *coram non iudice*, and void; but if he acts according to the direction of the statutes, neither the justices in sessions nor B. R. can reverse what he has done. *Jones*, 170.

The power of justices is ministerial when they are commanded to do any thing by a superior authority, as by the Court of B. R. &c. In all other cases they act as judges: but they must proceed according to their commission, &c. Where a statute requires any act to be done by two justices, it is an established rule, that if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as formerly, in orders of removal and filiation, the appointment of overseers, and now, in the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor-rate. This is the only act of two justices which has yet been construed to be ministerial; and the propriety of this

construction has been justly questioned. 4 *T. R.* 386.

A man may be a justice of peace in one part of Yorkshire, and yet not be a justice of peace in every part of the county; this county being divided into separate ridings. *Hill.* 22 *Car. B. R.*

From the general rule of law that a justice is to act only within his own county, two considerations arise: one, how far a justice can act when he is out of the county; the other when he is in the county, how far his power extends to other counties.

As to the former case, when he is out of the county, it is said that the justices have no coercive power when out of the county; and therefore that an order of bastardy (see now *Poor*, VII.) or for payment of labourer's wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations voluntarily taken before them in any place are good. 2 *Hawk. P. C.* And Hale says, that a justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons: but that he cannot do a compulsory act, as committing a person for not giving a recognizance.

Now, however, by the 28 *G. 3. c. 49.* (and 59 *G. 3. c. 92.* as to Ireland) any justice acting as such for any two or more counties, being adjoining counties, may act in all matters concerning any or either of the said counties; and all acts of any such justice, and of any officer in obedience thereto, shall be as valid as if done in the county to which they relate. Provided that such justice be personally resident in one of the said counties at the time of doing such act, and that his warrants, &c. be directed, in the first instance, to the constable, &c. of the county to which the same relate.

Also by stat. 9 *G. 1. c. 7.* a justice dwelling in a city or precinct, that is a county of itself within the county at large, may act at its own dwelling-house for such county at large. This statute was explained by stat. 28 *G. 3. c. 49.* § 4. which provided that any justice acting for any county at large, may act as such at any place within any city, &c. being a county of itself, and situate within, or adjoining to such county at large; but not to extend to give such justices of the county, not being justices of the city, &c. power to act in any matters relating to such city, &c. As to Ireland, see 59 *G. 3. c. 92.* § 4.

Doubts having arisen whether justices acting for a county at large were empowered by the above statute to act within any city or other precinct having exclusive jurisdiction, but not being a county of itself, it was enacted by the

1 and 2 G. 4. c. 63. that justices of counties or divisions of counties may act in any such jurisdiction within or adjoining to such counties, &c.

Justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties. Unless facts are stated to make the contrary appear, the court always presumes in favour of the acts of inferior jurisdictions. *R. v Morgan, Cald. ca.* 156.

By the 33 G. 3. c. 55. § 3., where a distress cannot be found in the jurisdiction of a justice granting a warrant for that purpose, the same may be levied on the offender's goods in another county, upon the warrant being indorsed by a justice of that county.

A justice ought not to act in any case in which he himself is interested, but should cause the party to be convened and carried before some other justice, or desire the aid of some other justice who is present. *Dalt. c.* 173.

If any matter concerning an office held by a justice comes in question at the sessions, and he joins in making the order, it is void. 2 *Salk.* 207.

By stat. 16 G. 2. c. 18. justices of peace may do all things relating to the laws for relief of the poor, the passing and punishing vagrants, the repairs of the highways, or concerning parochial taxes or rates, although such justices are rated to the taxes, within any place where they execute their office: but no justice shall act in determining any appeal to the quarter sessions, from any order that relates to the parish where he is so charged. In the case of *R. v. Yarpole* it was determined, that on an appeal to the sessions, against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote. 4 *T. R.* 71.

By stat. 13 G. 2. c. 18. no *certiorari* shall issue to remove any order, made by justices of peace of any county, &c., or at the quarter sessions, unless it be applied for within six months, and proved on oath that six day's notice in writing was given to the justices, by whom the order was made, that they or the parties concerned may show cause against it. See tit. *Certiorari*.

If a commission of *oyer and terminer* issues to hear and determine felonies, that determines the commissions of justices of peace as to felonies, though not as to the peace, &c.

The stat. 1 and 2 P. & M. c. 13. (the provisions of which are incorporated and amended by the 7 G. 4. c. 64.) directs justices of peace to take examinations in cases of felony and murder, and to certify them to the justices of

gaol-delivery, &c., after which they forbore to try great felonies. *H. P. C.* 166.

Justices of peace may take an information against persons committing treason; issue warrants for their apprehension, and commit them to prison, &c. They commit all felons in order to trial; and bind over the prosecutors to the assizes: and if they do not certify examinations and informations to the next gaol-delivery, or do not bind over prosecutors, &c. they shall be fined. *Dalt. c.* 11.

With respect to the authority of a justice of peace to administer an oath to a party brought before him to be examined on a matter within his jurisdiction, or in pursuance of an act of parliament; although there is some obscurity in the 15 G. 3. c. 39., which rather encumbers than aids the common law upon the subject, there appears no doubt that when a justice is either expressly or impliedly required by a statute to examine witnesses with a view to the performance of any judicial act, he has not only authority, but it is his duty to examine such witnesses according to the mode prescribed by the common law, which is on oath. See *Lamb.* 213: *Dalt. c.* 16: 1 *Hale*, 586: 1 *Deac. Cr. Law*, 719.

For larceny and small felonies, the justices in their quarter sessions may try offenders; other felonies being of course tried at the assizes; and in case of felonies, and pleas upon penal statutes, they cannot hold cognizance without an express power given them by the statutes. Justices of peace in their sessions cannot try a cause the same sessions, without consent of parties, &c., for the party ought to have convenient time, or it will be error. *Cro. Car.* 317: *Sid.* 334. Nor can the sessions of justices refer a matter which ought to be tried, to be determined by another session; yet they may refer a thing to another to examine, and make report to them for their determination. 2 *Salk.* 477. The sessions is all as one day, and the justices may alter their judgments at any time while it continues. *Ib.* 494.

With respect to the times when justices are to hold their sessions, and generally as to their powers and duties there, see *Sessions of the Peace*.

It is incident to the office of a justice of peace to commit offenders; and a justice may commit a person that doth a felony in his own view, without warrant; but if it be on the information of another, he must make a warrant under hand and seal for that purpose. If a justice issue a warrant to arrest a felon, and the accusation be false, the justice is excused, where a felony is committed: if there be no accusation, action will lie against the justice.

1 *Leon.* 187. A justice makes a warrant to apprehend a felon; though he is not indicted, he who executes the warrant shall not be punished. 13 *Rep.* 76: *Cro. Jac.* 432. If complaint and oath be made before a justice of peace, by one, of goods stolen, and that he suspects they are in such a house, and shows the cause of his suspicion; the justice may grant a warrant to the constable, &c. to search in the place suspected, and seize the goods and person in whose custody they are found, and bring them before him or some other justice, to give an account how he came by them; and farther to abide such order, as to law shall appertain. 2 *Hale's Hist. P. C.* 114. The search on these warrants ought to be in the day-time, and doors may be broken open by constables to take the goods; which are to be deposited in the hands of the sheriff, &c. till the party robbed hath prosecuted the offender, to have restitution. *Ib.* 150, 151.

A justice of peace may make a warrant to bring a person before himself only, and it will be good; though it is usual to make warrants to bring the offenders before him or any other justice of the county, &c. And if a justice directs his warrant to a private person, he may execute it. 5 *Rep.* 60: 1 *Salk.* 347.

It seems now to be indisputable, that in all cases where justices of peace have a jurisdiction over the offence, they may grant a warrant in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend and submit to such examination. 2 *Hawk. P. C. c.* 13. § 15. And this extends undoubtedly to all treasons, felonies, and breaches of the peace, and also to all such offences as they have power to punish by statute. Sir E. Coke indeed hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; 4 *Inst.* 176; and the contrary practice is by others held to be grounded rather upon connivance than the express rule of law, though now by long custom established. 2 *Hawk. P. C. c.* 13. § 16. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted; 2 *Hal. P. C.* 108; and, 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to

him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. *Ibid.* 110. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace officer (or, it may be, to any private person by name); *Salk.* 176; requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant. 2 *Hawk. P. C. c.* 13. § 26. A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; 1 *Hal. P. C.* 583: 2 *Hawk. P. C. c.* 13; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all; for it will not justify the officer who acts under it; whereas a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by stat. 24 *G. 2. c.* 44. at all events indemnify the officer who executes the same ministerially. And when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief or other justice of the Court of King's Bench extends all over the kingdom, and is tested or dated England, not Oxfordshire, Berks, or any other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed, by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, before it was authorised by stats. 23 *G. 2. c.* 26. § 11. 24 *G. 2. c.* 55. and 13 *G. 3. c.* 31. 4 *Comm.* 220—292.

The 24 *G. 2. c.* 55. enacts, that where a justice shall grant a warrant against a person escaping or residing out of his jurisdiction, a justice of the county, &c. where such person shall reside shall indorse his name on the warrant,



which shall be a sufficient authority to the person to whom the warrant was originally directed, to execute the warrant, and carry the person before the justice who indorsed the warrant, or any other justice of the same county, who, if the offence be bailable, shall take bail for the person's appearing at the next sessions for the county, &c. where the offence was committed, and deliver the recognize and all proceedings to the constable, &c. who apprehended the party, to be by him delivered to the clerk of the peace of the county, &c. where the fact was committed; if the fact be not bailable, or the party shall not give bail, the constable may carry the party before a justice of the county where the fact was committed. No action lies against the justice who indorses such warrant, but only against the justice who granted it.

By stat. 13 *G. 3. c. 31.* offenders against whom warrants are issued by any justice of peace in England escaping into Scotland, the justices in Scotland may indorse the warrant, and the offender shall be conveyed to the adjacent county of England, and the justices there shall (if that is not the county where the offence was committed) indorse the warrant, &c. according to the directions of stat. 24 *G. 2. c. 55.* And by 54 *G. 3. c. 186.* the provisions of the act 13 *G. 3. c. 31.* are extended to the cases of all warrants issued in England, Scotland, or Ireland respectively.—For a fuller statement of the provisions of the statutes 44 *G. 3. c. 92.* and 45 *G. 3. c. 92.* see tit. *Ireland.*

In cases of summary conviction, and the lighter kinds of misdemeanors, a magistrate should issue a summons against the party, and not a warrant in the first instance. 13 *East*, 55. But if a party disobeys the summons, then the justice may properly issue a warrant against him; for where a statute gives a justice jurisdiction over an offence, it impliedly gives him a power to compel the attendance of the party charged with it. 12 *Rep.* 131. *b.* 2. *Huok. c.* 13. § 15: 10 *Mod.* 248: 2 *Bing.* 63.

For the power of justices to take bail for offences under the 7. *G. 4. c. 64.* see *Bail*, II.

Justices of peace may make and persuade an agreement in petty quarrels and breaches of the peace, where the King is not entitled to a fine: though they may not compound offences, or take money for making agreements. *Noy*, 103. Justices may not intermeddle with property; if they do, action lies against them and the officers who execute their orders. 3 *Salk.* 217. But see tit. *Forcible Entry.*

A justice of peace hath a discretionary power of binding to the good behaviour; and may require a recognizance with a great pen-

alty of one for his keeping of the peace, where the party bound is a dangerous person, and likely to break the peace, and do much mischief. *Pasch* 1652: 2 *Lall. Abr.* 131. And where a person is to be bound to the good behaviour, for default of sureties he may be committed to goal. But a man giving security for keeping the peace in B. R. or the Chancery, may have a *supersedeas* to the justices in the county not to take security; and so where a person hears of a warrant out against him, and gives surety of the peace to any other justice, &c. See tit. *Surety of the Peace.*

A magistrate, in case of a breach of the peace within his view, may instantly order the offender into custody; 7 *East*, 536: 6 *Esp.*, 36; and in such case may commit the offender without warrant or information. *Lofft*, 24. Or for an apprehended breach of the peace. *Id.*

A justice of the peace is authorised to require surety of the peace for a limited time, according to his discretion, and need not bind the party over to the next session only. 2 *B. & A.* 278. And in a recent case the court refused to interfere with the discretion of magistrates in taking security for keeping the peace. 2 *N. & M.* 379.

If one make an assault upon a justice of peace, he may apprehend the offender, and send him to gaol till he finds sureties for the peace; and a justice may record a forcible entry upon his own possession: in other cases he cannot judge in his own cause. *Wood's Inst.* 81. Where a man abuseth a justice by words, before his face, or behind his back, in relation to his office, he may be bound to his good behaviour: and if a justice of peace be abused in the execution of his office, the offender may be also indicted and fined. *Cromp.* 149: 4 *Rep.* 16. To say of a justice of peace he doth not understand law, &c. is indictable; and contempts against justices are punishable by indictment and fine at the sessions. 3 *Mod.* 139: 1 *Sid.* 144. But abusing a justice out of his office by words that do not relate to his office, seems to stand only as in case of other persons.

As to summary convictions by justices, see *Conviction.* By the 3. *G. 4. c. 23.* a general form of conviction is given in all cases where no form is contained in the acts, empowering magistrates to decide offences in a summary way.

By § 2. one justice may receive original informations in cases where two or more justices are empowered to hear and determine.

In all cases where a justice is empowered to hear and determine a matter out of sessions, he should make a record in writing, under his hand, of all the matters and proof; and all convictions should be returned by him to the

sessions. *Dalt. c. 115. 2 T. R. 285.* And see 7 and 8 G. 4. c. 29. § 74: and 7 and 8 G. 4. c. 30. § 40.

So it is the indispensable duty of a justice to take all charges, of whatever nature or kind they may be, in writing. 1 *Leach*, 202. And by 7 G. 4. c. 64. § 2, 3. he is required to certify all examinations and depositions, in cases of felony and misdemeanor, and deliver them to the proper officer of the court in which the trial of the accused is to be had. And by § 5. he is liable to be fined by the court for any neglect of his duty in this respect, upon proof of the offence, in a summary manner. See *Bail*, II. 1.

By the 27 G. 2. c. 20. in all cases of a warrant of distress for levying any penalty inflicted, or money directed to be paid, the justice or justices granting such warrant, may therein order the goods distrained to be sold within a certain time limited in the warrant, to be not less than four days, nor more than eight days, unless the penalty or money, with the reasonable charges of taking and keeping such distress, be sooner paid. The officer may deduct the reasonable charges of taking and keeping, and selling the distress; and, if required, shall show the party his warrant, and permit him to take a copy of it. This not to extend to stats. 7 and 8 W. 3. c. 34: 1 G. 1. c. 6. as to levying tithes, &c. on Quakers. The stat. 18 G. 3. c. 19. enables justices to award costs on determination of complaints before them, and to levy them by distress and sale of the party's goods, or commit the offender to the house of correction. General rules as to costs may be settled in sessions, and allowed by the judges on their circuits.

By 41 G. 3. (*U. K.*) c. 85. for better payment of fines and forfeitures imposed by justices out of sessions in England, receipts were to be given by the justices for such fines, accounts thereof kept by them, and the amount paid over annually to the sheriff of the county; a duplicate account, to charge the sheriff, was to be transmitted by the justice to the clerk of the peace.

And now, in all cases, where the offender is convicted in a fine or penalty, the justice is required, by the 3 G. 4. c. 46. § 2., to certify the amount and particulars of the fine, or forfeiture to the clerk of the peace. And see the 4 G. 4. c. 37.

The stat. 26 G. 2. c. 14. was made for the regulation of fees of justices' clerks; a table of which is to be made at sessions, and allowed by the judges on their circuits; and in Middlesex, by stat. 27 G. 2. c. 16. by the chief justices at Westminster, or any two of them. And by 57 G. 3. c. 91. the justices at sessions

are empowered to settle the fees of the clerk of the peace.

V. If a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law: and there are many statutes made to protect him in the upright discharge of his office; which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand; and stop all suits begun, on tender made of sufficient amends. See *stats. 7 Jac. 1. c. 5: 21 Jac. 1. c. 12: 24 G. 2. c. 44: 43 G. 3. c. 141.* See *Post*. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs. See 1 *Comm.* 350—354.

The *stat. 24 G. 2. c. 44.* particularly provides, that no writ shall be sued out against any justice of peace, for any thing done by him in the execution of his office, until a notice in writing shall be delivered to him one month before the suing out the same, containing the cause of action, &c., within which month he may tender amends, and if the tender be found sufficient, he shall have a verdict. No such plaintiff shall recover against the justice, unless such notice shall be proved at the trial. If the justice shall neglect to make such tender, he may, before issue joined, pay into court such sum as he shall think fit. Where an action is against a justice, and constable, if there be a verdict against the justice, and the constable be acquitted, the plaintiff shall recover such costs against the justice, as to include the costs the plaintiff shall be obliged to pay the constable. And this statute enacts, that if the plaintiff in any such action shall recover against a justice, and the judge shall certify that the injury was wilfully and maliciously done, the plaintiff shall recover double costs. No action shall be brought against a justice for any thing done in the execution of his office, unless commenced within six months after the act committed.

This act is by very many subsequent acts extended to justices of various descriptions, and on several occasions, as militia, &c.

By 43 G. 3. c. 141. it is provided, that in all actions against justices on account of any conviction, &c. by them, the plaintiff (besides any penalty levied) shall recover only two-pence damages; unless notice and want of probable cause be expressly alleged in the declaration, and which shall be in an action upon the case only. And if on the trial of any such action it shall be proved that the plaintiff was guilty

of the offence whereof he was convicted, and that he underwent no greater punishment than was by law assigned thereto, he shall not be entitled to recover any penalty levied, or any costs or damages against the justice.

See as to proceedings on this latter statute, 12 *East*, 67: 16 *East*, 13: 1 *Marsh*, 220. And see further as to the cases in which an action will lie against a justice, *Trespas*, IV.

If a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interests or ambition, he may be punished also criminally by indictment or information. But the Court of K. B. have frequently declared, that though a justice of peace should act illegally, yet if he has acted candidly without any bad view or ill attention whatsoever, the court will never punish him by the extraordinary mode of information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. *Burr*. 556. 785. 1162: 1 *T. R.* 653. 692. And in no case will the court grant information, unless an application for it is made within the second term after the offence is committed; and unless notice of the application be previously given to the justice, and the party injured will undertake to bring no action. And if the party proceeds both by action and indictment, the attorney general will grant a *noli prosequi* to the indictment. Indeed where a justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned whether it is an indictable offence. 1 *Comm.* 354. c. 9. and Mr. Christian's note there. And see further *Information*, II.

If a justice of peace is guilty of any misdemeanor in his office, information lies against him in B. R., where he shall be punished by fine and imprisonment. *Sid.* 192. If a person be never summoned by justices of peace to be heard and make his defence before the justices make any order against him, it is a misbehaviour, for which an information will lie against him. See tit. *Conviction*.

The Court of B. R. will grant an information against a justice of peace on motion for sending a servant to the house of correction without sufficient cause: if the justice do not show good cause, &c. *Mod. Cas. in L. and E.* 45, 46. And for contempt of laws, &c. attachment may be had against justices of peace in B. R. on motion of the attorney general, &c. A justice of peace fined a thousand marks for corrupt practice. See 1 *Keb.* 727.

Justices shall not be regularly punished for any thing done by them in sessions as judges; and if a justice of peace be sued for any thing done in his office, he may plead the general issue, and give the special matter in evidence;

and if a verdict goes for him, or the plaintiff be nonsuit, he shall have double costs. *Stat. Jac.* 1. c. 12.

With regard to the duties of a magistrate in the metropolis, see *Police*.

For further matter relative to this extensive and useful office, see *Burn's Justice*, tit. *Justices of the Peace*; and that book, and this Dictionary, *passim*; under the appropriate titles.

A bill was introduced into the House of Commons last year to consolidate the laws relating to justices of the peace, and which is intended to be renewed in the course of the present session (1835).

JUSTICES OF PEACE WITHIN LIBERTIES; *Justiciarii ad pacem infra libertates*.] Are such in cities, and other corporate towns as the others are of the county; and their authority is all one within the several territories and precincts, having, besides the assize of ale and beer, wood, victuals, &c. See *stat.* 27 H. 8. c. 5. But if the King grant to a corporation, that the mayor and recorder, &c. shall be justices of peace within the city; if there be no words of exclusion, justices of the county have concurrent jurisdiction with them; and the King, notwithstanding his charter, may grant a commission of the peace specially in that city or county. 2 *Hale's Hist. P. C.* 47. Also where the justices of any corporate town deny doing right, justices of the peace of the county may inquire into it. *Mod. Cas.* 164. The justices of peace, in cities, or towns corporate, may commit persons apprehended within their liberties to the house of correction of the county, &c., which persons shall be liable to the like correction and punishment as if committed there by any justice of the same county. *Stat.* 13 G. 2. c. 24. Justices of cities and corporations are not within the qualification act, 5 G. 2. c. 18. See tits. *Mayors, Corporations, Justices of the Peace*.

By *stat.* 38 G. 3. c. 52. it is enacted that any prosecutor may prefer his indictment for any offence committed within the county of any city or town corporate, to the grand jury of the next adjoining county, to be tried there; and by the same act provision is made for the trial of indictments, found by any grand jury of any city or town corporate, in the next adjoining county; and by *stat.* 51 G. 3. c. 100. the court before whom the conviction shall take place may order the offender to be punished either in the county where he was tried, or in the city, &c. where the offence was committed. In all those cases all expenses incurred by the trial, &c. are to be defrayed by the city, &c. in which the offence was committed.



By stat. 1 G. 4. st. 1. c. 14. to remedy certain inconveniences in local and exclusive jurisdictions; after reciting that trial of capital offences before justices of peace within local and exclusive jurisdictions, not being counties, may be attended with inconvenience, it is enacted, that such justices, acting within and for any town, liberty, soke, or place not being a county, but having exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall have full power within their respective limits, at their discretion, to commit persons charged with any capital offences, perpetrated within such limits, to the gaol of the county within which such liberty, &c. shall be situate, to be tried at the next session of Oyer and Terminer for the county; and such justices shall bind over the parties and witnesses to prosecute and give evidence there, and shall transmit the depositions, &c. thither. The expenses of the prosecution, &c. to be defrayed (under orders of the judges,) by the liberty, &c. within which the offence was perpetrated.

By the 4 G. 4. c. 27. in cities, &c. having a limited number of justices, any of such justices may act, though not of the quorum.

By the 4 and 5 W. 4. c. 27. justices of the peace acting for boroughs not being empowered by charter or otherwise to hear and determine felonies, may commit persons charged with felonies triable at the sessions, for trial at such sessions.

And by § 2. justices in boroughs, &c. having jurisdiction at sessions over certain felonies, may commit to the county gaol any person charged with a felony which may be tried at the sessions, but to which their jurisdiction does not extend.

By § 3. in places having a recorder and a fit prison, the magistrates thereof shall commit to such prison persons charged with felonies or misdemeanors, which might be tried at the county sessions and the court of quarter sessions of such places (which the justices are required to hold), shall inquire, determine and punish such felonies and misdemeanors.

**JUSTICES OF TRAIL-BASTON.** Were justices appointed by King Edward I. during his absence in the Scotch and French wars. They were so styled, says *Hollingshed*, for trailing or drawing the staff of justice; or for their summary proceedings according to *Sir Edward Coke*, who tells us, they were in a manner justices in eyre; and it is said they had a baston, or staff, delivered to them as the badge of their office, so that whoever was brought before them was *truilé ad baston, traditus ad baculum*: whereupon they had the name of justices *de trail baston*, or *justiciarii ad trahendum offen-*

*des ad baculum vel baston*. Their office was to make inquisition through the kingdom on all officers and others, touching extortion, bribery, and such grievances; of intruders into other men's lands, barretors, robbers, and breakers of the peace, and divers other offenders; by means of which inquisitions some were punished with death, many by ransom, and the rest flying the realm, the land was quieted and the king gained riches towards the support of his wars. *Mat. Westm. anno 1305*. A commission of *trail-baston* was granted to *Roger de Gray*, and others his associates, in the reign of King Edward III. *Spelm. Gloss.*

**JUSTICE-SEAT**, was the highest court that was held in a forest, and was always held before the lord chief justice in eyre of the forest, upon warning forty days before; and there fines were set for offences, and judgments given, &c. *Mamwood's Forest Law, cap. 24*. The fine and amercement of the justices in eyre, for false judgment, or other trespass, were to be assessed by the said justices upon the oath of knights, and other honest men, and be estreated into the Exchequer. *Stat. 3 Ed. 1 c. 18*. And justices in eyre were to appoint a time for delivering all writs by the sheriff, &c. *Stat. 13 Ed. 1. c. 10*. See *tit. Forest*.

**JUSTICIAR**, or **JUSTICIER**, Fr. *justicier*.] A judge, justice, or, as he was sometimes termed, justiciary. Shakspeare uses the term justicier for judge: "The Lord Bermingham, justicier of Ireland." *Baker's Chron. Angl. fol. 118*.

The whole jurisdiction which is now distributed among the several courts as Westminster-Hall, seems in the first reigns after the conquest to have been lodged in one court, commonly called the King's Court, where justice is said to have been administered sometimes by the King in person, and sometimes by the high justicier, who was an officer of very great authority, and used, in the King's absence beyond sea, to govern the realm as viceroy. *2 Hawk. P. C. c. 3*.

The first justiciaries after the conquest were Odo, bishop of Baieux in Normandy, half brother by the mother to the Conqueror, and William Fitz-Osborn, who was viceroy, and had the same power in the north that Odo had in the south, and was the chief in the Conqueror's army. The next justiciaries were William, earl of Warren, in Normandy, a great commander in the battle against Harold, and Richard de Benefacta, alias Richard de Tonebridge, son to Gilbert, earl of Brion, in Normandy, and were constituted in 1073. In a great plea between Lanfranck and the said

Odo, Goisfrid, bishop of Constance in Normandy, was justiciary. In the beginning of William Rufus, Odo was again justiciary. William de Carilefo, bishop of Durham, a Norman, succeeded Odo, and then followed Ranulph Flambard, in 1099. Afterwards, in the reign of Henry I. in 1100, Hugo de Bocland, a Norman, was justiciary, and after him his son, Richard Basset; then Roger, bishop of Salisbury, was justiciary and chancellor. The next, in the time of King Stephen, was Henry, duke of Normandy, afterwards King Henry II. And in Henry the Second's time was Robert de Bello Monte, earl of Leicester, in 1168, but Alboric de Vere, earl of Guisnes, is said to have been justiciary before him; and after earl of Leicester, Richard de Lucie was made justiciary; and after him, in 1180, Ranulph de Glanville, that famous lawyer, was made justiciary; after him, Hugo de Putacio, commonly called Pusas, Putac, or Pudsey, nephew to King Stephen, by his sister, was made justiciary in the north parts beyond Trent; and William de Longo-Campo, or Long-Champ, bishop of Ely, was at the same time, by Richard the First, made justiciary on the south parts of this side Trent. Then, after the deprivation of William, bishop of Ely, Walter, archbishop of Rouen, in Normandy, was made judiciary of all England. *Brady's Preface*, &c. 151. (D) (E) (F); 152. (A) (B) (C). See *Dugd. Chron. Series*, 1, 2, 3, 4, 5.

William, Long-Champ, bishop of Ely, chief justiciar, and lord chancellor to Richard I. *Speed*. 473. Fitz Peter, chief justiciar in the first of John. *Ib*. 487. Hubert de Burgh, earl of Kent, chief justiciar. 1 *H. 3. Ib*. 513. And after him, Stephen Seagrave. *Ib*. 521. The chief justiciar was the minister of regal command in the absence of the King. *Ib*. 513.

Towards the latter end of the Norman period, the power of the grand justiciar was broken, so that *Aula Regis*, which before was one great court where the justiciar presided, was divided into four distinct courts, viz. Chancery, Exchequer, King's Bench, and common Pleas. *Gilb. Hist. View of the Court of Exchequer*, 7. cites *Madd*. 2. 4. It determined about the 45 *H. 3. Brady's Preface*, &c. 154. b.

The chancellor was the first in order on the left hand of the justiciary, and as he was a great person in the court, so he was in the Exchequer; for no great thing passed but with his consent and advice; nothing could be sealed without his allowance and privity. But the justiciary surmounted him and all others in authority; and he alone was endowed with, and exercised all the power which afterwards was executed by the four chief judges, viz. the chief justice of B. R., the chief justice of C. B., the chief baron of the Exchequer, and the

master of the Court of Wards. *Brady's Preface to the Roman History*, 153. (B.) As long as the dower of the justiciar continued, the *Aula Regis* was one court, and only distinguished by the several officers; for all the officers were united under the justiciar, and he was the governor and superintendent of the courts. *Gilb. Hist. View of the Exchequer*, 10. See *tit. Judge, Justices, King's Bench, &c.*

**JUSTICIATUS.** Judicature, prerogative. *Cowell*.

**JUSTICIES**, is a writ directed to the sheriff in some special cases, by virtue of which he may hold plea of debt in his county court for a large sum; whereas, otherwise, by his ordinary power, he is limited to sums under 40s. *F. N. B.* 117: *Kitch*. 74.

It is called *justicies*, because it is a commission to the sheriff to do a man justice and right, beginning with the word *justicies*, &c. *Bract. lib. 4.* makes mention of a *justicies* to the sheriff of London, in a case of dower: and it lies in account, annuity, customs and services, &c. *New Nat. Br.*

In debt, the writ runs thus: "*The King to the Sheriff of S. greeting: We command you, that you justice A. B., that justly and without delay he render to C. D. five pounds, which to him he oweth, as it is said, and as reasonably he can shew, that he ought to render him, that no more clamour thereof we may hear, for default of justice, &c.*"

This writ of *justicies* empowers the sheriff, for the sake of despatch, to do the same justice in his county court as might otherwise be had at Westminster. *Finch*. 318: *F. N. B.* 152.

The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. 3 *Comm*. 36. c. 4.

The writ of *pone* is the proper writ to remove to a superior court all suits which are before the sheriff by *justicies*. See further the statutes of Wales, 12 *Ed. 1.*: and this Dict. tit. *County Court*.

**JUSTIFIABLE HOMICIDE.** See *tit. Homicide*.

**JUSTIFICATION**, *justificatio*.] A maintaining or shewing good reason in court why one did such a thing which he is called to answer. *Broke*.

Pleas in justification are to set forth some special matter whereby the party justifies what he hath done concerning lands or goods; as that he did it by authority: and this may be by the law, or from another person; wherein, to make it right, there must be good authority, which is to be exactly pursued. *Shep. Epit.* 1041. Justification may be in trespass, and under writs, &c.

But a person cannot justify a trespass, un-

less he confesseth it; for he ought to plead the special matter, and confess and justify what he hath done. 3 *Salk.* 218. See *tit. Action, Libel, Pleading, Trespass.*

A justification (in other words) is a special plea in bar; as in actions of assault and battery, *son assault demense*, viz. that the plaintiff first, with force and arms, assaulted the defendant, and he defended himself, and therefore, if any damage happened to plaintiff, it was owing to the assault he made on defendant, and in his necessary defence;—in other actions of trespass, that the defendant did the thing complained of in right of some office which warranted him so to do;—or in an action of slander, that the plaintiff was guilty of such or such a crime, and therefore he, the defendant, spoke the words.

Of pleas in confession and avoidance, some are distinguished (in reference to their subject-matter) as pleas in *justification* or *excuse*; others as pleas in *discharge*. *Com. Dig. Plead.* (3 *M.* 12). The pleas of the former class shew some justification or excuse of the matter charged in the declaration; those of the latter some discharge or release of that matter. The effect of the former, therefore, is to shew that the plaintiff never had any right of action,

because the act charged was lawful; the effect of the latter, to shew that though he had once a right of action, it is discharged and released by inatter subsequent. *Stephens on Plead.* 240. 1st. *edit.*

JUSTIFICATORS, *justificatores*.] A kind of compurgators, or those that by oath justified the innocence, or oaths of others; as in the case of waging of law. See *Wager of Law.*

JUSTIFYING BAIL. See *tit. Bail. I.*

JUSTITIA. A statute, law, or ordinance. *Hoveden*, p. 666. *Justitia* is often taken for jurisdiction, or the office of a judge. *Leg. Edw. Conf. cap.* 26.

JUSTITIAM FACERE. To hold plea of any thing. See *Selden in his Notes upon Eadmerus.*

JUSTITIUM. A ceasing from the prosecution of law, and exercising justice in places judicial. *Cowell.*

JUSTS, or more properly *jousts*, *Fr. jousts*, i. e. *decursus*.] Were exercises between martial men and persons of honour, with spears on horseback; and different from *tournaments*, which were military contentions, and consisted of many men in troops; whereas *jousts* were usually between two men singly. They are mentioned in stat. 24 *H. 8. c.* 13. but are now wholly disused and illegal.

## K.

### KEB

**K**AIA. A key or wharf. *Spelm.*

KAIAGIUM. Keyage; which see.

KAIN, Poultry payable by a tenant to his landlord. *Scotch Dict.*

KALENDÆ. Rural chapters or conventions of the rural deans and parochial clergy; so called because formerly held on the Kalends, or the first day of every month. *Paroch Antiq.* 640.

KALENDAR and KALENDS. See *Calendar* and *Calends*.

KANTREF. See *Cantred*.

KARITE. See *Caritas*.

KARLE, *Sax.*] A man; and with any addition a servant or clown; as the Saxons called a domestic servant, a *huskarle*; from whence comes the modern word *churl*. *Domesday.*

KARRATA FOENI. A cart-load of hay. *Mong. Ang. tom.* 1. p. 548. See *Carecta*.

KAY. See *Key*.

KEBBARS, or *Cullers*.] The refuse of

### KEE

sheep drawn out of a flock; *oves rejicula*. *Cooper's Thesaur.*

KEELAGE, *killakuim*.] A privilege to demand money for the bottom of ships resting in a port or harbour. *Rot. Parl.* 21 *Ewd.* 1.

KEELMEN. Are mentioned among mariners, seamen, &c. in various statutes. See title *Coals*.

KEELS. This word is applied to vessels used in rivers of the north of England for the carriage of coals, &c. See *Keyles*.

KEEP. A strong tower or hold in the middle of any castle or fortification, wherein the besieged made their last efforts of defence, was formerly in England called a *Keep*; and the inner pile within the castle of Dover, erected by King Henry II. about the year 1153, was termed the King's *Keep*: so at Windsor, &c. It seems to be something in the nature of that which is called abroad a *Citadel*.

KEEPER OF THE FOREST, *Custos Forestæ*.] Or chief warden of the forest,



hath the principal government over all officers within the forest: and formerly warned them to appear at the court of justice-seat, on a general summons from the lord chief justice in eyre. *Manwood, part 1. p. 156.* See title *Forest*.

**KEEPER OF THE GREAT SEAL, *Custos magni sigilli*.** Is a lord by his office, styled Lord Keeper of the Great Seal of *England*, and is of the King's Privy Council: through his hands pass all charters, commissions, and grants of the king under the great seal; without which seal many of those grants and commissions are of no force in law; for the king is by interpretation of law a corporation, and passeth nothing but by the great seal, which is as the public faith of the kingdom, in the high esteem and reputation justly attributed thereto.

The great seal consists of two impressions, one being the very seal itself with the effigies of the king stamped on it; the other has an impression of the king's arms in the figure of a target, for matters of a smaller moment, as certificates, &c. that are usually pleaded *sub pede sigilli*. And anciently when the king travelled into France or other foreign kingdoms, there were two great seals; one went with the king, and another was left with the *Custos Regni*, or the Chancellor, &c.

If the great seal be altered, the same is notified in the Court of Chancery, and public proclamations made thereof by the sheriffs, &c. 1 *Hale's Hist. P. C.* 171, 4.

The Lord Keeper of the Great Seal, by statute 5 *Eliz. c. 18*, hath the same place, authority, pre-eminence, jurisdiction, and execution of laws, as the Lord Chancellor of *England* hath; and he is constituted by the delivery of the great seal, and by taking his oath. 4 *Inst.* 87. See *Lamb. Archeion* 65; 1 *Rot. Abr.* 385, and this Dictionary, titles *Chancellor*; *Great Seal of England*.

**KEEPER OF THE PRIVY SEAL, *Custos privati sigilli*.** That officer, through whose hands all charters, pardons, &c. pass, signed by the king, before they come to the great seal: and some things which do not pass the seal at all: he is also of the Privy Council; but was anciently called only Clerk of the Privy Seal; after which he was named Guardian *del* Privy Seal; and lastly, Lord Privy Seal, and made one of the great officers of the kingdom. See stat. 12 *R. 2. c. 11*; *Rot. Parl.* 11 *H. 4*; and 34 *H. c. 4*.

The Lord Privy Seal is to put the seal to no grant without good warrant; nor with warrant, if it be against law, or inconvenient, but that he first acquaint the King therewith. 4 *Inst.* 55. As to the fees of the clerks under the Lord Privy Seal, for warrants, &c. see stat.

27 *H. 8. c. 11*. See further this Dictionary, titles *Grants of the King*; *Privy Seal*.

**KEEPER OF THE TOUCH**, mentioned in the ancient statute 12 *H. 6. c. 14*, seems to be that officer in the King's mint at this day called the Master of the Assay. See *Mint*.

**KEEPERS OF THE LIBERTIES OF ENGLAND.** By authority of Parliament. See *Custodes Libertatis*.

**KENDAL, *Conceagium*.** An ancient barony. *MS.*

**KENNETS.** A coarse Welsh cloth. See stat. 33 *H. 8. c. 3*.

**KERHERE.** A custom to have a cart-way; or a commutation for the customary duty for carriage of the lord's goods. *Cowell*.

**KERNELLEARE DOMUM**, from Latin *Crena*, a notch.] To build a house formerly with a wall or tower, kernelled with crannies or notches, for the better convenience of shooting arrows, and making other defence. *Da Fresne* derives this word from *quarnellus* or *quadrannellus*, a four-square hole or notch; *ubicunque patent quarnelli sive fenestræ*: and this form of walls and battlements for military uses might possibly have its name from *quadrellus*, a four-square dart. It was a common favour granted by our Kings in ancient times, after castles were demolished for prevention of rebellion, to give their chief subjects leave to fortify their mansion-houses with kernelled walls. *Paroch. Antiq.* 533.

**KERNELLATUS.** Fortified or embattled according to the old fashion. *Plac.* 31 *Ed. 3*.

**KERNES.** Idle persons; vagabonds. *Ordin. Hibern.* 31. *Ed. 3. m.* 11, 12.

**KEVERE.** A cover or vessel used in a dairy-house for milk or whey. *Paroch. Antiq.* 386.

**KEY, *Kaia* and *caya*, *Sax. Leg. Teut.* *Kay*, now generally spelled *Quay*, from the French *quai*.] A wharf to land or ship goods or wares at. The verb *caiare*, in old writers, signifies (according to *Scaliger*) to keep in, or restrain: and so is the earth or ground, where keys are made, with planks and posts. *Cowell*.**

The lawful keys and wharfs for lading or landing goods belonging to the port of London, were *Chester's Key*, *Brewer's Key*, *Galley Key*, *Wool Dock*, *Custom-house Key*, *Bear Key*, *Porter's Key*, *Sab's Key*, *Wiggan's Key*, *Young's Key*, *Ralph's Key*, *Dice's Key*, *Smart's Key*, *Somer's Key*, *Hammond's Key*, *Lyon's Key*, *Botolph Wharf*, *Grant's Key*, *Cock's Key*, and *Fresh Wharf*; besides *Billingsgate*, for landing of fish and fruit; *Bridgehouse*, in Southwark, for corn and other provision, &c. but for no other goods or merchandize. Deal boards, masts, and timber, may be landed at any place between Limehouse and Westminster, the owner first paying or compounding for the

customs, and declaring at what place he will land them. *Lex Mercat.* 132, 133; stat. 13 & 14 *Car.* 2. c. 11, § 14; *Rot. Scuc.* 19 *Car.* 2. These quays were some years ago purchased out of money advanced by government, with a view to the improvement of the port of London. See the acts 43 *G.* 3. c. cxxiv; 46 *G.* 3. c. 118.

There is now a lawful wharf at Hungerford Market, for the landing of goods or merchandize, and passengers for steam-boats, &c. See 11 *G.* 4. c. 70.

By the 7 & 8 *G.* 4. c. 29. s. 17. persons stealing goods or merchandize from any dock, wharf, or quay adjacent to any port of entry or discharge, navigable river, or canal, or to any creek, &c. may, on conviction, be transported for life, or not less than seven years, or imprisoned for not exceeding four years, and if males, whipped.

**KEYAGE, Kaiagium.** The money or toll paid for lading or unlading wares at a key or wharf. *Rot. Pat.* 1 *Edw.* 3. m. 10; 20 *Ewd.* 3. m. 1.

**KEYLES or KEELS, Ciali or Ciules.** A kind of long-boats of great antiquity, mentioned in stat. 23 *H.* 8. c. 18. *Spelm.*

**KEYING.** Five fells, or pelts, or sheepskins with their wool on them. *Cowell.*

**KEYUS, KEYS.** A guardian, warden, or keeper. *Mon. Ang. tom.* 2. p. 71. In the Isle of Man, the twenty-four chief commoners, who are, as it were, conservators of the liberties of the people, are called keys of the island. See tit. *Man, Isle of.*

**KITCHELL.** A cake: it was an old custom for godfathers and godmothers, every time their godchildren asked them blessing, to give them a cake, which was called a God's Kichell. *Cowell.*

**KIDDER.** Signified one that badges or carries corn, dead victual, or other merchandize, up and down to sell. 5 *Eliz.* c. 12. They are also called Kiddiers in 13 *Eliz.* c. 25.

**KIDDLE, KIDLE, or KEDEL, Kidellus.** A dam or open wear in a river with a loop or narrow cut in it, accommodated for the laying of wheels or other engines to catch fish. 2 *Inst. fol.* 38. The word is ancient, for we meet with it in *Magna Charta*, c. 24, and in a charter made by King John to the city of London. By stat. 1 *H.* 4. c. 12. it was accorded, *inter alia*, that a survey should be made of the weirs, mills, stanks, stakes, and kidels, in the great rivers of England. They are now called Kettles, or Kettle-nets, and are much used on the sea-coasts of Kent and Wales. *Cowell.*

**KIDNAPPING.** The forcible abduction and conveying away of a man, woman, or child from their own country, and sending

them to another; it is an offence at common law. *Raym.* 474.

This is unquestionably a very heinous crime, as it robs the King of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory. 2 *Show.* 221; *Skin.* 47; *Comb.* 10; 4 *Comm.* 219.

The 11 & 12 *W.* 3. c. 7. though principally intended against pirates, had a clause to prevent the leaving abroad, by masters of vessels, of persons who had been kidnapped or spirited away: that clause was repealed by the 9 *G.* 4. c. 31. which by s. 30. enacts, that if any master of a merchant vessel shall (during his being abroad) force any man on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if they are in a condition to return, he shall be guilty of a misdemeanor, and shall on conviction, be imprisoned for such time as the court shall award, and such offences may be prosecuted by indictment or by information at the suit of the attorney-general in K. B., and may be alleged to be committed at Westminster; and that court may issue commissions to examine witnesses abroad. As to the stealing of children, see tit. *Child.*

**KILDERKIN.** A vessel of ale, &c. containing eighteen gallons.

**KILKETH.** An ancient servile payment made by tenants in husbandry. *Cowell.*

**KILLAGIUM.** Keelage. *Cowell.*

**KILLING CATTLE** maliciously. 7 & 8 *G.* 4. c. 29. s. 25. 7 & 8 *G.* 4. c. 30. s. 16. See tit. *Cattle.*

**KILLYTHSTALLION.** A custom by which lords of manors, were bound to provide a stallion for the use of their tenants' mares. *Spelm. Gloss.*

**KILTH.** *Ac omnes annuales redditus de quadam consuetudine in, &c. vocat. Kilth. Pat.* 7 *Ehz.*

**KINDRED.** Are a certain body of persons of kin or related to each other. There are three degrees of kindred in our law; one in the right line descending, another in the right line ascending, and the third in the collateral line.

The right line descending, wherein the kindred of the male line are called *Agnati*, and of the female line *Cognati*, is from the father to the son, and so on to his children in the male and female line; and if no son, then to the daughter, and to her children in the male and female line; if neither son nor daughter, or any of their children, to the nephew and his children, and if none of them, to the niece and her children; if neither nephew nor niece,

nor any of their children, then to the grandson or grand-daughter of the nephew: and if neither of them, to the grandson or grand-daughter of the niece; and if none of them, then to the great grandson or great grand-daughter of the nephew and of the neice, &c. *et sic ad infinitum*.

The right line ascending is directly upwards; as from the son to the father or mother; and if neither father nor mother, to the grandfather or grandmother; if no grandfather or grandmother, to the great grandfather or great grandmother; if neither great grandfather or great grandmother, to the father of the great grandfather, or the mother of the great grandmother; and if neither of them, then to the great grandfather's grandfather, or to the great grandmother's grandmother; and if none of them, to the great grandfather's great grandfather, or great grandmother's great grandmother, *et sic ad infinitum*.

The collateral line is either descending by the brother and his children downwards, or by the uncle upwards: it is between brothers and sisters, and to uncles and aunts, and the rest of the kindred, upwards and downwards, across and amongst themselves. 2 *Nels. Abr.* 1077, 1078.

There are several rules to know the degrees of kindred; in the ascending line, take the son and add the father, and it is one degree ascending, then add the grandfather, and it is a second degree, a person added to a person in the line of consanguinity making a degree; and if there are many persons, take away one, and you have the number of degrees; as if there are four persons, it is the third degree, if five, the fourth, &c. so that the father, son, and grandchild, in the descending line, though three persons, make but two degrees: To know in what degree of kindred the sons of two brothers stand, begin from the grandfather and descend to one brother, the father of one of the sons, which is one degree, then descend to his son the ancestor's grandson, which is a second degree; and then descend again from the grandfather to the other brother, father of the other of the sons, which is one degree, and descend to his son, &c. and it is a second degree; thus reckoning the person from whom the computation is made, it appears there are two degrees, and that the sons of two brothers are distant from each other two degrees: for in what degree either of them is distant from the common stock, the person from whom the computation is made, they are distant between themselves in the same degree; and in every line the person must be reckoned from whom the computation is made. If the kindred are not equally distant from the common stock; then in what degree the most remote is dis-

tant, in the same degree they are distant between themselves, and so the kin of the most remote maketh the degree; by which rule, I, and the grandchild of my uncle, are distant in the third degree, such grandchild being distant three degrees from my grandfather, the nearest common stock. The common law agrees in its computation with the civil and canon law, as to the right line; and only with the canon law as to the collateral line. *Wood's Inst.* 48, 49. See further at length, 2 *Comm.* c. 14: and this Dict. titles *Descent*; *Executor*, III.; V. 8.

## KING.

REX; from the Lat. *Rego* to rule: Sax. *Cyning* or *Coning*.] A monarch or potentate, who rules singly and sovereignly over a people: or he that has the highest power and rule in the land. The king is the head of the state. See *Bract. lib.* 1. c. 8.

THE SUPREME EXECUTIVE POWER of these kingdoms is vested by the English laws in a single person, the King or Queen; for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power: as is declared by stat. 1 *Mary*, stat. 3. c. 1.

- I. *Of the Title and Succession to the Throne.*
- II. *Of the Royal Family.*—As to the Queen, see this Dict. under that title.
- III. *Briefly and incidentally of the King's Councils.*
- IV. *Of the King's Duties; and his Coronation Oath.*
- V. *Of the King's Prerogative.*
  1. *Generally.*
  2. *As relates to his Royal Character; wherein of his Sovereignty, Perfection, and Perpetuity.*
  3. *With respect to his Authority, Foreign and Domestic; in sending Ambassadors; making Treaties, War and Peace: As one of the Estates of the Realm; Commander of our Armies and Navies; the Fountain of Justice and of Honour; Arbiter of Domestic Commerce; Supreme Head of the Church.*
  4. *As regards his Revenues, ordinary and extraordinary; and, in the latter, of his Civil List.*
- VI. *Of the King's Prerogative in relation to his Debts; and see this Dict. titles Execution; Extent; Judgment, &c.*



VII. *The former and present state of the Prerogative in general.*

I. The executix power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down uniform, universal, and permanent, in order to mark out with precision *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due.

When the succession to the crown was formerly interrupted by the state of society and the constitution, which had not then arrived to the state of perfection it attained in later ages, and even more recently since the Revolution, distinctions have been frequently made between a King *de facto* and *de jure*. Though it is to be hoped that no contest of this nature is likely again to rise in these kingdoms, what is just shortly hinted on this subject will doubtless be agreeable to the student: see further on this subject, title *Treason*.

If there be a King regnant in possession of the crown, although he be but *Rex de facto*, and not *de jure*, yet he is *Seignior le Roy*: and another that hath right, if he be out of possession, he is not within the meaning of the stat. 11 H. 7. c. 1. for the subjects to serve and defend him, in his wars, &c. And a pardon &c. granted by a King *de jure*, that is not likewise *de facto*, is void. 3 Inst. 7. If a King that usurps the crown, grants licences of alienation or escheats, they will be good against the rightful King; so of pardons, and any thing that doth not concern the King's ancient patrimony, or the government of the people: judicial acts in the time of such a one, bind the right King and all who submitted to his judicature. The crown was tost between the two families of York and Lancaster many years; and yet the acts of royalty done in the reign of the several competitors were confirmed by the Parliament: and those resolutions were made because the common people cannot judge of the King's title, and so avoid anarchy and confusion. *Jenk. Cent.* 130, 1.

All judicial acts done by Henry VI. while he was King, and also all pardons of felony, and charters of denization granted by him, were deemed valid; but a pardon made by Edward IV. before he was actually King, was declared void even after he came to the crown. See 1 *Hawk. P. C.* c. 17: and stat. 1 *Edw.* 4. c. 1.

*Hale* says the right heir of the Crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a King within this act; as was the case of the House of York during the plenary possession of the crown in Henry IV., Henry V., Henry VI. But if the right heir had once the possession of the crown as King, though an usurper had got the possession thereof, yet the other continues his style, title, and claim thereto, and afterwards re-obtains the full possession thereof; a compassing the death of the rightful heir during that interval, is compassing of the King's death within this act for he continued a King still, *quasi* in possession of his kingdom; which was the case of Edward IV. in that small interval wherein Henry VI. re-obtained the crown; and the case of Edward V. notwithstanding the usurpation of his uncle Richard III. 1 *Hal. Hist. P. C.* 104.

The grand fundamental maxim upon which the *Jus Coronæ*, or right of succession to the throne of these kingdoms depends, seems to be this: "That the crown is by common law and constitutional custom *hereditary*; and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by Parliament; under which limitations the crown still continues hereditary."

First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and as no instance can be found wherein the crown of England has ever been asserted to be elective, by any authority but that of the regicides at the trial of King Charles I. it must of consequence be hereditary. Yet an hereditary by no means intends a *jure-divino* right to the throne, save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of Providence. Nor, indeed, have a *jure-divino* and an *hereditary* right any necessary connection with each other, as some have very weakly imagined. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our Constitution, and to them only. The founders of our English monarchy might perhaps, if they had thought proper, have made it elective; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent, and ripened by degrees into common law; the very same title that every private man has to his own estate. Lands are not *naturally* descendible any more than thrones: but the law has thought proper, for the benefit and peace,

of the public, to establish hereditary succession in the one as well as the other.

Secondly, as to the particular mode of inheritance, it in general corresponds with feudal path of descents, chalked out by the common law in the succession to landed estates, yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch, as it did from King John to Richard II. through a regular degree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. But among the females the crown descends by right of primogeniture to the eldest daughter and her issue, and, not as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect. The doctrine of representation also prevails in the descent of the crown, as it does in other inheritances, whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late King, provided they are lineally descended from the blood-royal; that is, from that royal stock which originally acquired the crown. But herein there is no objection (as in the case of common descents previous to the recent statute) to the succession of a brother, an uncle, or other collateral relation of the half blood; provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood-royal is communicated to each. The reason of which diversity between royal and common descents may be understood by recurring to the general rules of descent at common law. See title *Descent*.

Thirdly, the doctrine of hereditary right does by no means imply an indefeasible right to the throne. No man will surely assert this who has considered our laws, constitution and history without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the King and both Houses of Parliament, to defeat this hereditary right, and by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution as may be gathered from the expression so frequently used in our statute-book of "the King's Majesty, his heirs and successors." In which we may observe, that as the word *heirs* necessarily implies an

inheritance or hereditary right generally subsisting in the royal person; so the word *successors*, distinctly taken, must imply that this inheritance may sometimes be broken through, or that there may be a successor without being the heir of the King.

Fourthly, however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. And hence, in our law, the King is said never to die in his political capacity; because immediately upon the natural death of Henry, William, or Edward, the King survives in his successor. For the right of the crown vests *eo instanti* upon his heir; either the *haeres natus*, if the course of descent remains unimpeached, or the *haeres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum*; but, as *Hale* observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. 1 *Hist. P. C.* 61. Hence the statutes passed in the first year after the restoration of Charles II. are always called the acts in the 12th year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

On this principle, that the King commences his reign from the day of the death of his ancestor, it hath been held that compassing his death before coronation, or even before proclamation, is compassing of the King's death within the statute of 25 *Edw.* 3. *stat.* 5. *c.* 2; he being King presently, and the proclamation and coronation only honourable ceremonies for the further notification thereof. 3 *Inst.* 7; 1 *Hale's Hist. P. C.* 101. See title *Treason*.

However acquired, therefore, the crown becomes in the successor absolutely hereditary; unless by the rules of the limitation it should be otherwise ordered and determined.

In these four points consists the constitutional notion of hereditary right to the throne; which is further elucidated by the learned commentator, from whom much of the foregoing and following abstract is taken, in a short historical view which he gives of the succession to the crown of England, from Egbert to the present time; of the doctrines of our ancient lawyers, and of the several statutes that have from time to time been made to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. In the pursuit of this inquiry, he states, that from the days of Egbert, the first sole monarch of this kingdom, to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession to the crown. It is true this succession, through

fraud or force, or sometimes through necessity, when in hostile times the crown descended on a minor, or the like, has been very frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted, or endeavoured to transmit, it to their own posterity, by a kind of hereditary right of usurpation. See 1 *Comm. c. 3. p. 190—7.*

It is not very easy to say whether Mary and Elizabeth took the crown by inheritance or special parliamentary limitation. When the act 35 *H. 8. c. 1.* passed, they had both by a preceding act (28 *H. 8. c. 7.*) been declared illegitimate, and not capable of inheriting the crown. The act 35 *H. 8.* without repealing the former, limited the succession to them and the heirs of their bodies respectively, under certain circumstances, and upon certain conditions. On the accession of Mary the clauses of 28 *H. 8. c. 7.* by which her illegitimacy had been declared, were repealed (1 *M. st. 2. c. 1.*) and in 1 *M. st. 3. c. 1.* she is called the "inheritor to the imperial crowne," but the act 35 *H. 8. c. 1.* was not formally repealed. Elizabeth did not formally repeal the clauses of 28 *H. 8. c. 7.* which affected her legitimacy; but by 1 *Eliz. c. 3.* she was recognized as being lineally and lawfully descended of the blood royal of the realm; at the same time, however, the limitation of the crown by 35 *H. 8. c. 1.* was expressly confirmed. The inference from the whole seems to be, that though neither of them chose to rely on the parliamentary limitation alone, neither thought it right entirely to forego the security which it afforded. *Coleridge's Note, 1 Comm. 195.*

It may be worth while in this place to advert to the statement of an acute modern writer as to the succession of King James I. to the crown of England. See *Hallam's Constitutional History of England, from Henry VII. to George II. vol. 1. cap. 6.*

"The popular voice in favour of James was undoubtedly raised in consequence of a natural opinion that he was the lawful heir to the throne. But this was only according to vulgar notions of right which respect hereditary succession as something indefeasible. In point

of fact, neither James nor any of his posterity were legitimate sovereigns according to the senses which that word ought properly to bear. The House of Stuart no more came in by a lawful title than the House of Brunswick; by such a title, I mean, as the constitution and established laws of this kingdom had recognised. No private man could have recovered an acre of land without proving a better right than they could make out to the crown of England. What then had James to rest upon? What renders it absurd to call him or his children usurpers? He had that which the flatterers of his family most affect to disdain, *the will of the people*; not certainly expressed in regular suffrage or declared election, but unanimously and voluntarily ratifying that which could in itself give no right,—the determination of the council to proclaim his accession to the throne. It is probable (adds the writer) that what has been just said may appear paradoxical to those who have not considered this part of our history, yet it is capable of satisfactory proof. This proof consists of four propositions: 1. That a lawful King of England, with the advice and consent of Parliament, may make statutes to limit the inheritance of the crown as shall seem fit. 2. That a statute passed in the 35<sup>th</sup> of *H. 8. (c. 1.)* enabled that prince to dispose of the succession by his last will signed by his own hand. 3. That Henry did execute such will, by which in default of issue from his children the crown was entailed upon the descendants of his younger sister, Mary Duchess of Suffolk, before those of Margaret Queen of Scots. [*Blackstone*, however, affirms that this power of making a will was never carried into execution. 4. That such descendants of Mary were living at the decease of Elizabeth." The writer then proceeds to prove the four preceding propositions, and concludes thereon against the legal title of King James I. to the throne, and in favour of such right being vested in the descendants of the House of Suffolk. See also *Luder's Essay on the Right of Succession to the Crown in the Reign of Elizabeth*, who also supports the position as to the want of legal title in the House of Stuart.

*Hallam* concludes the subject by the following statement: "There is much reason to believe that the consciousness of this defect in his parliamentary title put James on magnifying, still more than from his natural temper he was prone to do, the internal rights of primogenitary succession as something indefeasible by the legislature; a doctrine which, however it might suit the schools of divinity, was in diametrical opposition to our statutes." [*Bolingbroke*, (the author adds, in a note,) was of this opinion, considering the act of recog-





IV. to the present, (stated at large in 1 *Comm.* c. 3.) do clearly prove the power of the *King and Parliament* to new model or alter the succession. And, indeed, it is now again made highly penal to dispute it; for by stat. 1 *Ann.* c. 7. it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing, or printing, that the *Kings* of this realm, with the authority of *Parliament*, are not able to make laws to bind the crown, and the descent thereof, he shall be guilty of high treason; or if he maintains the same only by preaching, teaching, or advised speaking, he shall incur the penalties of a *præsumptor*.

The Princess Sophia dying before Queen Anne, the inheritance thus limited descended on her son King George I., and having taken effect in his person, from him it descended to King George II., from him to his grandson and heir, King George III., from him to his son King George IV., and on the death of the latter to our present sovereign William IV.

The *title to the crown* therefore, though at present hereditary, is not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was King Egbert, then William the Conqueror; afterwards, in James I.'s time, the two common stocks united, and so continued till the vacancy of the throne, occasioned by the abdication of James II. in 1688: now it is the Princess Sophia, in whom the inheritance was vested by the King and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only of the body of the Princess Sophia, as are *Protestant members of the Church of England*, and are married to none but Protestants.

In these heirs of the Princess Sophia, (to use, with some modification, the expressions of a modern historian, already quoted in the course of this article,) the right to the crown is as truly hereditary as it ever was in the Plantagenets and the Tudors. But they derive it not from those ancient families. The blood, indeed, of Cerdic, and of the Conqueror, flows in the veins of his present Majesty. Our Edwards and Henrys illustrate the almost unrivalled splendour and antiquity of the House of Brunswick. But they have transmitted no more right to the allegiance of England than Boniface of Este, or Henry the Lion. That right rests wholly on the Act of Settlement, and resolves itself into the sovereignty of the legislature. We have, therefore, an abundant security that no prince of the House of Brunswick will ever countenance the silly theories

of imprescriptible hereditary right, which flattery and superstition seem still to render current in other countries. He would brand his own brow with the names of upstart and usurper. For the history of the Revolution, and that change in the succession which ensued upon it, will, for ages to come, be as fresh and familiar as the recollections of yesterday. And if the people's claim be, as surely it is, the primary foundation of magistracy, it is perhaps more honourable to be nearer the source, than to deduce a title through a series not free from some whose vices or deficiencies may have sullied the splendour of their descent.

The Bill of Rights was reckoned hasty and defective, some matters of great importance had been omitted, and in the period which elapsed from the passing of that statute to the Act of Settlement, new abuses had called for new remedies. It was, therefore, determined to accompany that settlement with additional securities for the subject's liberty, and eight articles were inserted in the act, to take effect only from the commencement of the new limitation to the House of Hanover. Some of them appeared to spring from a natural jealousy of the unknown and foreign line; some should not strictly have been postponed so long, but it is necessary to be content with what it is practicable to maintain. These articles were: 1. That whoever should hereafter come to the possession of the crown should join in communion with the Church of England as by law established. 2. That in case the crown should come to any person not being a native of the kingdom, the nation should not be obliged to engage in any war for the defence of any dominions or territories, which do not belong to the crown of England, without the consent of parliament. 3. That no person who should hereafter come to the possession of the crown should go out of the dominions of England, Scotland, or Ireland, without consent of parliament. [This article was repealed by stat. 1 *Geo.* 1. c. 51.] 4. That all matters relating to government cognizable by the Privy Council should be transacted there, and all resolutions taken thereon should be signed by the privy councillors advising and consenting to the same. [This provision was repealed by stat. 4 *Ann.* c. 8. and see 6 *Ann.* c. 7. and tit. *Privy Council*.] 5. That no person born out of the kingdom of England, Scotland, or Ireland, or the dominions thereunto belonging, (although he be naturalized or made a denizen,) except such as are born of English parents, shall be capable of being of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands or tenements from the crown to himself, or any

others in trust for him. [By 1 *Geo. 1. stat. 2. c. 4.* it is enacted, that no bill of naturalization shall be received without a clause disqualifying the party to sit in Parliament.] 6. That no person having an office or place of trust or profit under the king, or receiving a provision from the crown, shall be capable of serving as a member of the House of Commons. [This has been repealed and otherwise provided for. See tit. *Parliament.*] 7. That judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it shall be lawful to remove them. [See tit. *Judges.*] 8. That no pardon under the great seal of England be pleadable to an impeachment by the Commons in Parliament. [See tit. *Impeachment.*]

As to offences in denying the King's title, see this Dict. tit. *Misprision*; in oppugning it, tit. *Treason*.

II. The first and most considerable branch of the King's royal family, regarded by the laws of England, is the Queen; as to whom see this Dict. tit. *Queen*.

The Prince of Wales, or heir-apparent to the crown, and also his royal consort; and the Princess Royal, or eldest daughter of the King, are likewise peculiarly regarded by the laws. For, by stat. 25 *Edw. 3.* to compass or conspire the death of the former, or to violate the chastity of the latter, is as much high treason as to conspire, the death of the King, or violate the chastity of the Queen. See this Dictionary, tit. *Treason*. The heir-apparent to the crown is usually made Prince of Wales and Earl of Chester, by special creation and investiture; but being the King's *eldest son*, he is by inheritance Duke of Cornwall, without any new creation. 8 *Rep. 1*; *Seld. tit. Lon. 2. 5.*

The observations in *Coke's* reports, however, as well as the words of the statute, it has been remarked, limited the dukedom of Cornwall to the *first begotten son* of a King of England, and to him only. But although from this it is manifest that a Duke of Cornwall must be the first begotten son of a King, yet it is not necessary that he should be born after his father's accession to the throne.

This is, on the whole, a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the Prince's Case, reported by Lord *Coke*, the question was, whether the original grant to Edward the Black Prince, who was created in the 11th of *Edw. 3.* Duke of Cornwall, and who was the first duke in England after the Duke of Normandy, had the authority of parliament; or was an honour

conferred by the King's charter alone? If the latter, the limitation would have been void, as nothing less than the power of Parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the legislature. It concludes, *per ipsum regem et totum concilium in parlamento*.—*Christian's Note* on 1 *Comm. c. 4.* (See printed Parliament Rolls, 5 *H. 4. nu. 22.* and 38 *H. 6. nu. 29.* for full information on this subject. See also this Dictionary, tit. *Prince.*)

The rest of the royal family may be considered in two different lights, according to the different senses in which the term royal family is used. The larger sense includes all those, who are by any possibility *inheritable to the crown*. Such, before the Revolution, were all the descendants of William the Conqueror, who had branched into an amazing extent by intermarriages with the ancient nobility. Since the Revolution and Act of Settlement, it means the *Protestant issue of the Princess Sophia*, now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the laws pay an extraordinary regard and respect.

At the time of passing the Regency Act, stat. 5 *G. 3. c. 27.* (see *post. V. 2.*) the bill, which was framed on the plan of the Regency Act in the preceding reign, empowered his Majesty to appoint either the Queen, or *any other person of his royal family* usually resident in Great Britain, to be Regent until the successor to the crown should attain eighteen years of age. A doubt arising on the question *who were the royal family*, it was explained by the law lords to be the descendants of King George II. It was, therefore, found necessary expressly to insert in the act the name of her Royal Highness the Princess Dowager of Wales, widow of the King's eldest son deceased, and mother of King George III. as she was not held to be comprehended under the general description of the *royal family*. See *Belsham's Memoirs of King George III.*

The younger sons and daughters of the King, and other branches of the royal family, who are not in the immediate line of succession, were, therefore, little farther regarded by the ancient law than to give them a certain degree of precedence before all persons and public officers, as well ecclesiastical as temporal. This is done by stat. 31 *Hen. 8. c. 10.* which enacts, that no person, except the King's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers



therein named shall have precedence above all dukes, except only such as shall happen to be the King's son, brother, uncle, nephew, (which latter Sir *E. Coke*, 4 *Inst.* 362, explains to signify grandson or *nepos*,) or brother's or sister's son.

Indeed, under the description of the King's children, his grandsons are held to be included, without having recourse to Sir *E. Coke's* interpretation of *nephew*; and, therefore, when his late Majesty King George II. created his grandson Edward (the second son of Frederick Prince of Wales, deceased,) Duke of York, and referred it to the House of Lords to settle his place and precedence, they certified that he ought to have place next to the late Duke of Cumberland, the then King's youngest son; and that he might have a seat on the left hand of the cloth of estate. *Lds'. Journ.* Ap. 24, 1760. But when, on the accession of King George III. those royal personages ceased to take place as the children, and ranked only as the brother and uncle of the King, they also left their seats on the side of the cloth of estate; so that when the Duke of Gloucester, his Majesty's second brother, took his seat in the House of Peers, he was placed on the upper end of the earl's bench, (on which the dukes usually sit,) next to his Royal Highness the Duke of York. *Lds'. Journ.* 10 Jan. 1765. And in 1718, upon a question referred to all the judges by King George I. it was resolved by ten against the other two, that the education and care of all the King's grand-children, while minors, did belong of right to his Majesty as King of this realm, even during their father's life. *Fortesc. Al.* 401—440. And they all agreed, that the care and approbation of their marriages, when grown up, belonged to the King, their grandfather. And the judges have more recently concurred in opinion, that this care and approbation extend also to the *presumptive heir* of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. *Lds'. Journ.* 28th Feb. 1772; 11 *St. Tr.* 295. The most frequent instances of the crown's interposition go no farther than nephews and nieces, but examples are not wanting of its reaching to distant collaterals. Therefore, by stat. 28 *H. 8. c.* 18. (repealed among other statutes of treason by 1 *Ed. 6. c.* 12.) it was made high treason for any man to contract marriage with the King's children, or reputed children, his sisters or aunts, *ex parte paterna*, or the children of his brethren or sister; being exactly the same degrees to which precedence is allowed by the stat. 31. *H. 8.* before mentioned. And now by stat. 12 *G. 3. c.* 11. no descendant of the body of King George II. (other than

the issue of princesses married into foreign countries,) is capable of contracting matrimony, without the previous consent of the King signified under the great seal; and any marriage contracted without such consent is void: but it is provided by the act, that such of the said descendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the King's Privy Council, contract and solemnize marriage without the consent of the crown; unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. All persons solemnizing, assisting, or being present at any such prohibited marriage shall incur the penalties of *præmunire*.

In 1793 a marriage was solemnized at Rome, according to the forms, and by a minister, of the church of England, between his Royal Highness the Duke of Sussex and Lady Augusta Murray, daughter of the Earl of Dunmore, who, on their return to England, were re-married at St. George's, Hanover Square. The second marriage attracted the notice of George III., and at his instigation a suit was commenced in the Court of Arches, and a decree pronounced in 1794 declaring both marriages void. A bill for perpetuating the evidence of the first marriage has lately been filed in the Court of Chancery by Sir Augustus d'Este and his sister, the children of his Royal Highness by the above lady. For further particulars concerning the claim of Sir Augustus d'Este, see *Law Mag.* vol. vii. 176.

III. In order to assist the King in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with. These are, his *Parliament*, his *Peers*, and his *Privy Council*. See this Dictionary under those titles.

For law matters the judges of the courts of law are held to be the King's council, as appears frequently in our statutes, particularly the 14 *Edw. 3. c.* 5. and in other books of law. So that when the King's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam*; and if the subject be of a legal nature, then by the King's council is understood his council for matters of law, namely, his judges.—Therefore, when by the 16 *R. 2. c.* 5. it was made a high offence to import into this kingdom any Papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the King and his council to answer for such their offence; here, by the expression of

the King's council were understood the King's judges, of his courts of justice, the subject matter being local; this being the original law of the Coronation Oath, which way of interpreting the word council, 3 *Inst.* by stat. 1 *W. & M. st. 1. c. 6.* is to be admitted to every King and Queen who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops in the presence of all the people; who, on their parts, do reciprocally take the oath of allegiance to the crown.

Upon the same principle, in cases where fine and ransom is imposed for any offence at the King's pleasure, this does not signify any extra-judicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice, *voluntas regis in curia, non in camera.* 1 *Hal. P. C.* 375. This Coronation Oath is conceived in the following terms:

IV. It is in consideration of the duties incumbent on the King by our constitution that his dignity and prerogative are established by the laws of the land; it being a maxim in the law, that protection and subjection are reciprocal. 7 *Rep.* 5. And these reciprocal duties are most probably what was meant by the Convention Parliament in 1688, when they declared that King James II. had broken the original contract between king and people.—But, however, as the terms of that original contract were in some measure disputed, being alledged to exist principally in theory, and to be only deducible by reason and the rules of natural law, in which deduction different understandings might very considerably differ; it was, after the Revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that whatever doubts might be formerly raised about the existence of such an original contract, they must now entirely cease; especially with regard to every prince who hath reigned since the year 1688.

The principal duty of the King is to govern his people according to law. And this is not only consonant to the principles of nature, reason, liberty, and society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. See our ancient authors, *Bract. l. 1. c. 8; l. 2. c. 16. § 3; Fortesc. cc. 2, 34.* But to obviate all doubts and difficulties concerning this matter, it is expressly declared by stat. 12 & 13 *W. 3. c. 2.* "That the laws of England are the birthright of the people thereof; and all the Kings and Queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same; and therefore all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are ratified and confirmed accordingly." See further tit. *Liberties.*

"The Archbishop or Bishop shall say, Will you solemnly promise and swear to govern the people of this [kingdom of England,—see now stat. 5 *Ann. c. 8 § 1.* as to the union of Scotland, and 39 & 40 *G. 3. c. 67.* as to the union of Ireland, and which together is called the United Kingdom of Great Britain and Ireland,] and the dominions thereto belonging, according to the statutes in Parliament agreed on: and the laws and customs of the same? The King or Queen shall say, I solemnly promise so to do.—Abp. or Bp. Will you to your power cause law and justice, in mercy, to be executed in all your judgments? K. or Q. I will.—Abp. or Bp. Will you to the utmost of your power maintain the laws of God, the true profession of the Gospel, and the Protestant reformed religion established by the law; and will you preserve unto the bishops and the clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them? K. or Q. All this I promise to do.—After this the King or Queen, laying his or her hand upon the Holy Gospels, shall say: The things which I have here before promised I will perform and keep; so help me God. And then shall kiss the book."

It is also required, both by the Bill of Rights, 1 *W. & M. st. 2. c. 2.* and the Act of Settlement, 12 & 13 *W. 3. c. 2.* that every King and Queen of the age of twelve years, either at their coronation or on the first day of the first parliament upon the throne in the House of Peers (which shall first happen,) shall repeat and subscribe the declaration against Popery, according to the 33 *Car. 2. st. 2. c. 1.*

The foregoing is the form of the Coronation Oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the *Mirror of Justices* (c. 1. § 2.) and even as the time of *Bracton*. See *l. 3. tr. 1. c. 9.* But the wording of it was changed at the Revolution, because (as the statute alledges) the oath itself had been framed in doubtful words and expressions with relation to ancient laws and constitutions at this time unknown. For these old coronation oaths, see

1 *Comm. c. 6. p. 235, in n.*; and *Rot. Claus. 1 Edw. 2.* In a roll of 5 *Folio. 2.* preserved in Canterbury cathedral, marked K. 11. is the form of the Coronation Oath *si Rex fuerit literatus* in Latin, and *si Rex non fuerit literatus* in French, as required to be administered by the Archbishop of Canterbury, "*ad quem de jure & consuetudine Ecclesie Cant' antiqua & approbata pertinet Regis Anglie inungere & coronare.*"

However, in what form soever this oath be conceived, it is most indisputably a fundamental and express original contract; though doubtless the duty of protection is not as much incumbent on the sovereign before coronation as after; in the same manner as allegiance to the King becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. In the King's part of this original contract are expressed all the duties that a monarch can owe to his people, viz. to govern according to law; to execute judgment in mercy; and to maintain the established religion. And with respect to the latter of these three branches, the Act of Union 5 *Ann. c. 8.* recites and confirms two preceding statutes; the one of the Parliament of Scotland, the other of the Parliament of England; which enact, the former, that every King, at his accession, shall take and subscribe an oath to preserve the Protestant religion, and Presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereto belonging. The 39 & 40 *G. 3. c. 67.* for the union of Great Britain and Ireland, recognizes and confirms this part of the act for the Union with Scotland. See article V. of the Union with Ireland, and this Dict. title *Ireland*. See also the act of the Irish Parliament, 33 *H. 8. c. 1.* by which it is enacted that the Kings of England shall always be Kings of Ireland.

V. I. It has been observed, that one of the principal bulwarks of civil liberty, or, in other words, of the British constitution, is the limitation of the King's prerogative, by bounds so certain and notorious, that it is impossible he should ever exceed them, without either the consent of the people, or a violation of that contract which we have seen expressly subsists between the prince and the subject. When we more particularly consider this prerogative minutely, in order to mark out, in the most important instances, its particular extent and restrictions, one conclusion will evidently fol-

low; that the powers which are vested in the crown by the laws of England are necessary for the support of society, and do not intrench any farther on our *natural*, than is expedient for the maintenance of our *civil liberties*.

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining with decency and respect the limits of the King's prerogative. This was formerly considered as a high contempt in a subject, and the glorious Queen Elizabeth herself directed her parliament to abstain from judging of or meddling with her prerogative. It is no wonder, therefore, that her successor James I. should consider such a presumption as little less than blasphemy and impiety. But whatever may be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The sentiments of *Bracton* and *Fortescue*, at the distance of two centuries from each other, may be seen by a reference to the place cited in the preceding division IV. And *Sir Hen. Finch*, under Charles I., after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people.—The King, says he, has a prerogative in all things that are not injurious to the subject; for in them all it must be remembered, that the King's prerogative stretcheth not to the doing of any wrong. *Finch, l. 84, 85. Nihil enim aliud potest Rex, nisi id solum quod de jure potest. Bract. l. 3. tr. 1. c. 9.*

The nature of our constitution is that of a limited monarchy, in which the legislative power is lodged in the King, Lords, and Commons; but the King is intrusted with the executive part, and from him all justice is said to flow; hence he is styled the head of the Commonwealth, supreme governor, *parens patriæ*, &c.: but still he is to make the law of the land the rule of his government, that being the measure as well of his power as of the subjects' obedience; for as the law asserts, maintains, and provides for the safety of the King's royal person, crown, and dignity, and all his just rights, revenues, powers, and prerogatives, so it likewise declares and asserts the rights and liberties of the subject. 1 *And. 153; Co. Lit. 19, 75; 4 Co. 124.*

Hence it hath been established as a rule, that all prerogatives must be for the advantage of the people, otherwise they ought not to be allowed by law. *Moor, 672; Show, P. C. 75.*

Although the King is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to alter the laws which have been established, and are



the birthright of every subject, for by those very laws he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner they declare and ascertain the rights and liberties of the people, therefore admit of no innovation or change but by act of parliament. 4 *Inst* 164; 2 *Inst* 54, 478 2 *Hul. Hist. P. C.* 131, 282 *Vaugh.* 418; 2 *Salk.* 510.

The rights and prerogatives of the crown are in most things as ancient as the law itself; for though the statute 17 *Edw. 2. c. 1.* commonly called the statute *De prerogativa Regis*, seems to be introductive of something new, yet for the most part it is a collection of certain prerogatives that were known long before. *Bendl.* 117; 2 *Inst.* 263, 496; 10 *Co.* 64.—And this statute does not contain the King's whole prerogative, but only so much thereof as concerns the profits of his coffers. *Plowd.* 314.

The nature of the government of our King, says *Fortescue*, is not only regal, but political; if it were merely the former, regal, he would have power to make what alterations he pleased in our law, and impose taxes and other hardships upon the subject, whether they would or no; but his government being political he cannot change the laws of the realm without the people consent thereto, nor burthen them against their wills. It is also said by the same writer, that the king is appointed to protect his subjects in their lives, properties, and laws; for which end and purpose he has the delegation of power from the people; likewise our King is such by the fundamental law of our land; by which law the meanest subject enjoys the liberty of his person and property in his estate; and it is every man's concern to defend these, as well as the King in his lawful rights. *Fortescue, de Laud. leg. Angl.* 17, &c.

If a King hath a kingdom by title of descent, where the laws have taken good effect and rooting, or if a King conquers a *Christian* kingdom, after the people have laws given them for the government of the country, to which they submit, no succeeding King can alter the same without the parliament. 7 *Rep.* 17. It has nevertheless been held, that conquered countries may be governed by what laws the King thinks fit, and that the laws of England do not take place in such countries until declared so by the conqueror, or his successor; here in case of infidels, their laws do not cease, but only such as are against the law of God; and where the laws are rejected or silent, they shall be governed according to the rule of natural equity. 2 *Salk.* 411, 412, 666.

If the King makes a new conquest of any

country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what laws he pleases. *Dyer*, 224; *Vaugh.* 281.

But until such laws given by the conquering prince, the laws of the conquered country hold place; (unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent;) for in all such cases the laws of the conquering country prevail. 2 *P. Wms.* 75, 76.

If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go carry their laws with them, therefore such new found country is to be governed by the laws of England; though after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them.—2 *P. Wms.* 75; 2 *Salk.* 411. And see *Campbell v. Hall, Consp.* 204; *Spragge v. Stone*, cited *Dougl.* 35, 37, 38.

Questions of this nature are not at present likely often to arise, since (as in the instance of annexing the crown of Corsica to the British crown in 1794) all such transactions are now regulated by express stipulations; which neither leave to the prerogative of the conquering monarch, nor the laws of his kingdom, any power to interfere.

By the word *prerogative* is usually understood that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology from *præ* and *rego*, something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone in contradistinction to others; and not to those which he enjoys in common with any of his subjects; for if once any prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. *Finch*, therefore, lays it down as a maxim, that the prerogative is that law in case of the King, which is law in no case of the subject. *Finch, L.* 85.

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority as are rooted in, and spring from, the King's political person, and of which we are about to state the law at some length. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the King's person, and are indeed only exceptions in fa-

your of the crown, to the general rules established for the rest of the community; such as that no costs shall be recovered against the King; that he can never be a joint-tenant; and that his debt shall be preferred before that of a subject. These, and an infinite number of other instances, will better be understood by referring to the subjects themselves, to which these incidental prerogatives are exceptions. As to his prerogative relating to his debts, however, here reckoned among those considered as incidental, see *post*, VI. at some length; and this Dictionary, titles *Execution, Extent, Judgment, &c.* Other incidental prerogatives are, that where the title of the King and a common person concur, the King's title shall be preferred. 1 *Inst.* 30. No distress can be made upon the King's possession, but he may distrain out of his fees in other lands, &c. and may take distresses in the highway. 2 *Inst.* 131. An heir shall pay the King's debt, though he is not named in the bond; and that the King's debt shall be satisfied before that of a subject, from which there is a prerogative writ. 1 *Inst.* 130, 386. But this is where the debt is in equal degree with that of the subject. See 33 *Hen.* 8. c. 39. at large; *post*, VI.; and *Cro. Car.* 283 *Hardr.* 23. Goods and chattels may go in succession to the King, though they may not to any other sole corporation. *Inst.* 90. In the hands of whomsoever the goods of the King came, their lands are chargeable, and may be seized for the same; and the King is not bound by sale of his goods in open market. 2 *Inst.* 713. No entry will bar the King, and no judgment is final against him, but with a *salvo jure regis*. *Litt.* 178; *Finch*, 46; but see *post*, 2, as to the *nullum tempus* act, 9 *G.* 3. c. 9. &c. The King may plead several matters without being guilty of double pleading, and the party shall answer them all. *Bro. Dougl. pl.* 57. In his pleading he need not plead an Act of Parliament as a subject is bound to do. 4 *Rep.* 75. He is not bound to join in demurrer on evidence, and the court may direct the jury to find the matter specially.—*Finch*, 82; 5 *Rep.* 104. The King's own testimony of any thing done in his presence is of as high a nature and credit as any record; whence, in all original writs or precepts, he useth no other witness than himself, as *teste meipso*. 1 *Inst.* 41, 57.

It may not be unapt here to mention, one of the prerogatives of the crown with respect to the descent of lands, that wherever either a general or special custom of descents would operate so as to sever lands, before held by the King *jure coronæ*, from the person of his successor, there that custom cannot prevail,

“for the crown and the lands whereof the King is seised *jure coronæ* are *concomitantia*.” Thus, if the King dies, leaving two sons by different wives, and the elder having succeeded, and having been seised of lands in fees, dies without issue, the younger will on succeeding to the crown inherit these lands, though of half the blood only to the person last seised. So, if a King die, leaving two daughters, the eldest alone will, with the crown, take all the lands whereof he was seised *jure coronæ*, and not as coparcener with her sister. These two are instances where the general custom as regards subjects will not prevail against the *jure coronæ*. So, if the King purchase lands of the nature of gavelkind, where by the custom all the sons inherit equally yet upon the King's demise his eldest son shall succeed to those lands alone in exclusion of any other sons.—See 1 *Inst.* 15.

It is also held, that the King is by his prerogative *universal occupant*, as all property is presumed to have been originally in the crown; and that he partitioned it out in large districts to the great men who deserved well of him in the wars, and were able to advise him in time of peace. Hence the King hath the direct dominion; and all lands are holden mediately or immediately from the crown. *Co. Lit.* 1; *Dyer*, 154; 1 *Bentl.* 237; *Seld. Mare Claus.*

If the sea leaves any shore by the water suddenly falling off, such derelict lands belong to the King; but if a man's lands lying to the sea are increased by insensible degrees, they belong to the soil adjoining. *Dyer*, 326; 2 *Rol. Abr.* 170. This distinction was fully established in *Rex v. Lord Yarborough*, 3 *Barn. & C.* 91; 5 *Bing.* 163; and see 4 *Barn. & C.* 495.

So, if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the King; for the English sea and channels belong to the King; and, having never distributed them out to the subjects, he hath a property in the soil. 2 *Rol. Abr.* 170.

But if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands. 2 *Rol. Abr.* 170.

If land be drowned, and so continue for years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries. 8 *Co.* *Sir Francis Barrington's case*.

It is said, that there is a custom in Lincolnshire, that the lord of the manor shall have derelict lands; and that as such it is a reasonable custom; for if the sea wash away the lands





mestic tribunal, there would soon be an end to the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

Are then, it may be asked, the subjects of England totally destitute of remedy in case the crown should invade their rights either by private injuries or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

As to private injuries, if any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. *Finch, l. 525.* See this Dictionary, title *Chancery*; and *post*, as to the perfection ascribed to the King.

As to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a King cannot misuse his powers without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the law of the land. But at the same time it is a maxim in those laws, that the King himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

As to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, these are cases which the law will not, out of decency, suppose; being incapable of distrusting those whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust or abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the very idea of sovereignty. If therefore (for example) the two Houses of Parliament, or either of them, had avowedly a right to animadvert on the King or each other, or if the King had a right to animadvert on either of the Houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of law therefore is, that neither the King, nor either House of Parliament (collectively taken) is capable of doing any wrong;

since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule or express legal provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity, nor will sacrifice their liberty by a scrupulous adherence to those political maxims which were originally established to preserve it. And, therefore, though the positive laws are silent, experience furnishes us with a very remarkable case, wherein nature and reason prevailed. When King James II. invaded the fundamental constitution of the realm, the Convention Parliament declared an abdication, whereby the throne was considered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no further, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution by breaking the original contract between King and people, should violate the fundamental laws, and should withdraw himself out of the kingdom, we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

It may not be amiss to conclude this part of the subject with observing, that all persons born in any part of the King's dominions, and within his protection, are his subjects; thus are those born in Ireland, Scotland, Wales, the King's plantations, or on the English seas; who by their birth owe such an inseparable allegiance to the King, that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince. *7 Co. 1, &c.; Calvin's case; Molloy, 370; Co. Lit. 129; Dyer, 300.* See titles *Aliens, Allegiance, Treason.*

Besides the attribute of sovereignty, the law also ascribes to the King, in his political

capacity, absolute *perfection*. The King can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice. *Plowd.* 487.

Or perhaps it means that, although the King is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong that he may actually commit. The law will therefore presume no wrong where it has provided no remedy. The *inviolability of the King* is essentially necessary to the free exercise of those high prerogatives which are vested in him, not for his own private splendor and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects.

The King moreover is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness. If, therefore, the crown should be induced to grant any franchise or privilege to a subject, contrary to reason, or any way prejudicial to the commonwealth, or a private person, the law will not suppose the King to have meant either an unwise or an injurious action; but declares that the King *was deceived* in his grant; and, therefore, such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the crown has thought proper to employ. See title *Grants of the King*. But a latitude of supposing a possibility of some failure of this personal perfection is allowed in the case of inquiries frequently instituted by Parliament, even as to those acts of royalty which are most properly and personally the King's own; but which are to be conducted in those assemblies with the decency and respect due to the kingly character. See further *Parliament*.

The following is a concise statement of the remedies for the various injuries which may proceed from, and also for those which may affect the rights of the crown.

The distance between the sovereign and his subjects is such, that it can rarely happen that any *personal* injury can immediately and directly proceed from the prince to any private man; and as it can so seldom happen, the law in decency supposes that it never can

or will happen at all. But injuries to the rights of *property* can scarcely be committed by the crown, without the intervention of its officers, against whom the law furnishes various methods of detecting their errors or misconduct.

The common law methods of obtaining possession or restitution from the crown of either real or personal property are, by *petition of right*, (already alluded to above,) or *monstrans de droit*, manifestation or plea of right; as to both which see title *Monstrans de Droit*.

The methods of redressing such injuries as the crown may receive from a subject are, either by such usual common-law actions as are consistent with the royal prerogative and dignity; or by such prerogative modes of process as are peculiarly confined to the crown. As the King, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a disposssession of the plaintiff, such as an *assise* or *ejectment*. *Bro. Ab.* 1; *Prerogative*, 89. But he may bring a *quare impedit*, which always supposes the plaintiff to be seised or possessed of the advowson; and he may prosecute this writ like every other by him brought, as well in the Court of King's Bench as of Common Pleas, or in whatever court he pleases. *F. N. B.* 32; 3 *Comm.* c. 17. So too he may bring an action of *trespass* for taking away his goods; but such actions (of trespass) are not usual, though in strictness maintainable for breaking his close or other injury done upon his soil and possession. *Bro. Ab.* 1; *Prerogative*, 130; *F. N. B.* 90; *Y. B.* 4 *H.* 4, 4.

Much easier and more effectual remedies are, however, usually obtained by prerogative modes of process. Such is that of *inquisition* or inquest of office, as to which see title *Inquest*. Where the crown hath unadvisedly granted any thing by letters patent which ought not to be granted, or where the patentee hath done any act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in Chancery. See *Dyer*, 198; 3 *Lev.* 220; 4 *Inst.* 88. So also, if upon office untruly found for the King, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined, to a *scire facias* against the patentee in order to avoid the grant. *Bro. Ab.* 1; *Scire Facias*, 69, 185. See title *Scire Facias*. An *information* on behalf of the crown is a method of suit for recovering money, or obtaining damages for any personal wrong to the lands or possessions of the crown; as to which see title *Information*. A writ of *quo war-*

*ranto* is in the nature of a writ of right for the King against any person claiming or usurping any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. *Finch, l. 322; 2 Inst. 282.* See title *Quo Warranto*. And something of the same nature is the writ of *mandamus*, as to which see titles *Corporation, Mandamus*.

The law also determines that in the King can be no negligence or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit Regi* has been the standing maxim upon all occasions; for the law intends that the King is always busied for the public good, and therefore has not leisure to assert his right within the times limited to his subjects. *Finch, l. 82; Co. Litt. 90.* This maxim applies also to criminal prosecutions which are brought in the name of the King; and therefore by the common law there is no limitations in treasons, felonies, or misdemeanors. By stat. 7 W. 3. c. 7. an indictment for treason, except for an attempt to assassinate the King, must be found within three years after the commission of the treasonable act. See title *Treason*. But where the legislature has affixed no limit, *nullum tempus occurrit Regi* holds true; thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim obtains still in full force in Ireland. 1 *Ld. Mountm.* 365.

In civil actions relating to landed property, by stat. 9 G. 3. c. 16. commonly called the *Nullum Tempus* Act, the King, like a subject, is limited (in respect to claims in Great Britain) to sixty years. For the occasion of passing this act, see *Belsham's Memoirs of George III. sub. an. 1768.* See also the stats. 21 Jac. 1. c. 23; 11 G. 3. c. 4. The provisions of the 9 G. 3. c. 16. were extended to Ireland by the 49 G. 3. c. 47.

The King is also expressly bound by two of the recent statutes of limitations, viz. the 2 & 3 W. 4. c. 100. for shortening the time in claims of *modus decimandi*; and the 2 & 3 W. 4. c. 71. for shortening the time of prescription in certain cases. See further *Modus, Tithes*, and the various titles relative to incorporeal hereditaments.

In the King also can be no *stain* or *corruption of blood*; for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*. *Finch, l. 82; Rot. Parl. 1 R. 3.*

Neither can the King, in judgment of law, as King, ever be a *minor* or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not

in his natural capacity attained the age of twenty-one. *Co. Litt. 43; 2 Inst. Proem. 3.* Indeed by stat. 28 H. 8. c. 17. power was given to future Kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four; but this was repealed by stat. 1 Edw. 6. c. 11. so far as related to that prince; and both statutes are declared by stat. 24 G. 2. c. 24. to be determined. It hath also been usually thought prudent, when the heir-apparent has been very young, to appoint a protector, guardian, or regent for a limited time; but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the King is no minority, and therefore he hath no legal guardian.

The methods of appointing a guardian or regent, in case of an infant-heir to the crown, have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore the surest way is to have him made by authority of the great council in parliament. 4 *Inst.* 58. The stats. 24 H. 3. c. 12; 28 H. 8. c. 7. [*q. 17?*] provided, that the successor, if a male, and under eighteen, or a female, and under sixteen, should be till such age in the government of his or her natural mother, (if approved by the King,) and such other counsellors as his Majesty should by will or otherwise appoint; and he accordingly appointed his sixteen executors to have the government of his son Edward VI. and the kingdom, which executors elected the Earl of Hertford protector. The stat. 24 G. 2. c. 24. in case the crown should descend to any of the children of Frederic, then late Prince of Wales, under the age of eighteen, appointed the princess dowager; and the stat. 5 G. 3. c. 27. in case of a like descent to any of the children of King George III. empowered the King to name either the queen, the princess dowager, or the descendant of King George II. residing in this kingdom, to be guardian and regent, till the successor attained such age, assisted by a council of regency, the powers of them all being expressly defined and set down in the several acts. See *ante*, II.

By the statute 1 W. 4. c. 2. "to provide for the administration of the government in case the crown should descend to the Princess Alexandrina Victoria when under the age of eighteen," her mother, the Dutchess of Kent, (widow of the deceased Duke of Kent, the fourth son of King George III.) was appointed her guardian, with authority, in the name of the princess and in her stead, under the style and title of regent, to exercise the royal power during such minority, in case the King, William IV.



should die without issue; with a proviso, that if any child of his should be born after his decease, all the powers of the act should cease and determine, § 1. If on the demise of the crown there should not be any child living born of his queen, the privy council are directed to cause the princess to be proclaimed as sovereign, but subject to and saving the rights of any issue of King William IV. which might be afterwards born; and such reservation was also to be added to the oath of allegiance till parliament should otherwise order, § 2. If at the death of King William IV. no child of his should be living, but a child should be afterwards born, his Queen is to be guardian of the child, and regent until the child shall be eighteen, § 3. Such child shall be proclaimed King or Queen, § 4. In case of the birth of such posthumous child, parliament shall meet forthwith, and the laws regarding parliament and all officers, &c. shall apply as on a demise of the crown, § 5. All acts of royal power exercised during the regency otherwise than according to the direction of this act declared void, § 6. Oath of regent to be administered by and taken before the privy council, § 7.—The regent on taking the oath "shall make, subscribe, and audibly repeat," the declaration against Popery required by the 30 *Car. 2. st. 2.* and produce a certificate of having taken the sacrament, § 8. The King or Queen under age prohibited from marrying without the consent of the regent, § 9. Regent disabled from giving royal assent to any bill for changing the order of succession to the crown, contrary to act, 1 *W. 3. c. 2*; or for altering the English act, 13 & 14 *Car. 2. c. 4*; or the Scotch act, 1702, *c. 3.* for securing the Protestant religion, § 10. If the Dutchess of Kent shall during his Majesty's lifetime, without his consent, or after his death if any such regent shall marry a Roman Catholic, or a foreigner, without consent of parliament, or shall cease to reside in the United Kingdom, she shall cease to be regent, § 11. In case of the decease of the Queen of William IV. and his subsequent marriage, the act shall determine, § 12.

As to the mode of proceeding in appointing a *custos* or guardian of the realm, and executing the sovereign authority in case of a demise of the crown, while the successor is in foreign parts, see Macpherson's *Original Papers*, containing the secret history of Great Britain, from the Restoration to the accession of the House of Hanover, 4to. 1776, vol. ii. p. 475, &c.; a paper from the minister of the Elector of Hanover, asking the opinion of his friends in England concerning the measures to be taken in the event of Queen Anne's death; and p. 481, &c. a letter from the Earl of

Sunderland to the Elector's minister at the Hague, inclosing an answer to the minister's inquiries, and the powers of commissioners necessary on such an occasion.

Upon King George III.'s illness in 1811, the act, 51 *G. 3. c. 1.* was passed to provide for the administration of the royal authority, and the care of his Majesty's person during the continuance of such illness. By this act the Prince of Wales was appointed "REGENT of the United Kingdom of Great Britain and Ireland," under certain restrictions, many of which were afterwards removed. The other acts passed for regulating the regency were 52 *G. 3. c. 6, 7*; 53 *G. 3. c. 14*; and 55 *G. 3. c. 15*.

From the maxim that the King, as King, cannot be a minor, grants, leases, &c. made by him, though under age, bind presently, and cannot be avoided by him either during his minority, or when he comes of age: for it is a maxim of politics, that he who is to govern the kingdom should never be considered as incapable, from minority, of governing his own affairs. *Dy. 209. pl. 22*; *Plowd. 289*; *Co. Lit. 43*; 5 *Co. 27*; *Raym. 90*.

The law ascribes to the King's Majesty, in his political capacity, an absolute immortality. The King never dies. Henry, Edward, or George may die, but the King survives them all: for immediately upon the decease of the reigning prince, in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is *eo instanti* King to all intents and purposes: and so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*, *demissus regis vel coronæ*, an expression signifying merely a transfer of property. By the term *demise of the crown*, therefore, is understood, that in consequence of the disunion of the King's natural body from the body politic, the king is transferred or demised to his successor, and so the royal dignity remains perpetual. *Plowd. 177. 234.*—Thus, too, when Edward IV. in the 10th year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as it then was upon the natural death of the King. *M. 49 H. 6. pl. 1—8.*

King Henry II. took his son into a kind of subordinate regality with him, so that there were *Rex Pater* and *Rex Filius*: but he did not divest himself of his sovereignty, but reserved to himself the homage of his subjects. And notwithstanding this King, by consent of parliament, created his son John King of Ireland; and King Richard II. made Robert de Vere Duke of Ireland; and Edward III. made his el-

dest son Lord of Ireland, with royal dominion; yet it has been expressly held, that the King cannot regularly make a king within his own kingdom. 4 *Inst.* 357, 360. Henry de Beauchamp, Earl of Warwick, was by King Henry VI. crowned King of Wight Island; but it was resolved that this could not be done without consent of parliament; and even then our greatest men have been of opinion that the King could not by law create a King in his own kingdom, because there cannot be two kings of the same place: and afterwards the same King Henry made the same Earl of Warwick *Primus Comes totius Angliæ*. *Hul. Hist. Coron.*

A King cannot resign or dismiss himself of his office of King without consent of parliament; nor could Henry II. without such consent divide the sovereignty: there is a sacred bond between the King and his kingdom that cannot be dissolved without the free and natural consent of both in Parliament; and though in foreign kingdoms there have been instances of voluntary cessions and resignations, which possibly may be warranted by their several constitutions, yet by the laws of England, the King cannot resign his sovereignty without his Parliament. *Hale's H. Cor.*

3. In the exercise of those branches of the royal prerogative which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, consists the executive part of the government. This is wisely placed in a single hand by the British Constitution, for the sake of unanimity, strength, and dispatch.—The King of England is therefore not only the *chief*, but properly the *sole magistrate* of the nation; all others acting by commission from and in due subordination to him.

In the exertion of lawful prerogative, the King is and ought to be absolute, that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases, unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary, declaring that thus far the prerogative shall go, and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man, or body of men, were permitted to disobey it in the ordinary course of law. It is not now meant to speak of those *extraordinary* resources to first principles which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a

defence against the violence of fraud or oppression: and yet the want of attending to this obvious distinction has occasioned these doctrines of absolute power in the prince, and of national resistance by the people, to be much misunderstood and perverted by the advocates for slavery on the one hand, and the demagogues of faction on the other. Civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society. Society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

In the exertion, therefore, of these prerogatives, which the law has given him, the King is irresistible and absolute, according to the forms of the constitution; and yet, if the consequence of that exertion be manifestly to the grievance or dishonour of the kingdom, the parliament will call his advisers to a just and severe account. Thus the King may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded.

With regard to *foreign concerns*, the King is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with any other community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the King, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates, who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the King's concurrence is the act only of private men: and so far is this point carried by our law, that it hath been held, that should all the subjects of England make war with the King of England, without the royal assent, such war is no breach of the league. 4 *Inst.* 152. And by the 2 *H. 5. c. 6.* any subject committing acts of hostility upon any nation in league with the King, was declared to be guilty of high treason; and though that act was repealed by the 20 *H. 6. c. 11.* so far as relates to making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or other-

wise, according to the circumstances of the case.

The King, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. How far the municipal laws of England intermeddle with or protect the right of these messengers from one potentate to another, may be seen in this Dictionary tit. *Ambassadors*, and more fully, 1 *Comm.* c. 7.

It is also the King's prerogative to make *treaties, leagues, and alliances* with foreign states and princes: for it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the King.—Whatever contracts therefore, he engages in, no power in the kingdom can legally delay, resist, or annul. Although, lest this plentitude of authority should be abused to the detriment of the public, the constitution (as has been already hinted) hath here interposed a check; by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives, advise or conclude any treaty which shall afterwards be judged to derogate from the honor and interest of the nation.

Upon the same principle, the King has also the sole prerogative of making *war and peace*. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power. *Puff. b. 8. c. 9. § 6*—This right is given up, not only by individuals, but by the entire body of the people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war.—Whatever hostilities, therefore, may be committed by private citizens, the state ought not to be affected thereby, unless that should justify their proceeding, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers. In order to make a war completely effectual, it is necessary with us in England that it may be publicly [actually or virtually] declared and duly proclaimed by the King's authority; and then all parts of both contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must

reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

The power of making war or peace is enumerated by Lord Hale *inter jura summi imperii*, and in England is lodged *singly* in the King; though, says he, it ever succeeds best when done by parliamentary advice. 1 *Hale's Hist. P. C.* 159; 7 *Co.* 25.

A general war, according to the same writer, is of two kinds, 1. *Bellum solenniter denunciatum.* 2. *Bellum non solenniter denunciatum.* The first is, When war is solemnly declared or proclaimed by our King against another prince or state, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting letters of marque, by a foreign prince invading our coasts, or setting on the King's navy at sea; and hereupon a real, though not a solemn, war may arise and hath formerly arisen; therefore to prove a nation to be at enmity with England, or to prove a person to be an alien enemy, there is no necessity of showing any war proclaimed; but it may be averred, and so put upon the trial of the country, whether there was a war or not. 1 *Hale's Hist. P. C.* 163. See further also as connected with this subject, titles *Letters of Marque; Safe Conduct.*

In all these prerogatives of the King respecting this nation's intercourse with foreign nations, he is considered as the delegate or representative of his people: but in domestic affairs, he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

*First.* He is a constituent part of the supreme legislative power, and as such has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution is evinced at large under tit. *Parliament.* It may here be added, that the King is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (any person or persons, bodies politic or corporate, &c.) affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. 11 *Rep.* 74. Yet where an act of parliament is expressly made for the preservation of public rights, and suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the King as the subjects. 11 *Rep.*



71. The King may likewise take the benefit of any particular act, though he be not especially named. 7 Rep. 32.

The King is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom.

In this capacity of General of the Kingdom, the King has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated, more is said in other places. We are now only to consider the prerogative of enlisting and governing them, which indeed was disputed and claimed, contrary to all reason and precedent, by the Long Parliament of King Charles I.; but, upon the restoration of his son, was solemnly declared by the 13 Car. 2. c. 6. to be in the King alone; for that the sole supreme government and command of the *militia* within all his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of England; and that both or either house of parliament cannot nor ought to pretend to same. See title *Militia*.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts and other places of strength within the realm, the sole prerogative as well of erecting, as manning and governing of which belongs to the King in his capacity of general of the kingdom. 2 Inst. 30. And all lands were formerly subject to a tax for building of castles wherever the King thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas*, viz. *pontis reparatio*, *arcis constructio*, and *expeditio contra hostem*. Cowell's Inter. tit. *Castellorum operatio*. Seld. Jan. Angl. 1, 42. See title *Castles*, *Forts*, &c.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the King has the prerogative of appointing ports and havens, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper. See title *Harbours* and *Havens*; and to this head may be referred also the prerogative as to the erection of beacons and lighthouses; as to which see 4 Inst. 148; 12 Co. 13; Carter, 90; 2 Keb. 214; 3 Inst. 204; and title *Beacons*.

To this branch of the prerogative may also be referred the power which has been vested in the King, from time to time, by various acts, and by the recent statute 3 & 4 W. 4. c. 52, of allowing or prohibiting the importation or exportation of arms, gunpowder, mili-

tary stores, &c.; and likewise the right which the King has, wherever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas.

By the common law, every subject may go out of the kingdom for merchandize or travel, or other cause, as he pleases, without any license for that purpose; this appears from the statute 5 R. 2. c. 2. made to restrain persons passing out of the realm, but excepts lords, great men, and notable merchants; as also by the statute 26 H. 8. c. 10. which gave power to the King, during his life, to restrain persons from trading to certain countries; which acts had been vain and idle if the King, by his prerogative, might have done it. F. N. B. 85; Dyer, 165, 296; 2 Rol. Rep. 12; 3 Mod. 131; Still. 442.

But notwithstanding this general liberty allowed by the common law, it appears plainly that the King by his prerogative, and without any help of an act of parliament, may prohibit his subjects from going out of the realm; but thus must be by some express prohibition; as by laying on embargoes, which can be only done in time of danger, or by writ of *ne exeat regno*, which, from the words *quamplurima nobis & coronæ nostræ præjudicialia ibidem prosequi intendis*, appears to be a state writ, though it is never granted universally, but to restrain a particular person, on oath made, that he intends to go out of the realm; indeed, Fitzherbert says, that the King may restrain his subjects by proclamations, and assigns as a reason for it, that the King may not know where to find his subject, so as to direct a writ to him. 12 Co. 33; 11 Co. 92; Fitz. N. B. 89; 2 Inst. 54. See title *Imbargo*, *Ne exeat Regno*.

As the King may restrain any of his subjects from going abroad, in like manner he may command them to return home; and disobeying a privy seal for this purpose is the highest contempt. 1st, It is a disobedience to the command of the King himself, directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the King is the principal duty of a subject, viz. to be at the service of his King and country. Dyer, 128 b; Lane, 44; Moor, 109; 3 Inst. 179.

The punishment for this offence is seizing the party's estate till he return; and of this there are many instances in our books; and when he does return he shall be fined. 1 Harok. P. C. c. 22. § 4.

William de Brittain, in the 19th of Edw. 2. refusing to return on the King's writ, his goods and chattels, lands and tenements were seized into the King's hands; so in the case of

Edward of Woodstock, Earl of Kent, in the same reign. *Dyer*, 128, b.

So in the case of one Bartue, who married the Duchess of Suffolk, they obtained a license from Queen Mary to go out of the realm, under pretence of recovering debts as executors to the duke; when in reality it was on account of the religion established by Queen Mary, and living with other fugitives under the protection of the Palsgrave of the Rhine, in Germany, who was an eminent Calvinist, were sent to by privy seal, but the messenger, in endeavouring to serve them with his letters, being obstructed and abused by their attendants, a certificate was made of this, and their lands and tenements seized. *Dyer*, 176; *Jenk. Cent.* 220.

So in the case of Sir Francis Englefield, who departed the kingdom on a license obtained for three years, but not returning at the expiration of three years, a privy seal was sent to him by Queen Elizabeth, which he not obeying, and this matter being certified into Chancery by the queen, under her sign manual, his lands and tenements were seized in the fifth year of her reign, by virtue of a commission under the great seal. 1 *Leon.* 9; *Moor*, 109; 1 *And.* 95, *S. C.* See also 7 *Co.* 18; *Poph.* 18; 4 *Leon.* 135.

So in the case of Sir Robert Dudley, who intending to travel, obtained a licence from James the First to go to Venice; but before his departure, he, by indenture inrolled, for valuable consideration, as was expressed in the deed, (but none paid,) conveyed the manor of Killingworth, with other lands, to the Earl of Nottingham and others, in fee, with a proviso, that on tender of an angel of gold, all should be void; and with a covenant on the part of the bargainees, that they should make all such estates as the said Sir Robert should appoint; the bargainees were not parties to the deed, nor had they notice of it till some time after; but afterwards they made a lease to Sir Robert Lee, to the intent that Lady Dudley should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The King hearing that Sir Robert had been guilty of some bad practices beyond sea, in the fifth year of his reign, sent his privy seal to him, which he not obeying, the great question in this case was, whether those lands thus conveyed were forfeited; and adjudged that they were, the conveyance being fraudulent as to the King. *Lane*, 42, &c.

In these cases it hath been held, that the King hath only an interest in the offender's lands till he return; and that his restoring them is not a matter of grace but of right. *Lane*, 48.

The King is also considered as the fountain of justice, and general conservator of the peace of the kingdom. All jurisdiction exercised in these kingdoms, that are in obedience to our King, is derived from the crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence it is that all judges derive their authority from the crown, by some commission warranted by law. *Fleta*, c. 17; *Co. Lit.* 99 a, 144; see title *Judges*.

From the inherent right inseparable from the King to distribute justice among his subjects, it hath been held that an appeal from the Isle of Man lies to the King in council, without any reservation in the grant of the Isle of Man of any such right; and though there had been exclusive words, yet the grant must have been construed to be void on the King's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice. 1 *P. Wms.* 329.

A consequence of this prerogative is the legal ubiquity of the King; his Majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. *Fortesc.* c. 8; 2 *Inst.* 186. His judges are the mirror by which the King's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions or pronounce judgment for the benefit and protection of the subject; and from this ubiquity it follows, that the King can never be nonsuit; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court; but the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. *Co. Lit.* 139. For the same reason, also, in the forms of legal proceedings, the King is not said to appear by his attorney, as other men do; for in contemplation of law he is always present in court, *Finch*, L. 81.

From the same original, of the King's being the fountain of justice, may also be deduced the prerogative of issuing proclamations, which is vested in the King alone. These proclamations have then a binding force, when they are grounded upon and enforce the laws of the realm. 3 *Inst.* 162. For though the making of laws is entirely the work of a distinct part, the legislative branch of the sovereign power; yet the manner, time, and circumstances of putting these laws in execution, must frequently be left to the discretion of the executive magistrate; and therefore his constitutions or edicts concerning these points, which we call proclamations,

are binding upon the subject where they do not either contradict the old laws, or tend to establish new ones, but only enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary. Thus the established law is, that the King may prohibit any of his subjects from leaving the realm: a proclamation, therefore, forbidding this, in general, for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an act of parliament, because founded upon a prior law. 4 *Mod.* 177, 179.

But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in time of a public scarcity,) being contrary to law, and particularly to a statute then in force (22 *C. 2. c. 13.*) the advisers of such a proclamation, and all persons acting under it, always found it necessary to be indemnified by special acts of parliament. See stats. 7 *G. 3. c. 7*; 30 *G. 3. c. 1*; and title *Embargo*.

By the stat. 31 *H. 8. c. 8.* it was enacted that the King's proclamations should have the force of acts of parliament; a statute, which was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after, by stat. 1 *Edw. 6. c. 12.* It was anciently held, though that is not now law, that the King might suspend, *dispense* with, or alter any particular law that he deemed hurtful to the public; and it has been said, that he may dispense with a penal statute wherein his subjects have not any interest. 4 *Inst.* 7; 4 *Rep.* 36; but by stat. 1 *W. & M. st. 2. c. 2.* it is declared and enacted, "that no dispensation by *non obstante* of or to any statute, or any part thereof, be allowed, but that the same shall be held void and of none effect, except a dispensation be allowed in such statute." It is plain, however, that the King, by his prerogative, may in certain cases and on special occasions, issue proclamations for prevention of offences, to ratify and confirm an ancient law, or as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm, are of great force. *Fortesc. de Laud. c. 9*; 11 *Co.* 87; 12 *Co.* 74, 75; *Dal.* 20. *pl.* 10; 2 *Roll. Abr.* 209; 3 *Inst.* 162.

It is likewise clear, that the subject is obliged, on pain of fine and imprisonment, to obey every proclamation legally made, and though the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it, and on which alone the

party disobeying may be punished. 12 *Co.* 74; *Hob.* 251. It is clearly agreed, that no private person can make any proclamation of a public nature, except by custom, as is usual in some cities and boroughs; this being a prerogative act, with which alone the King is intrusted. *Bro. Procl. pl.* 1; 12 *Co.* 75, *Crom. Juris.* 41.

But, according to the principles already laid down, the King, by his proclamation, cannot change any part of the common law, statutes or customs of this realm; nor can he by his proclamation create an offence which was not an offence before. 11 *Co.* 87 *b*; 12 *Co.* 75.

On this foundation it hath been held that the King's proclamation prohibiting the importation of wines from France, on pain of forfeiture, was against law, and void; there being at that time no war subsisting between the nations. 2 *Inst.* 63.

So where an act was made by which foreigners were licensed to merchandize within London; and Henry IV. by proclamation, prohibited the execution of it, and ordered it should be in suspense *usque ad proximum parliamentum*; and this was held to be against law. 12 *Co.* 75.

On a conference between some lords of the privy council, and the two chief justices (of which Lord Coke was one,) and chief baron and baron Altham, the question was,

1st, Whether the King by proclamation might prohibit new buildings in and about London?

2d, If the King might prohibit the making starch of wheat?

And the judges were of opinion that the subject could not be restrained in these particulars by the King's proclamation. 12 *Co.* 74

The King, by proclamation, may call or dissolve parliament, and declare war or peace; for these are prerogative acts with which he is intrusted, as the executive part of the law; but if there be an actual war, it is not necessary in pleading to show that such war was proclaimed. 3 *Inst.* 162; 1 *Hal. H. P. C.* 163; *Owen*, 45; *Rast. Ent.* 605; see *ante*.

The King, by proclamation, may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation; he may legitimate base coin, or mixed below the standard of sterling; he may enhance coin to a higher denomination or value, and may decry money that is current in use and payment; and in all these cases a proclamation, with a *proclamation writ* under the great seal, is necessary. *Co. Lit.* 207 *b*; 5 *Co.* 114 *b*; *Dar.* 21; 1 *Hal. H. P. C.* 192, 197; see title *Coin*.

The King, by proclamation, may appoint



fasts and days of thanksgiving and humiliation, and issue proclamations for preventing and punishing immorality and profaneness, and enjoin reading the same in churches and chapels. *Comp. Incumb.* 354.

A proclamation must be under the great seal, and if denied, is to be tried by the record thereof; but if a man pleads he was prevented doing a thing by proclamation, it seems the better opinion that he need not aver that such proclamation was under the great seal; for alleging that such proclamation was made, it shall be intended to have been duly made. *Cro. Car.* 180; see 1 *Rol. Rep.* 172; *vide Cro. Car.* 130.

The King is likewise the fountain of honour, of office, and of privilege; and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank, that the people may know and distinguish such as are set over them, in order to yield them that due respect and obedience; and also that the officers themselves being encouraged by emulation, and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services, as the King himself who employs them. It has, therefore, intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. And, therefore, all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown, either expressed in writing by writs or letters-patent, as in the creation of peers and baronets; or by corporal investiture, as in the creation of a simple knight. See titles *Precedency*, *Peers*.

From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices are in their nature convertible and synonymous. All officers under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them; an earl, comes, was the conservator or governor of a county; and knight, miles, was bound to attend the King in his wars. For the same reason, therefore, that honours are in the disposal of the King, offices ought to be so likewise; and as the King may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be

a tax upon the subject, which cannot be imposed but by act of parliament. 2 *Inst.* 533. Wherefore, in 13 *H.* 4. a new office being created by the King's letters-patent for measuring cloths, with a new fee for the same, the letters-patent were, on account of the new fee, revoked and declared void in parliament.

On this subject it hath been further said, that the King, as the fountain of justice, hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him; those who derive their authority from him are called the officers of the crown, and are created by letters-patent; such as the great officers of state, judges, &c.; and there needs no stronger evidence of a right in the crown herein, than that the King hath created all such officers time immemorial. *Dyer*, 176; 2 *Rol. Abr.* 152; 4 *Co.* 32; 2 *Inst.* 425, 540; 12 *Co.* 116; 1 *Rol. Rep.* 206; *Show. Par. Ca.* 111; 1 *Lev.* 219.

But though all such officers derive their authority from the crown, and from whence the King is termed the universal officer and disposer of justice; yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the King grant any new powers to such officers, but they must execute their offices according to the rules prescribed by law. *Co. Lit.* 3, 114; 2 *Vent.* 270; 4 *Inst.* 125; 6 *Co.* 11, 12.

Neither can the King create any new office inconsistent with our constitution or prejudicial to the subject. 2 *Inst.* 540; 2 *Sid.* 141; *Moor*, 808; 4 *Inst.* 200.

And on this foundation an office created by letters-patent for the sole making of all bills, informations and letters-missive in the council of York was unreasonable and void. 1 *Jon.* 231. See further title *Office*.

Upon the same, or a like reason, the King has also the prerogative of conferring privileges upon private persons, such as granting place or precedence to any of his subjects as shall seem good to his royal wisdom. 4 *Inst.* 361. See title *Precedence*. Or such as converting aliens, or persons born out of the King's dominions, into denizens, whereby some very considerable privileges of natural-born subjects are conferred upon them. See title *Aliens*. Such also is the prerogative of erecting corporations; which is grounded upon this foundation, that the King, having the sole administration of the government in his hands, is the best and the only judge in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve and act under him.

Another light in which the laws of England consider the King, with regard to domestic

concerns, is as the arbiter of domestic commerce, by the establishment of *markets*, the regulating of *weights and measures*, and of the *coin*. See this Dictionary under those titles.

The King is, lastly, considered by the laws of England as the *head and supreme governor* of the national church.

To enter into the reasons upon which this prerogative is founded, is matter rather of divinity than law. It shall only, therefore, be observed, that by stat. 26 H. 8. c. 1. (reciting that the King's Majesty justly and rightfully is and ought to be the supreme head of the church of England, and so had been recognized by the clergy of this kingdom in their convocation,) it is enacted, that the King shall be reputed the only supreme head in earth of the church of England, and shall have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1. See titles *Oaths*, *Supremacy*.

In virtue of this authority the King convenes, prorogues, restrains, regulates, and dissolves, all ecclesiastical synods or convocations. This was an inherent prerogative of the crown long before the time of Henry VIII. as appears by the stat. 8 H. 6. c. 1. and the many authors, both lawyers and historians, vouched by Sir E. Coke. 3 Inst. 322, 323; 5 Rep. 9. So that the stat. 25 H. 8. c. 19. which restrains the convocation from making or putting in execution any canons repugnant to the King's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common laws, 12 Rep. 72; that part of it only being new which made the King's royal assent actually necessary to the validity of every canon. See further titles *Bishop*, *Convocation*. As head of the church, the King is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in Chancery from the sentence of every ecclesiastical judge; which right was restored to the crown by stat. 25 H. 8. c. 19. See title *Courts Ecclesiastical*.

The Kings of England not having the whole legislative power, if the King and clergy make a canon, though it bind the clergy in *re ecclesiasticâ*, it does not bind laymen; for they are not represented in the convocation, but in Parliament. In the primitive church, the laity were present at all synods; and when the empire became Christian, no canon was made without the emperor's consent, and indeed the emperor's consent included that of the people, he having in himself the whole legislative power; but the kings of this kingdom have it not. 2 Salk. 412, 673. See title *Canon Law*.

4. The King's *fiscal prerogatives*, or those which regard his *revenue*, are such as the British constitution hath vested in the royal person, in order to support his dignity and maintain his power; being a portion which each subject contributes of his property, in order to secure the remainder.

This revenue is either ordinary or extraordinary. The King's ordinary revenue is such as has either subsisted time out of mind in the crown, or else has been granted by parliament, by way of purchase or exchange, for such of the King's inherent hereditary revenues as were found inconvenient to the subject.

It is not, however, to be understood, that the King is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part,) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the Kings of England, which has rendered the crown, in some measure, dependent on the people for its ordinary support and subsistence. So that among the royal revenues are now recounted, what lords of manors and other subjects frequently look upon to be their own absolute inherent rights, because they are, and have been, vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes. See 1 Comm. c. 8.

The King's ordinary revenues are stated by the learned commentator to arise from: 1. The custody of the temporalities of *bishops*. 2. A *corody* from each bishopric. 3. The *tithes* in extra-parochial places. 4. *First-fruit* and *tenths* of all spiritual preferments. 5. The *demesne lands* of the crown. (See stats. 26 G. 3. c. 87; 30 G. 3. c. 50.) 6. Military *tenures*, *purveyance*, and pre-emption. 7. *Wine licences*. 8. *Forest courts*. 9. *Fines and fees* in courts of justice. 10. *Royal fish*. 11. *Shipwrecks*. 12. *Mines*. 13. *Treasure-trove*. 14. *Waifs*. 15. *Estrays*. 16. *Forfeitures* of lands and goods for offences; in which are included *deodands*. 17. *Escheats* of lands. 18. The custody of *idiots*. As to all which, see this Dictionary, under title *Taxes*, and the several other appropriate titles.

The *ordinary revenue*, or proper patrimony of the crown, was very large formerly, and capable of being increased to a magnitude truly formidable. for there are very few estates in the kingdom that have not, at some period of time or other since the Norman conquest, been vested in the hands of the King, by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits arising from the other branches of the *census regalis*, are likewise almost all of





c. 25. the clear yearly sum of 510,000*l.* is granted to his Majesty out of the consolidated fund, commencing from the death of George IV. and to be paid to his majesty for life. By § 9, the annuities of 15,000*l.*, 6,000*l.*, and 2,500*l.*, granted to his Majesty in the reigns of George III. and George IV. are to cease and determine, as well as the annuity of 6,000*l.* granted to the Queen when Duchess of Clarence. By § 13, whenever the total charge on the civil list in any year shall exceed the 510,000*l.*, an account, stating the particulars of the exceedings, shall be submitted to parliament within thirty days after the same shall have been ascertained. The charges on the civil list are divided into five classes, which are estimated in the schedule to the act thus: First class, for their Majesty's privy purse, 110,000*l.*; second class, salaries of his Majesty's household, 130,000*l.*; third class, expenses of his Majesty's household, 171,500*l.*; fourth class, special and secret service, 23,200*l.*; fifth class, pensions, 75,000*l.* The lords of the treasury may appropriate out of the quarterly payments any sum not exceeding one-fourth of the whole amount of the class for defraying any charge on that particular class before it is applied to any other class. By § 8, no other payments than those specified in the above schedule are to be charged upon the civil list thereby granted.

By stat. 47 *G. 3. st. 2. c. 24.* the King is empowered to direct the execution of any trusts to which lands vested in him by escheat, &c. or in right of the crown on the duchy of Lancaster, might have been liable, and to bestow such lands, or reward discoveries. See also stat. 52 *G. 3. c. 148.* respecting the King's privy purse.

Upon the whole, it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing, rather than the ancient; for the crown, because it is more certain, and collected with greater ease; for the people, because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet, if we consider the sums that have been formerly granted, the limited extent under which it is now established, the expenses defrayed by it, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family, and, above all, the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which the King of Great Britain should maintain, with an in-

come in any degree less than what is now established by parliament.

As to the land revenue of the crown, see stat. 10 *G. 4. c. 50.* repealing former acts, and consolidating and amending their provisions.

VI. By *Magna Charta*, 9 *H. 3. c. 8.* "the King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt; howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges."

*Goods and Chattels.*] By order of the common law, the King for his debt has execution of the body, lands, and goods of his debtor; this is an act of grace, and restrains the power the King had before. 2 *Inst.* 19.

*Pledges be distrained.*] This act does not extend, nor was ever taken to extend, to sureties in a bond or recognizance, if they may be so called, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner; but to pledges and mancapors only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. *Hart.* 378.

By *Magna Charta*, c. 18, "the King's debtor dying, the King shall be served before the executor."

By this statute, the King by his prerogative shall be preferred in satisfaction of his debt by the executors before any other; and if the executors have sufficient to pay the King's debt, the heir, nor any purchaser of his lands, shall not be charged. 2 *Inst.* 32.

Stat. *West. 1; 3 Edw. 1. c. 19.* enacts, "that the sheriff having received the King's debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will. And the sheriff and his heirs shall answer all monies that they whom he employed receive; and if any other that is answerable to the Exchequer by his own lands do so, he shall render thrice so much to the plaintiff, and make fine as before. And on payment of the King's debt, the sheriff shall give a talley to the debtor, and the process for levying the same shall be showed him on demand without fee, on pain to be grievously punished."

*The King's debt.*] Under this word, debt, all things due to the King are comprehended, and not only debt in the proper sense, but du-

ties on things due, as rents, fines, issues, amercements, and other duties to the King received or levied by the sheriff; for debt in its large sense signifies whatever a man doth owe; and *debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini Regis.* 2 Inst. 198.

*The sheriff and his heirs shall answer.*] This is to be understood *quoad restitutionem*, but not *quoad poenam*; that is, for the civil, but not for the criminal part; for this is a maxim in law. 2 Inst. 198.

The stat. 28 Edw. 1. st. 3. c. 12. enacts, "that beasts of the plough shall not be distrained for the King's debts so long as others may be found, on such pain as is elsewhere ordained by statute, (*viz.* by the statute *de distractione soaccarii*, 51 H. 3. st. 4.) And the great distresses shall not be taken for his debts, nor driven too far; and if the debtor can find convenient surety, the distress shall in the meantime be released, and he that does otherwise shall be grievously punished."

This is an act of grace, and on this act there lies a writ directed to the sheriff, commanding him to receive surety according to this act, which, if he refuses, an attachment lies against him, or the party offering surety according to this act, if it be refused, may have an action against the sheriff, &c. 2 Inst. 565.

The stat. 25 Edw. 3. st. 5. c. 19. enables a common person to sue a debtor of his (who is likewise a debtor to the King) to judgment, but he cannot proceed to execution, unless the plaintiff gives security to pay the King's debt first, and then he may take execution for his own and the King's debt too. For otherwise, if, without giving such security, the party takes forth execution upon his judgment, and levies the money, the same money may be seized upon to satisfy the King's debt.

The stat. 33 H. 8. c. 39. § 2. enacts, "that all obligations and specialties concerning the King and his heirs, or made to his or their use, shall be made to his highness and to his heirs, Kings, in his or their name or names, by these words, *domino Regi*, and to no other person to his use, and to be paid to his highness, by these words, *solvend' eidem domino Regi, hæred' vel executoribus suis* with other words used in common obligations, which obligations and specialties shall be in the nature of a statute staple."

None other are to be charged, but such as were liable to the bond when it was made. Sav. 10.

An obligation for performance of covenants is within this act, after the covenants are broken. 7 Rep. 20 b.; Hard. 368, 442.

By § 3 of the said act, 33 H. 8. c. 39. all such obligations, the debt not being paid, shall

come, remain, and be to the heirs or executors of the King as he shall appoint; and if any person take any obligation to the use of the King or his heirs, otherwise than as aforesaid, he shall suffer such imprisonment as shall be adjudged by the King or his honourable council.

Costs and damages are given to the King, § 6.

Debts to be sued for in proper courts, § 7.

And every of the courts are empowered to set such fines, &c. on persons for their defaults, &c. as to the court seem expedient. And all trials shall be by due examination of witnesses, writings, proofs, or such other way as by the courts shall be thought expedient, § 13.

And in all actions in any of the courts for any debt due to the King by reason of any attainder, outlawry, forfeiture, gift of the party, or by any other collateral way or means, it shall be sufficient in law to show and allege generally, that the party to whom the said debt did belong, such a year and day did give the same to the King, or was attainted, outlawed, &c. whereby the said debt did accrue to the King; and the same shall be of the same effect, as if the whole matter had been declared at large, according to the order of the common law, § 25.

If any suit be commenced, or any process awarded for the King, for the recovery of any debt, then the same suit and process shall be preferred before any person. And the King, his heirs and successors, shall have first execution against any defendant for his debt, before any person; so always that the King's suit be commenced, or process awarded for the debt, at the suit of the King, his heirs or successors, before judgment given for the other person, § 26. And this extends to Scotland, under the articles of Union, and the stat. 6 Ann. c. 26. establishing the Court of Exchequer in Scotland. *Ogilvie v. Wingate, Parliament Cases*, vi. 498.

This statute abridges the prerogative, and controuls the common law; and here is a negative implied, though the statute sounds in the affirmative; for it enacts a new thing, and the *ita quod* makes a condition precedent and a limitation; and the words are introductive. Hard. 27.

Strange arg. said, that on this act he took it, the suit must be said to be then taken or commenced when the first step is made towards the proceeding to execution, and the first step to be taken is to procure a fiat of a baron, and then it is in fact that the process is awarded. Gilb. Eq. R. 222.

All manors, lands, tenements, possessions, and hereditaments, which be, or that hereafter shall be, in the hands, possession, occupation,

or seisin of any person, to whom the manors, &c. have heretofore or hereafter shall descend, revert, or remain in fee-simple, or in fee-tail, general or special, by, from, or after the death of any ancestor as heir, or by gift of his ancestors whose heir he is, which ancestor was, is, or shall be indebted to the King, or to any person to his use, by judgment, recognizance, obligation, or other specialty, the debt whereof is or shall not be paid; then in every such case the same manors, &c. shall be chargeable for payment of the debt. Stat. 33 H. 8. c. 39. § 27.

*All manors.]* A. seised of the manor of F., in consideration of a marriage to be had between B. his son, and M. daughter of J. S., covenanted to levy a fine to the use of himself and wife for their lives, remainder to the use of B. and M. and the heirs of their bodies, with remainders over; afterwards A. acknowledged a recognizance to the Queen and died. His wife died; the manor is extended for the Queen's debt, by force of the statute. It was argued, by *Coke*, that the manor is not chargeable by the statute; but it was made for the King's benefit in two points. To make lands entailed liable for the King's debts, where they were not so before, against the issue. 2. To make bonds taken by the officers of the King to the use of the King, as effectual a Stat. 1. that the words (was or shall be indebted) shall not be intended after the gift made; that (shall be) is to be intended of future debts after the statute, whereas at the time of the settlement A. was not receiver or other officer to the Queen; the words are (by gift after the debt acknowledged to the Queen); that this case is not within the statute; for the words are (of the gift of his ancestor,) but here B. has not the manor of the gift of A. but rather of the statute of uses, and so he is in the *post*, and not in the *per*, by his ancestor, for the fine was levied to divers persons to the uses aforesaid; nor was the gift a mere gratuity, but in consideration that he should marry the daughter of J. S. and the debt accrued not till after the gift. He admitted, that had there been any fraud in the case, or any promise in A. when he made the conveyance, to become the King's debtor or officer, it would be within the statute, and the gift had been a mere gratuity, &c. and afterwards (as *Coke* reported) B. and his lands were discharged. 2 *Leon.* 90, 91.

*Shall be indebted.]* This is intended an immediate debt, and not such debts as are due to the subject and accrue to the King by any collateral means; for which this statute has a clause for the writ and general manner and form of pleading in such cases, of the part of the King for the recovery of them, that the

party such a year and day, &c. (which see at § 25 above.) So that the several manners of penning these two branches manifest the intention of the makers of the act to prefer immediate debts due to the King by judgment, &c. before debts of the subject which accrue to the King by assignment, attainder, outlawry, &c.; and the reason was, because debts due immediately to the King by judgment, recognizance, obligation, or other specialty, are in their nature more high, and may be better known, and upon search found, than debts due to subjects. 7 *Rep.* 2; *Jenk.* 226, *pl.* 99. S. P. But for such debts the King is left at common law. If the King's debtor, officer, or accountant, has leases for years or goods; these leases and goods are not liable if the debtor sold them *bonâ fide*; but if he sold them by covin it is otherwise. If land be purchased with the King's money, it is liable to satisfy the King.

The debt ought to be immediately to the King himself; or if it be to any other than to the King, it ought to be originally to the use of the King. 7 *Rep.* 22 a.

If tenant in tail becomes indebted to the King, unless it be by judgment, recognizance, obligation, or other specialty, and dies, the lands in the seisin of the issue in tail by force of this act shall not be extended by this act for such debt; for the statute extends only to the said four cases, and all other debts remain at common law. 7 *Rep.* 21 b.

The issue in tail (the land being in his hands) is also liable in either of the said four cases, but not the *bonâ fide* alienee of the issue; for the words of the statute do not extend to this alienee; the common law did not help the King in these cases; the statute helps the King in the case against the issue in tail. *Jenk.* 226, *pl.* 99, 285, *pl.* 19.

The issue in tail shall not be charged by this statute for the penalty on a conviction of recusancy of the tenant in tail by proclamation, under stat. 29 *Eliz.* c. 6. but otherwise it had been if he had been convicted under stat. 23 *Eliz.* c. 1. 1 *Roll. Rep.* 94.

*In every such case.]* By the express purview of this act, the land shall be solely extended as long as it is in the possession or seisin of the heir in tail; for this act says, that in every such case the land shall be charged. And as the land against the issue in tail was not extendable before this act, the King has benefit to extend it in the possession of the heir in tail, which he could not do before; but the King cannot extend the lands of the alienee, for the statute does not extend to this, and the makers of the act have reason to favour the purchasers, farmers, &c. of the heir in tail more than the heir himself; for they



are strangers to the debts of tenant in tail, and they come to the land on good consideration. 7 Rep. 21 b.

*The same manors.*] If the goods and chattels of the King's debtors be sufficient, and so can be made appear to the sheriff, whereupon he may levy the King's debt, then the sheriff ought to extend the lands of the debtor or his heir, or of any purchaser or tenant. 2 Inst. 19.

The King shall not be excluded to demand his debts against any of his subjects, as heir to any person indebted to his Highness or to his use, albeit this word heir be not comprised in such recognizance or specialty, or that such persons shall say, that they have not any hereditaments to them descended, but only such as be intailed or given to them by their ancestors. Stat. 33 H. 8. c. 39. § 28.

By this clause the intent of the makers of the act appears, that the heir in tail shall be only charged with the debt of the King; but lands in fee-simple were extendable at the common law in whatever hands they came; therefore, as to them, this statute was only *declarativum antiqui juris*; but as to the estates in tail, it was *introductionem novi juris* against the issue in tail. 7 Rep. 21 b.

One P. was indebted to the Queen, and one W. was bound to P. in 100*l.*, in which obligation W. did not mention his heirs; P. assigned the obligation in which W. was bound to him, to the Queen, and on this process was made against the heir of W. And it was held by the court, that as W. did not oblige himself and his heirs, that the heir, by the death of the father, was discharged. And if the assignment had been made in the lifetime of the father, and then the father had died, the heir should be discharged; but the son may be charged as executor or administrator, &c. Sav. 2.

Provided that the King may at his liberty demand his debts of any executors or administrators of any person indebted, if the executors, &c. have assets. Stat. 33 H. 8. c. 39. § 29.

J. S. was obliged to Sir Richard Cavendish, treasurer of the chamber to Henry VII. in 100*l.*, who was indebted to the King, on which process was made against those who were tenants of J. S. *tempore confectionis scripti prædicti* made to the said Sir Richard. Per Manwood, chief baron. The tenants are not chargeable in this case, but the heirs and executors. Per Skute, second baron. If an obligation be made to the King, it shall be of the same nature as a statute staple to all intents by this statute; but obligations made to other persons to the use of the King, shall be executory against the obligor, his heirs, executors, or ad-

ministrators, and not against other persons; but if J. N. be bound to J. S., and J. S. assigns this to Sir Richard Cavendish, and he over to the King, no process shall be made thereon; to which the court and all the clerks agreed.— And it was held, that if obligor, after the obligation made, voluntarily make feoffment of lands, such feoffees shall be charged; otherwise it is of purchasers before the obligation made in case of the King. Sav. 12.

If the hereditament be evicted out of the possession of such person by just title without fraud, whose hereditaments shall be chargeable as is above said, then such hereditaments shall be acquitted of the debts. Stat. 33 H. 8. c. 39. § 30.

B. was indebted to the Queen, for the payment of which debt certain lands of B. at the time of the debt, were purchased by one W. and one C. and D. the said B. exhibited his bill in the Exchequer Chamber, praying that the equity of the case might there be examined. Before any answer made, W. paid the debt, and then demanded judgment if the court would hold further plea, as the cause of privilege was determined, which is the debt due to the Queen. And it was held, that on this reason the court ought to dismiss the cause, and so it was done.— Sav. 13.

If any person of whom any such debt shall be due, shall show sufficient matter, in law, reason, or good conscience, why such persons ought not be charged with the same, and it be sufficiently proved, the courts have power to allow the proof, and acquit all persons so impleaded. Stat. 33 H. 8. c. 39. § 31.

*Sufficient matter in law.*] This proviso gives benefit not only to him who has matter in good conscience, but also to him who has good and sufficient cause and matter in law, reason, (and then comes) good conscience; and without question the first words, viz. cause and matter in law, shall extend to all the debts of the King, and process thereupon, as well at common law as on this act. And the conclusion of the branch does not make against it. For the sense thereof was, that he should plead matter in law or good conscience, and that nothing contained in the act should be an impediment thereto. 7 Rep. 19 b.

*Scire facias* issued against Sir W. H. as heir to M. H. his father, on a recognizance acknowledged to Edward VI. by the said M. H., the sheriff returned *scire feci*, and on his default judgment was given. And because in truth he never was summoned, and had good matter, if he had notice thereof, to plead in discharge of the recognizance acknowledged, all which he showed in certain in a bill in the

Exchequer; upon which, on reference had by the *Manwood* and the other barons, which the two chief justices, he was discharged of the recognizance. 7 Rep. 20; as 3 Rep. Trim. 37 *Eliz.* Sir William Herbert's case.

[In law, reason, or good conscience.] A. obtained of the King a privy seal, whereby the forfeiture of certain recognizances for appearing at the sessions, amounting in the whole to 800*l.*, was granted her. And it was made a question, whether the court might compound these forfeitures by their privy seal, which was granted before the privy seal and grant to A. And it was doubted whether the privy seal did not take away and revoke the power given to the court in this particular. But it was held clearly, that the court might upon good matter in equity discharge these debts by virtue of this statute. And the case in question seemed a hard case to the court, because the party himself was the cause why there was no appearance, by beating the party so heinously the very day before they ought to have appeared, that they were disabled thereby to appear. *Hard.* 334.

W. put 100*l.* out at interest to defendant, and took bond in the name of one J. who became *felo de se*, and the plaintiff was relieved against the King on this trust, in equity upon this statute. *Sed quare*, whether this statute extends to any equity against the King, otherwise than in case of pleas by way of discharge? But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others. *Hard.* 176.

And the matter so showed be sufficiently proved.] *Scire facias* issued against T. the father, and T. the son, to show cause wherefore they did not pay the King 1000*l.* for the mesne profit of certain lands holden by them from his Majesty, for which land judgment was given for him in the Exchequer, and the mesne rates were found by inquisition, which returned that the said mesne profits came to 1000*l.* upon which inquisition this *scire facias* issued; whereupon the sheriff returned that T. the father was dead, and T. the son appeared, and pleaded that he took the profits but as a servant to his father, and by his command, and rendered an account to his father for the profits, and also that judgment for the lands was given against his father and him for default of sufficient pleading, and not for the truth of the fact; and he showed this statute, which he pretended aided him for his equity; whereupon the King demurred.—*Tanfield*, chief baron, said, that the matter in equity ought to be sufficiently proved, and here is nothing but the allegation of the party, and the demurrer for the King; and, if the demurrer be in law an admittance of the alle-

gation, and so a sufficient proof within the statute, is to be advised on; and for that point the case is but this: A *scire facias* issues to have execution of a recognizance, which within this act ought, by pretence and allegation of the defendant, to be discharged for matter in equity, and the defendant pleads his matter in equity, and the King, supposing this not to be in equity with this statute, demurs in law, whether that demurrer be an insufficient proof of the allegation within the statute or not?—*Adjournatur.* Lane, 51.

By § 33 of the said stat. 33 H. 8. c. 39. it is provided, that the said act shall not take away any liberties belonging to the duchy and county palatine of Lancaster.

Process and executions for debts in the Court of Exchequer shall be made in the Exchequer by such officer as hath been used, as by this act is limited, § 34.

The stat. 34 & 35 H. 8. c. 2. directs how the King's receivers and collectors shall be charged; and the stat. 7 Edw. 6. c. 1. makes further regulations on that subject, and requires all officers to find sureties for duly accounting. See title *Accounts, Public.*

The stat. 13. *Eliz.* c. 4. enacts, "that all the lands, &c. which any accountant of the Queen, her heirs and successors, hath while he remains accountable, shall for the payment of the debts of the Queen, her heirs and successors, be liable, and put in execution in like manner, as if such accountant had stood bound by writ obligatory (having the effect of the statute staple) to her Majesty, her heirs and successors, for payment of the same, § 1.

The Queen, by her letters-patent, granted *catalla utlagatorum et felonum de se*, within such a precinct; one who was indebted to the Queen is *felo de se* within the precinct. It was ruled, that notwithstanding the grant by the letters-patent, the Queen shall have the goods for satisfying her debt. 3 *Leo.* 113; *Mo.* 126, 127, S. C. between the Queen of the first part, the Bishop of Sarum of the second part, and Oliver Coxhead of the third part; and there, *per Manwood*, chief baron, the patent does not extend to have the goods of *felo de se* against the Queen for her debt, because it wanted the words (*licet tangat nos*); but he agreed, that if the lands of the felon be liable to [sufficient to answer] all the debt of the Queen, the court may in discretion take all the lands in extent, and leave the goods to the patentee. And as to a petition of Coxhead praying a discharge of the lands, &c. by him purchased of the officer debtor to the Queen, it was answered, that the land was subject to the Queen's extent for all arrears of receipts by this office, received before the con-

veyance thereof, though the receipt be after, that the land shall be sold after the death of the conveyance, and that by reason of the the debtor, and when the account is made after the statute; but as to another office accepted after his death; therefore to remedy the other mischiefs, the statute 39 Eliz. c. 7. was made (but the same, being only a temporary act, is expired.) *Mo.* 646, & *pl.* 895, (where part of the last-mentioned act is set forth and explained.)

B. L. having purchased a long term for years in houses, afterwards purchased the inheritance; afterwards he became receiver of North Wales and having occasion for 500*l.* assigned over the term by way of mortgage to J. S. Afterwards on the marriage of E. L. his son he settled the houses in St. Clement's (inter alias) on himself for life, remainder to E. L. his son, and the heirs of his body. There was issue after the marriage, a daughter, the wife of P.; after this B. L. mortgages these houses to N. for 1800*l.* The King extends these houses for the debt of B. L.; N. gets an assignment of the extent, and a privy seal for the debt. Resolved, first, that by the statute Elizabeth, the land and the real estate of B. L. was bound and stood liable to answer the King's debt, although he was not actually a debtor to the King, nor any extent against him in several years after. Secondly, that where a term is attendant on the inheritance, he shall have a right to the term; but if it be a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. 2 *Vern.* 389, 390.

If either of the Queen's officers, on rendering of his account shall be found in arrear, and such arrears shall not be paid within six months after the account past, the Queen, &c. may sell so much of his estate as will answer the debt, and the overplus of the sale is to be rendered to the accountant, or his heirs, by the officer that receives the purchase-money, without further warrant. Stat. 13 Eliz. c. 4. § 2, 3.

Upon this statute many questions were moved; first, if the debtor died, whether the land might be sold? Secondly, when the account is determined after his death? Thirdly, when the accountant, after becoming debtor, and in arrear, makes feoffment, or other estate over, or charges or incumbers the land, either to his issue or others of his blood, to prevent the Queen's selling, or on other consideration, whether she may sell the land, the words of the act being make sale, &c. of so much of the lands, &c. of every such accountant or debtor so found in arrear, &c. and that the sale shall be good and available in law against the party accountant, and his heirs claiming as heirs. Fourthly, if the accountant was seised of land in tail, whether this land may be sold to be good against the issue; for the ousting of which doubts the statute of 27 Eliz. c. 3. was made; but this remedy only,

If such accountant or debtor purchase lands in others' names in trust for their use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such a manner as before is expressed. Stat. 13 Eliz. c. 4. § 5.

Lands purchased by accountants since the beginning of the Queen's reign, either in their own names, or in the names of others in trust for their use, shall be also liable to be sold for the discharge of their debts as aforesaid, rendering the overplus to the accountant, § 6.

Provided, that bishops' lands shall be only chargeable for subsidies or tenths, as they were before making this act, and not otherwise, § 9.

Neither shall this act extend to charge any accountant whose yearly receipt exceeds not 300*l.* otherwise than as he was lawfully chargeable before this act, § 10.

Neither shall this act extend to such accountants, as by order of their offices, and charge, immediately after their accounts past, are to lay out money again; such as are treasurers of war, garrisons, navy, provision of victuals, or for fortifications or buildings, and the master of the wardrobe; unless the Queen, &c. command present pay, § 11, 12.

Neither does this act extend to sheriffs, escheators, or bailiffs of liberties, concerning whose accounts the course remains the same as before, § 13.

Lands bought of an accountant *bonâ fide*, and without notice of any fraudulent intent in the accountant, shall be discharged; and if they be bound by office, yet shall they, on traverse, be discharged without livery, *ouster le main*, or their suit, § 14.

If a man is receiver to the King, and not indebted, but is clear and sells his land, and ceases to be receiver, and afterwards is appointed receiver again, and then a debt is contracted with the King, the former sale is good. 2 *Mod.* 247.

The Queen, &c. being satisfied by sale of lands, the sureties shall be discharged for so much, and if any yet remain unpaid, the sureties shall pay the residue rateably according to their abilities. Stat. 13 Eliz. c. 4. § 15.

By stat. 20 Car. 2. c. 2. all receivers of monies or duties for the King's use, are to pay damages of twelve per cent. per annum from the expiration of two months after the receipt



by them, till they pay the same into the Exchequer.

By stat. 25 *Geo. 3. c. 35.* for the more easy and effectual sale of lands, of the crown debtors, the Court of Exchequer, on application of the attorney-general in a summary way, may order the estate of and debtor to the King to be sold; and compel the production of title-deeds, &c. and apply the same in liquidation, of the King's demand, under a writ of extent or *diem clausit extremum*. (See title *Execution*.) The surplus, after satisfaction of the debt and costs, to be paid to the party entitled to the estate.

By the stat. 41 *G. c. 90. § 1.* when upon any account declared, &c. in the Court of Exchequer in England, or on judgment of that court, any debt is due to his Majesty, a copy of such account shall be exemplified, and transmitted to and enrolled in the Exchequer in Ireland, and process be issued against the debtor's body and effects in Ireland. By § 2, money levied in Ireland shall be paid into the Irish Exchequer, and transmitted to the English Exchequer. By § 3, 4, so *vice versâ*, on accounts declared in the Exchequer of Ireland. By 48 *G. 3. c. 47.* the King shall not sue in Ireland any person in respect of any estate, unless where the right has accrued, or shall accrue, within sixty years before the commencement of such suit; persons having enjoyed sixty years' possession quieted. In what cases rents, &c. of estates shall be deemed in charge, § 2. Estates, the reversion of which is in the crown, shall be sued for within sixty years after determination of the particular estate, § 3. Lands shall be holden of the crown upon the usual tenures, services, and duties, § 4. Rents paid to the King shall remain payable, § 5. Incumbents of benefices shall not be liable to arrears of crown rents accrued before their incumbency, § 6. By stat. 4 *G. 4. c. 18.* all the powers of the 39 & 40 *G. 3. c. 88.* relating to the disposition of the King's private estates are extended to lands in possession of any King at the time of his accession. The statute 11 *G. 4. c. 23.* enabled the late King (George IV.) to appoint certain persons to affix his royal signature to the instruments requiring such signature. (This statute, however, is now expired.)

VII. In King John's Magna Charta of Liberties, there was a clause making it lawful for the barons of the realm to choose twenty-five barons to see the charter observed by the King, with power, on any justice or other minister of the King's failing to do right, and acting contrary thereto, for four of the said barons to address the King, and pray that the same might be remedied; and if the same were not amended in forty days, upon the report of

the four barons to the rest of the twenty-five, those twenty-five barons, *with the commonalty of the whole land*, were at liberty to distress the King, take his castles, lands, &c. until the evils complained of should be remedied, according to their judgment; *saving the person of the King, Queen, and their children*; and when the evil were redressed, the people were to obey the King as before. *King John's Magna Charta, c. 73.* But this clause was admitted in King Henry III.'s Magna Charta, though in a statute made at Oxford, *anno 42 Henry III.* to reform misgovernment, it was enacted, that twenty-four great men should be named, twelve by the King, and twelve by the parliament, to appoint justices, chancellors, and other officers, to see Magna Charta observed. These regulations seem (like the other constitution, framed by an assembly in a neighbouring nation, before they had directly discarded a monarchical form of government) too laboured and unnatural to succeed in practice; the checks now formed by the law, on the power of the crown, are of a nature in reality more forcible, though in appearance more loyal, than a measure which placed the sovereign in subjection to a dangerous aristocracy.

The barons' wars seem to have proceeded in some measure from a like power granted to them, as by the charter of King John; and probably the parliament's wars in the time of King Charles I. from their examples.

But whatever attempts might have been previously made, it cannot but be observed, that most of the laws for ascertaining, limiting, and restraining, the prerogative of the crown, have been made within the compass of little more than a century past, from the Petition of Right in 3 *Car. 1.* to the present time, so that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of King James I. particularly by the abolition of the Star Chamber and High Commission Courts, in the reign of Charles I.; and by the disclaiming of martial law, and the power of levying taxes on the subject by the same prince; by the disuse of forest laws for a century past; and by the many excellent provisions enacted under Charles II. especially by the abolition of military tenures, purveyance, and pre-emption, the Habeas Corpus Act, and the act to prevent the discontinuance of parliaments for above three years; and since the Revolution, by the strong and emphatical words in which our liberties are asserted in the Bill of Rights and Act of Settlement, by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the House of Commons: by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the King's

pardon from obstructing parliamentary impeachments: besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may, perhaps, be led to think that the balance is inclined, pretty strongly, to the popular scale, and that the executive magistrate has neither independence nor power enough left, to form that check upon the Lords and Commons, which the founders of our constitution intended.

On the other hand, however, it is to be considered that every prince in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for life, and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence which at his accession seems, it must be owned, to be wanting; and then, with regard to power, we may find, perhaps, that the hands of government are at least sufficiently strengthened, and that an English monarch is now in no danger of being overborne either by the nobility or the people. The instruments of power are not, perhaps, so open and avowed, as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes have, in their natural consequences, thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight, established this system in their stead. The entire collection and management of so vast a revenue being placed in the hands of the crown, have given rise to such a multitude of new officers, created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence, and that over those persons whose attachment, on account of their wealth, is frequently the most desirable; and the same may be said with regard to the officers in our numerous army, and the places which the army has created; all which put together, give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

Upon the whole, therefore, it seems clear, that whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century: much is, indeed, given up, but much is also required. The stern commands of prerogative have yielded to the milder voice of influence; the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened, when the posture of foreign affairs, and the universal introduction of a well-planned and national militia, will suffer our formidable army to be thinned and regulated, and when, in consequence of all, our taxes shall be gradually reduced, this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose; but till that shall happen, it will be our special duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are entrusted with its authority: *to be LOYAL, yet FREE; OBEDIENT, and yet INDEPENDENT*, and, above every thing, to hope that we may long, very long, continue to be governed by a sovereign, who in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain, hath already, in more than one instance, remarkably strengthened its out-works, and therefore will never harbour a thought, or adopt a persuasion, in any the remotest degree, detrimental to public liberty. 1 *Com. c. 8.*

For further matters relative to the King, see titles *Parliament, Government, Grants of the King, Lease of the King.*

**KING OF HERALDS**, or *King at Arms, Rex Heraldum*. A principal officer at arms, that hath the pre-eminence of the society. Among the Romans he was called *pater patratus*. See titles *Herald, Quarter*.

**KING OF THE MINSTRELS**, at *Trutbury in com. Staff.* His power and privilege appear by a charter of Richard II. confirmed by Henry VI. in the 21st year of his reign. *Cowell.*

**KING'S ADVOCATE**, in Scotland. His office is similar, but in some respects superior, to that of the King's attorney-general in England. It is his province to prosecute all criminal actions, and bring the criminals to punishment, without the intervention of any grand jury, and at the expense of the public. *Scotch Dict.*

A question lately arose on an appeal before the House of Lords, between the lord advocate and the attorney-general, as to which was

entitled to precedence; the point was ultimately decided in favor of the latter.

### KING'S BENCH.

BANCUS REGIUS, from the Saxon *Banca*, a Bench or form.] The Supreme Court of Common Law in the Kingdom. 4 *Inst.* 73.

- I. *Of the Court itself generally.*
- II. *Of its Criminal Jurisdiction.*
- III. *Of its Civil Jurisdiction.*
- IV. *Of the Officers of the Court, and the mode of proceeding therein.*

I. The Court of King's Bench is so called because the King used formerly to sit in court in person, the style of the court still being *coram ipso rege*. During the reign of a Queen it is called the Queen's Bench; and under the usurpation in Cromwell's time it was styled the Upper Bench.

This court consists of a chief justice and four puisne judges, who are by their office the sovereign conservators of the peace, and supreme coroners of the land; yet though the king used himself to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered, to determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority. 4 *Inst.* 71. See 4 *Burr.* 851; 2 *Inst.* 46.

As to the varying number of the judges of this court formerly, see *tit. Judges*.

It has been said that King Henry III. sat in person with the justices in *Banco Regis* several times, being seated on a high bench, and the judges on a lower one at his feet: this, however, is a doubtful point. King Edward IV. sat three days in the second year of his reign, wholly to see, as he was young, the form of administering justice. King James I. it is also said, sat there for a similar reason. See 3 *Com. c.* 4. in *n.* It is said that in Westminster Hall, under the modern erections for the Courts of King's Bench and Chancery, there still remain a stone bench or table, and a stone chair, used by some of our ancient kings when they sat in parliament, or for the administration of justice. See *Antiquities of Westminster*, quarto, 1807.

This court, which is the remnant of the ancient *Aula Regia*, is not, nor can it be, from the nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes. See stat. 28 *Eliz.* 1. stat. 3. c. 5. For which reason all process issuing out of this court in the king's name is returnable, "*ubicunque fuerimus in Angliâ*, wheresoever we shall then be in England." See titles

*Courts, Common Pleas*. It hath, indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown, but might remove with the king to York or Exeter, if he thought proper to command it. And we find that after Edward I. had conquered Scotland, it actually sat at Roxburgh. *M.* 20, 21 *E.* 1; *Hale, H. C. L.* 200. And this moveable quality, as well as its dignity and power, are fully expressed by *Bracton*, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; à latere regis residentes: qui omnium aliorum corrigere tenentur injurias et errores.*" *Bract. l.* 3. c. 10. And it is moreover especially provided in the *Articula super cartas*, 28 *E.* 1. c. 5. that the king's chancellor and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

After the division of the courts, and the establishment of the Common Pleas for the express purpose of determining civil suits, the Court of King's Bench was accustomed, in ancient times, to be especially exercised in all criminal matters and pleas of the crown, leaving the judging of private contracts and civil actions to the Common Pleas and other courts. *Glanvil. lib.* 1. c. 2, 3, 4; *lib.* 10. c. 18; *Smith de Rep. Ang. lib.* 2. c. 11; 4 *Inst. fol.* 70.

Toward the latter end of the Norman period, the *Aula Regis*, which was before one great court where the *justiciar* presided, was divided into four distinct courts, i. e. the Court of Chancery, King's Bench, Common Pleas, and Exchequer. *Madox. c.* 19; *Bracton, lib.* 3. c. 7. *fol.* 105; see titles *Courts, Common Pleas, &c.*

The Court of King's Bench retained the greater similitude with the ancient *Curia* or *Aula Regis*, and was always ambulatory, and removed with the King wherever he went. It hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued from and was returnable into this court; but in trespass it might be made returnable into either the King's Bench or Common Pleas, because the plea was criminal as well as civil. 2 *Inst.* 24; 4 *Inst.* 70; *Co. Lit.* 71; *Dyer*, 187; *Crompt. of Courts*, 78; 1 *Rol. Abr.* 94.

II. The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no specific remedy. It protects the liberty of the sub-



ject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side or crown office, the latter in the plea side of court. 3 *Comm. c. 4*.

On the crown side, that is, in the crown office, this court takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. In this court also, indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar or *nisi prius*, by a jury of the county out of which the indictment is brought. But *informations* in the King's Bench can be filed for *misdemeanors* only, as no man can be put upon his trial for a capital offence, or for misprision of treason, without the accusation against him being found sufficient by twelve of his countrymen. See tit. *Information*. And it possesses the power, in all cases where an impartial trial cannot be had in the county out of which the indictment is brought, to direct the trial to take place in some other county. And by the 38 *G. 3. c. 52*, in all indictments removed into the King's Bench by *certiorari*, and in all informations, filed there, if the venue be laid in any city or town corporate, the court, at the instance of the prosecutor or defendant, may order the issue to be tried by a jury of the next adjoining county. London, Westminster, Southwark, Bristol, and Chester, are entirely exempted from the operation of the act; and Exeter, except in cases of indictments removed by *certiorari*.

Into this Court of King's Bench hath reverted all that was good and salutary of the jurisdiction of the Court of Star Chamber (*Camera Stellata*), which was a court of very ancient original, finally abolished, on account of the abuse of its jurisdiction, by 16 *C. 1. c. 10*. See title *Star Chamber*.

To state its powers more particularly, this court is termed the *Custos Morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequences if not restrained, adapts a proper punishment to it. 1 *Sid.* 168; 2 *Hawk. P. C. c. 3. § 4*.

The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction known to the laws of England; for which reason, by the coming of the Court of King's Bench into any county (as it was removed to Oxford on account of the sickness in 1665) all former commissions of oyer and terminer and general gaol delivery, are at once absorbed and determined *ipso facto*.

But according to Lord *Hale*, the King's

Bench, by coming into any county, does not determine any other commission, but suspends its session during the term, and in vacation time the commissioners may proceed again upon their former commission. A special commission, he adds, may sit in term time in the county where the King's Bench sits; but then the King's Bench must adjourn during its session. 2 *Hale's P. C. 4*; see also 2 *Hawk. P. C. c. 3. § 3. post*.

The justices of *B. R.* are the sovereign justices of oyer and terminer, gaol delivery, and of eyre, and coroners of the land; and their jurisdiction is general all over England: by their presence the power of all other justices in the county, during the time of this court's sitting in it, is suspended, as has already been noticed; for in *præsentia majoris cessat potestas minoris*; but such justices may proceed by virtue of a special commission, &c. *H. P. C. 156*; 4 *Inst. 73*; 2 *Hawk. P. C. c. 3*.

If an indictment in a foreign county be removed before commissioners of oyer and terminer into the county where the King's Bench sits, they may proceed; for the King's Bench not having the indictment before them, cannot proceed for this offence; but if an indictment is found in the vacation time in the same county in which the King's Bench sits, and in term time the King's Bench is adjourned, there may be a special commission to hear it. 4 *Inst. 73*.

By the 25 *G. 3. c. 18*, when any session of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middlesex, shall have begun to be holden before the essoign day of any term, the same sessions shall be continued to be holden, and the business thereof finally concluded, notwithstanding the happening of such essoign day of any term, or the sitting of his majesty's Court of King's Bench at Westminster, or elsewhere in the county of Middlesex; and all trials, &c. had at such session so continued to be holden, shall be good and effectual to all intents and purposes. The 32 *G. 3. c. 48*, made a similar provision for the sessions of the peace and of oyer and terminer, before the justices of the peace for the same county.

By the 4 & 5 *W. 4. c. 36*, his majesty is empowered to establish a new court, to be called the "Central Criminal Court," for the trial of offences committed in London and Middlesex, and certain parts of Essex, Kent, and Surrey. See further tit. *London*.

Justices of this court have a sovereign jurisdiction over all matters of a criminal and public nature, judicially brought before them, to give remedy either by the common law or statute; and their power is original and ordinary; when the King hath appointed them,

they have their jurisdiction from the law. 4 *Inst.* 74.

This court has a particular jurisdiction, not only over all capital offences, but also over all other misdemeanors of a public nature, tending either to a breach of the peace or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences, being manifestly against the public good, directly injure any particular person or not. 4 *Inst.* 71; 11 *Co.* 98; 2 *H. P. C. c.* 3. § 3.

And for the better restraining such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require; and it may make use of any prison which shall seem most proper; and it is said that no other court can remove or bail persons condemned to imprisonment by this court. 2 *Hawk. P. C. c.* 3. § 5. Newgate is as much the prison of this court as the King's Bench prison is: every prison in the kingdom is the prison of this court. 1 *Burr.* 541.

This court hath so sovereign a jurisdiction in all criminal matters, that an act of parliament appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude the jurisdiction of this court, without express negative words; and therefore it hath been resolved, that stat. 33 *H. 8. c.* 12. which enacts, that all treasons, &c. within the king's house, shall be determined before the lord steward of the king's house, &c. doth not restrain this court from proceeding against such offences. 2 *Inst.* 549; 2 *Jones*, 53.

But where a statute creates a new offence which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case. 1 *Sid.* 296; 2 *Hawk. P. C. c.* 3. § 6.

This court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on a statute making a new law concerning an old offence. *Dals.* 25; 44 *E.* 8. 31 *b*; *Crompt. Juris.* 131.

But the Court of King's Bench will not give judgment on a conviction in the inferior court, where the proceedings are removed by *certiorari*, but will allow the party to waive the issue below, and to plead *de novo*, and to go to trial upon an issue joined in *B. R.* *Carth.* 6.

Nor can a record, removed into the King's

Bench from an inferior court, regularly be remanded after the term in which it came in; yet if the court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they may, in discretion, refuse to receive it, and remand it back before it is filed. 2 *Hawk. P. C. c.* 3. § 7. and several authorities there cited.

Also by the construction of the statutes, which gives a trial by *nisi prius*, the King's Bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript, is sent down. 4 *Inst.* 74; *Raym.* 364; 2 *Hawk. P. C. c.* 3. § 7.

And by stat. 6 *H. 8. c.* 6. it is enacted, "That the King's Bench have full authority, by discretion, to remand as well the bodies of all felons removed thither, as their indictments, into the counties where the felonies were done; and to command the justices of gaol delivery, justices of the peace, and all other justices, to proceed thereon after the course of the common law, as the said justices might have done if the said indictments and prisoners had not been brought into the said King's Bench." This act extends not to high treason. *Raym.* 397; 2 *Hawk. P. C. c.* 3. § 8, 9.

As the judges of this court are the sovereign justices of oyer and terminer, gaol delivery, conservators of the peace, &c. as also the sovereign coroners, therefore, where the sheriff and coroners may receive appeals by bill, *a fortiori* the judges may; also this court may admit persons to bail in all cases, according to their discretion. 4 *Inst.* 73; 9 *Co.* 118 *b*; 4 *Inst.* 74; *Vaugh.* 157.

In the county where the King's Bench sits, there is every term a grand inquest, who are to present all criminal matters arising within that county, and then the same court proceeds upon indictments so taken; or if, in vacation, there be any indictment of felony before the justices of peace of oyer and terminer or gaol delivery there sitting, it may be removed by *certiorari* into *B. R.* and there they proceed *de die in diem*, &c. 2 *Hale's Hist. P. C.* 3.

It may award execution against persons attainted in parliament, or any other court, when the record of their attainder, or a transcript, is removed, and their persons brought thither by *habeas corpus*. *Cro. Car.* 176; *Cro. Jac.* 495.

Pardons of persons condemned by former justices of gaol delivery, ought to be allowed in *B. R.*, the record and prisoner being removed thither by *certiorari* and *habeas corpus*. 2 *Hawk. P. C. c.* 6. § 19.

Into the court of *B. R.* indictments from all inferior courts and orders of sessions, &c. may be removed by *certiorari*; and inquisitions of murder are certified of course into this court,

as it is the supreme court of criminal jurisdiction; hence also issue attachments for disobeying rules or orders, &c. 4 *Inst.* 71, 72.

III. On the first division of the courts it was intended to confine the jurisdiction of the Court of King's Bench to matters merely criminal, and accordingly soon afterwards it was enacted by *Magna Charta*, c. 11. that common pleas should not follow the king's court, but be held in a certain place; hence it was, that the Court of King's Bench could not determine a mere real action. 17 *Edw.* 3. 50; 1 *Rol. Abr.* 536, 537.

But notwithstanding common pleas could not be immediately holden in *Banco Regis*, yet where there was a defect in the court where by law they were holden originally, they might be holden in *B. R.*; as if a record came out of the Common Pleas by writ of error, there they might hold pleas to the end; so where the plea in a writ of right was removed out of the county by a *pone* in *B. R.* on a writ of *mesne replevin*, &c. 2 *Inst.* 23; 4 *Inst.* 72, 113; and see *Saund.* 256; *Show. P. C.* 57.

On the plea side or civil branch, this court has an original jurisdiction and cognizance of all actions of trespass or other injury alleged to be committed *vi et armis*; of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy, and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party.

So any action *vi et armis*, where the king is to have fine, as ejectment, trespass, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.* 2 *Inst.* 23.

The same doctrine was afterwards extended to all actions on the case whatsoever. *F. N. B.* 86, 92; 1 *Lil. Prac. Reg.* 503. But no action of debt or detinue, or other mere civil action, could by the *common law* be prosecuted by any subject in this court, by original writ out of Chancery. 4 *Inst.* 76; *Tyre's Just. Filazar*, 110. Though an action of debt, given by *statute*, may be brought in the King's Bench as well as in the Common Pleas. *Carth.* 234. And yet this court might always have held plea of any civil action (other than actions real) provided the defendant was an officer of the court, or in the custody of the marshal or prison keeper of this court for a breach of the peace or any other offence. 4 *Inst.* 71. And in process of time, it began, by a fiction, to hold a plea of all personal actions whatsoever, and continued to do so for ages; it being surmised that the defendant was arrested for a supposed

trespass, which he never had in reality committed; and being thus in the custody of the marshal of this court, the plaintiff was at liberty to proceed against him for any other personal injury; which surmise of being in the marshal's custody, the defendant was not at liberty to dispute. See 4 *Inst.* 72.

Also any officer or minister of the court entitled to the privilege thereof, might be there sued by bill in debt, covenant, or other personal action. 2 *Inst.* 23; 4 *Inst.* 71; 2 *Bust.* 123.

From hence as we hinted before, the notion arose that if a man was taken up as a trespasser in the King's Bench, and there in custody, they might declare against him in debt, covenant or account; for this likewise was a case of privilege, since the Common Pleas could not procure the prisoners of the King's Bench to appear in their court, and therefore it was an exception out of *Magna Charta*. 4 *Inst.* 71; *Cro. Car.* 330.

This court is likewise a court of appeal, into which may be removed, by writ of error, the determinations of all inferior courts of record in England (excepting the courts of London, of the Cinque Ports, and of a few other places,) and to which a writ of error also lay from the Court of King's Bench in Ireland, previous to the stat. 23 *G. 3. c.* 28. See title *Ireland*.

Formerly a writ of error lay from the Common Pleas into the Court of King's Bench, but this was altered by the 1 *W. 4. c.* 70. See further title *Error*.

The Court of King's Bench, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so various in their kinds, that it seems needless to attempt to insert them. 2 *Hawk. P. C. c.* 3. § 10; *Vaugh.* 157; 1 *Salk.* 201.

This court grants writs of habeas corpus to relieve persons wrongfully imprisoned, and may bail any person whatsoever. See titles *Bail*, *Habeas Corpus*. Writs of *mandamus* are granted by this court, to restore officers in corporations, colleges, &c. unjustly turned out, and freemen wrongfully disfranchised; also writs and informations in the nature of *quo warranto* against persons or corporations usurping franchises and liberties against the King, and on misuser of privileges to seize the liberties, &c. In this court also the king's letters-patent may be repealed by *scire facias*, &c. *Prohibitions* are likewise issued from this court



to keep inferior courts within their proper jurisdiction. See these several titles.

IV. The officers on the crown side are, the king's coroner and attorney, commonly called the clerk of the crown or master of the crown office; the secondary; the clerk of the rules; the examiner; calendar-keeper; and clerks in court.

The officers on the plea side are, the chief clerks; secondary or master; their deputy; marshal; clerk of the rules; clerk of the papers; clerk of the day-rules; clerk of the dockets; clerk of the declarations; clerk of the bails, postea, and escheats; signer of writs; signer of the bills of Middlesex; *custos brevium*; clerk of the upper treasury; clerk of the outer treasury; filacer; exigenter, and clerk of the outlawries; clerk of the errors; deputy marshal; marshal and associate to the chief justice; train-bearer; clerk of the Nisi Prius in London and Middlesex; clerks of the Nisi Prius to the different counties appointed by the *custos brevium*; crier at Nisi Prius in London and Middlesex; receiver-general of the seal office; criers; ushers; tipstaffs.

In this court there were formerly two ways of proceeding, viz. by original writ or by bill. Now by the Uniformity of Process Act (2 W. 4. c. 34.) personal actions can no longer be commenced in this or any of the superior courts of Westminster, by original writ, but must be brought upon the writs given by that act. See title *Process*.

KINGELD (rather *King-geld*.) Escuage or royal aid. As in a charter of King Henry II. to the abbot and monks of Mireval. *Mon. Ang.* i. 380.

KING'S BENCH PRISON for providing relief for the poor prisoners confined in the King's Bench, Fleet, and Marshalsea prisons. See 53 G. 3. c. 123. For the limits of the rules of the prison, see *Reg. Gen.* 3 T. R. 584; 7 T. R. 82; and 6 *East*, 2.

KING'S HOUSEHOLD or Civil List. See title *King*, V.

KING'S PALACE. The limits of the king's palace at Westminster extend from Charing Cross to Westminster Hall, and shall have such privileges as the ancient palaces. Stat. 28 H. 8. c. 12. The stat. 33 H. 8. c. 12. whereby any person striking another in the king's palace, should have his right hand cut off, be imprisoned during life, and also be fined, was repealed by the 9 G. 4 c. 31. § 1. See tit. *Striking*.

KING'S PREROGATIVE. See title *King*, V., &c.

KING'S SILVER, the money which was paid to the king, in the Court of Common Pleas, for a licence granted to a man to levy a

fine of lands, tenements, or hereditaments to another person; and this must have been compounded according to the value of the land, in the alienation office, before the fine would pass. 2 *Inst.* 511; 6 *Rep.* 39, 43. See title *Fine of Lands*.

KING'S STORES. See tit. *Public Stores*.

KING'S SWAN-HERD. See *Swan-herd*.

KINTAL. See *Quintal*.

KINTLIDGE, a term used among merchants and seafaring persons for a ship's ballast. *Merch. Dict.*

KIPE, [From Sax. *Cypa*.] A basket or engine made of osiers, broad at one end, and narrower by degree, used in Oxfordshire and other parts of England, for the taking of fish; and fishing with those engines is called *kiping*. This manner of fishing with baskets of the same kind and shape, is practised by the barbarous inhabitants of Ceylon, in the East Indies, as appears in the relation and figure of it given by Mr. Knox, in his *Travels*, p. 28.

KIPPER-TIME. No salmon shall be taken between Gravesend and Henley-upon-Thames in kipper-time, viz. between the Invention of the Cross (May 3) and the Epiphany. *Rot. Parl.* 50. *Edw.* 3; *Cowell*. See title *Fish*.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the Exchequer; so called from its being the inquest of John de Kirby, treasurer to King Edward I.

KIRK-MOTE. See *Chirchgemet*.

KNAVE. An old Saxon word, which had at first a sense of simplicity and innocence, for it signified a boy; Sax. *cnapa*; whence a knave-child. i. e. a boy, as distinguished from a girl in several old writers: "a knave-child between them two they gate." *Gower's Poems*, p. 52, 106; and *Wicliffe*, in his old translation; *Exod.* i. 16; if it be a knave-child. i. e. a son or male child. After, it was taken for a servant boy, and at length for any servant man; also it was applied to a minister or officer that bore the weapon or shield of his superior, as *scild-cnapa*, whom the Latins call *armiger*, and the French *escuyer*. See the old statute 14 *Edw.* 3. c. 3. And it was sometimes, of old, made use of as a titular addition; as *Johannes C. filius Willielmus C. de Derby*, knave, &c. 22 H. 7. 36. In the vision of *Piers Plowman*, "cokes and her knaves cryden hotes pyes hote," i. e. cooks and their boys, or skullions. *Cowell*. The present use of the word to denote a false, dishonest, or deceitful fellow, has arisen by long perversion.

KNAVESHIP. A portion of grain, given to the servant at the mill where it is ground, from tenants of lands bound to grind there. *Scotch Dict.* See *Thirlage*.

KNIGHT, [Saxon, *cnyt*; Latin, *miles*;] and *equus auratus*. From the gilt spurs he usually

wore, and thence called anciently knights of military service, was furnished by the chief the spur. The Italians term them *cavalieri*; lord with arms, and so *adoptabatur in militem*, the French *chevaliers*; the Germans, *ryfters*; which the French call *adoubet*, and we to dub the Spaniards, *cavalleros*, &c. such a person a knight. But before they went into the service, it was usual to go into a bath and wash themselves, and afterwards they were girt with a girdle; which custom of bathing was constantly observed, especially at the inauguration o' our kings, when those knights were made, who for that reason were called knights of the bath. Cowell.

Blackstone remarks, that it is observable that almost all nations call their knights by some appellation derived from a horse. 1 Comm. 404. Christian in his note on this place adds, that it does not appear the English word knight has any reference to a horse; for knight, or *enicht*, in the Saxon signified *puer servus*, an attendant. See *Spelm. in vv. Knight, Miles*. There is now only one instance where it is taken in that sense, and that is knight of a shire, who properly serves in parliament for such a county; but in all other instances it signifies one who bears arms, who, for his virtue and martial prowess, is by the king, or one having his authority, exalted above the rank of a gentleman, to higher degree of dignity. The manner of making them, Camden, in his *Britannia*, thus shortly expresseth; *Nostri verò temporibus, qui equestrem dignitatem suscipit, flexis genibus leviter in humero percussitur, princeps his verbis Gallicè affatur; sus vel sois Chevalier au nom de Dieu, i. e. Surge aut sis eques in nomine Dei*. This is meant by knights bachelors, which is the lowest, but most ancient degree of knighthood with us. As to the privilege belonging to a knight, see in *Fern's Glory of Generosity*, p. 116.

Of knights there are two sorts, one spiritual, so called by divines in regard of their spiritual warfare, the other temporal. Cassaneus de *Gloria Mundi*, par 9. considerat. 2. See *Selden's Titles of Honour*, fol. 770.

Chief justice Popham affirmed, he had seen a commission granted to a bishop, to knight all the persons in his diocese. *Godh.* 398.

Of the several orders, both of spiritual and temporal knights, see *Mr. Ashmole's Inst. of the Knights of the Garter*.

He who served the king in any civil or military office or dignity, was formerly called *miles*; it is often mentioned in the old charters of the Anglo-Saxons, which are subscribed by several of the nobility, viz. after bishops, dukes, and earls, *per A. B. militem*, where *miles* signifies some officer of the courts, as minister was an officer to men of quality. Thus we read in *Ingulphus*, *De dono F. quondam Militis Kenulfi Regis*, fol. 860.

Afterwards the word was restrained to him who served only upon some military expedition; or rather to him who by reason of his tenure was bound to serve in the wars; and in this sense the word *miles* was taken *pro vassallo*. Thus in the laws of William the Conqueror: *Manibus ei sese debet, cuncta sua ab eo miles à Domino recipit*. And he who by his office or tenure was bound to perform any

They were, says Blackstone, called *militēs*, because they formed a part of the royal army, in virtue of their feudal tenures, (see title *Tenures*, III. 2;) one condition of which was, that every one who held a knight's fee immediately under the crown, (which in Edward II.'s time amounted to 20*l.* per annum, stat. *de milit.* 1 *Edw.* 2.) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles I. gave great offence, though then warranted by law, and the recent example of Queen Elizabeth. It was, therefore, abolished by stat. 16 *Car.* 1. c. 20. Considerable fees used to accrue to the king on the performance of the ceremony. Edward VI. and Queen Elizabeth appointed commissioners to compound with the persons who had lands to the amount of 40*l.* a year, and who declined the honour and expense of knighthood. See 1 *Comm.* 404; and also 2 *Comm.* 62, 69; 1 *Inst.* 69, b; 2 *Inst.* 593, and the notes on 1 *Inst.*

KNIGHTS BACHELORS, [from *Bus Chevalier*, an inferior knight, 1 *Comm.* 404, in n.] The most ancient, though the lowest order of knighthood amongst us; for we have an instance of King Alfred's conferring this order on his son Athelstan. *Wil. Malms. lib.* 2; 1 *Comm.* 404. See *Knights of the Chamber*.

KNIGHTS BANERET, [*Militēs Vexillarii*.] Knights made only in the time of war; and though knighthood is commonly given for some personal merit, which, therefore, dies with the person, yet John Coupland, for his valiant service performed against the Scots, had the honour of baneret conferred on him and his heirs for ever, by patent; 29 *Edw.* 8. See title *Baneret*. These knights rank in general next after knights of the garter. By stats. 5 *R.* 2. st. 2. c. 4; 14 *R.* 2. c. 11, they are ranked next after barons; and their precedence before the younger sons of viscounts was confirmed by order of King James I. in the tenth year of his reign. But in order to be entitled to this rank, they must be created by the king in person in the field, under the royal banners in time of open war, else they rank after baronets. 1 *Comm.* 403.

**KNIGHTS OF THE BATH,** [*Milites Balnei.*] Have their name from their bathing the night before their creation. See *Knight*. The most honourable Military Order of the Bath was introduced by King Henry IV. in 1399, and revived by King George I. in the year 1725, who erected the same into regular military order for ever; to consist of thirty-seven knights, besides the sovereign. See the antiquity and ceremony of their creation in *Dugdale's Antiquities of Warwickshire*, 531, 532. They have each three honorary esquires; and they now wear a red ribbon across their shoulders; have a prelate of the order, (the Bishop of Rochester,) several heralds, and other officers, &c. See 1 *Comm.* 404.

By statute, 2d January, 1815, it was ordained, that the order should be composed of three classes, viz:—

First class, to consist of knights grand crosses, not to exceed seventy-two, exclusive of the sovereign and princes of the blood royal; one-sixth of which may be appointed for civil and diplomatic purposes. The remainder must have attained the rank of major-general, or rear admiral in the navy, and must have been previously appointed to the second class.

Second class, not to exceed upon the first institution 180, exclusive of foreign officers holding British commissions, of whom not exceeding ten may be admitted as honorary knights commanders; in the event of actions of signal distinction, or of future wars, this class may be increased. To be entitled to the distinctive appellation of knighthood; to have the same rights and privileges as knights bachelors; but to take precedence of them.

Third class, companions of the order; they are to take precedence of esquires, but not entitled to the appellation, style, &c. of knights bachelors.

No officer can be nominated unless he shall have received a medal or other badge of honour, or shall have been especially mentioned in despatches in the London Gazette, as having distinguished himself in action.

**KNIGHTS OF THE CHAMBER,** [*Milites Camerae.*] Seem to be such knights bachelors as are made in time of peace, because knighthood in the king's chamber, and not in the field; they are mentioned in *Rot. Parl.* 28. *Edw.* 3. p. 1. m. 39; 2 *Inst.* 667.

**KNIGHTS OF THE GARTER,** [*Equites garterii; vel periscelidis*, otherwise called *Knights of the Order of St. George.*] The most noble Order of the Garter was founded by King Edward III. A. D. 1344, who, after he had obtained many notable victories, for furnishing this honourable order, made choice in his own realm and all Europe of twenty-five the most excellent and renowned persons for

virtue and honour, and ordained himself and his successors, kings of England, to be the sovereign thereof, and the rest to be fellows and brethren, bestowing this dignity on them, and giving them a blue garter, decked with gold, pearl, and precious stones, and a buckle of gold, to wear daily upon the left leg only; a kirtle, crown, cloak, chaperon, a collar, and other magnificent apparel, both of stuff and fashion, exquisite and heroical, to wear at high feasts, as to so high and princely an order was meet. *Smith's Repub. Angl. lib.* 1. c. 20. And, according to *Camden* and others, this order was instituted upon King Edward III. having great success in battle, wherein the king's garter was used for a token. See *Selden's Tit of Hon.* 2, 5, 41.

But *Polydore Virgil* gives it another original, and says, that the king in the height of his glory, the kings of France and Scotland being both prisoners in the tower of London at one time, first erected this order, A. D. 1350, (see *infra*,) from the Countess of Salisbury's dropping her garter, in a dance before his majesty, which the king taking up, and seeing some of his nobles smile, he said, *Honi soit qui mal y pense*, interpreted, "Evil (or shame) be to him that evil thinketh;" which has ever since been the motto of the garter; declaring such veneration should be done to that silken tie, that the best of them should be proud of enjoying their honours that way.

*Camden* in his *Britannia* saith, that this order of knights received great ornament from King Edward IV. And King Charles I. as an addition to their splendour, ordered all the knights companions to wear on their upper garment, the cross encircled with the garter and motto. The honourable society of this order is a college or corporation, having a great seal, &c.

The site of the college is the royal castle of Windsor with the chapel of St. George, and the chapter-house in the castle, for their solemnity on St. George's day, and at their feasts and installations.

At a chapter held 3d June, 1786, the number of knights was fixed at twenty-five, exclusive of the sovereign and the sons of his majesty and his successors, who had been or should be elected.

Besides the above number, and one extra knight, (Earl Grey,) most of the sovereigns of Europe belong to this order which holds the highest rank among the British orders of knighthood, and is second to none in the world in dignity.

Attached to the order are a dean and canons, &c. and twenty-six poor knights, that have no other subsistence but the allowance of this house which is given them in respect of their



daily prayer to the honour of God and St. George, and these are vulgarly called Poor Knights of Windsor.

There are also certain officers belonging to the order, as prelate of the garter, which office is inherent to the Bishop of Winchester for the time being; the chancellor of the garter, the Bishop of Sarum; register, always Dean of Windsor; the principal king at arms, called garter, to manage and marshal their solemnities, and the usher of the garter, being likewise usher of the black rod.

A knight of the garter wears daily abroad, a blue garter, decked with gold, pearl, and precious stones, on the left leg; and in all places of assembly, upon his coat on the left side of his breast, a star of silver embroidery; and the picture of St. George enamelled upon gold, and beset with diamonds, at the end of a blue ribbon that crosses the body from the left shoulder; and when dressed in his robes, a mantle, collar of SS., &c.

**KNIGHTS OF THE ORDER OF ST. JOHN OF JERUSALEM,** [*Milites Sancti Johannis Hierosolymitani.*] Were an order of knighthood, that began about A. D. 1120, Honorius being pope. They had their denomination from John the charitable patriarch of Alexandria, though vowed to St. John the Baptist, their patron; *Fern's Glory of Generosity*, p. 127. They had their primary abode in Jerusalem, and then in the Isle of Rhodes, until they were expelled thence by the Turks, A. D. 1523. Their chief seat subsequently was in the Isle of Malta, where they performed great exploits against the Infidels, especially in the year 1595. They continued to hold the latter island until 1798, when they surrendered it to Buonaparte, then on his way to Egypt, from whom it was afterwards taken by this country. They lived after the order of Friars, under the rule of St. Augustine, of whom mention is made in the stats. 25 H. 8. c. 2; 26 H. 8. c. 2. They had in England one general prior that had the government of the whole order within England and Scotland; *Reg. Orig.* fol. 20; and was the first prior in England, and sat in the House of Lords. But towards the end of Henry VIII.'s days they in England and Ireland, being found to adhere to the pope too much, against the king, were suppressed, and their lands and goods given to the king, by stat. 32 H. 8. c. 24. For the occasion and propagation of this order more especially described, see the treatise entitled *The Book of Honour and Arms*, lib. 5. c. 18. See also titles *Hospitallers*, *Templars*, and the succeeding articles.

**KNIGHTS OF MALTA.** These knights took their name and original from the time of their expulsion from Rhodes, A. D. 1523.

The Island of Malta was then given them by the emperor Charles V. whence they were therefore called Knights of Malta. See the preceding article.

**KNIGHT MARSHALL,** [*Marescallus Hospitii Regis.*] An officer of the king's house, having jurisdiction and cognizance of transgressions within the king's house, and verge of it; as also of contracts made within the same house, whereto one of the house is a party. *Reg. of Writs*, fol. 185 a, and 191 b, and *Spelm. Gloss.* in voce *Marescallus*. See *Constable*, *Marshal*.

**KNIGHTS OF RHODES.** The knights of St. John of Jerusalem, after they removed to Rhode island. See stat. 32 H. 8. c. 24, and *ante*, title *Knights of the Order of St. John*.

**KNIGHTS OF THE SHIRE,** [*Milites Comitatus.*] Otherwise called knights of parliament; two knights or gentlemen of worth, chosen on the king's writ, in *pleno comitatu*, by the freeholders of every county that can dispend 40s. a year; and these, when every man that had a knight's fee was customarily constrained to be a knight, were obliged to be *milites gladio cincti*, for so runs the writ at this day; but now *notabiles armigeri* may be chosen. Their expenses were formerly borne by the county, during their sitting in parliament, under stat. 35 H. 8. c. 11. They are to have 600l. per annum freehold estate, &c. See stat. 9 Ann. c. 5. By the Reform Act (2 W. 4. c. 45.) many counties have been divided into two districts for the return of knights of the shire, others have had an additional member given to them, and the constituencies of all have been greatly increased, and are no longer confined to freeholders, but are extended to copyholders and leaseholders. See further title *Parliament*.

**KNIGHTS TEMPLARS.** See *Templars*, *Hospitallers*, and *ante*, *Knights of St. John*, &c.

**KNIGHTS OF THE THISTLE.** The most ancient Order of the Thistle was instituted by King Achias, was revived by King James II. in 1679, and was re-established by Queen Anne, 31st December, 1703. It is limited to the sovereign and eleven knights, but there is at present five extra knights. Its officers are a dean, Lord Lyon, king of arms, secretary, and gentleman usher of the green rod. The knights wear a green ribbon over their shoulders, and were otherwise honourably distinguished.

**KNIGHTS OF ST. PATRICK.** The most illustrious Order of St. Patrick was instituted by King George III. February, 1763. It consists of the sovereign, a grand master, (who is the lord lieutenant of Ireland for the

time being,) and fourteen knights; besides which, there are at present six extra knights.

The officers of this order are a prelate, (the Archbishop of Armagh,) a chancellor, (the Archbishop of Dublin,) a registrar (the Dean of St. Patrick,) with a secretary, genealogist, usher of the black rod, and Ulster king of arms attending the order.

These two last orders obtain no rank in England. See title *Precedency*.

**KNIGHTS OF ST. MICHAEL AND ST. GEORGE.** This order was instituted 27th April, 1818, for the United States of the Ionian Islands, and for the ancient sovereignty of Malta and its dependencies, under the name and title of the most distinguished Order of St. Michael and St. George. It consists of the sovereign, a grand master, (the Duke of Cambridge,) eight knights grand crosses, twelve knights commanders, and twenty-four knights, exclusive of British subjects, holding high and confidential employment in the service of the said United States, and in the government of Malta and its dependencies. The officers are a prelate for the Ionian islands, a prelate for Malta, a king at arms, registrar, and secretary.

**KNIGHTEN-GYLD.** Was a *gyld* in London, consisting of nineteen knights, which King Edgar founded, giving them a portion of void ground lying without the walls of the city, now called Portsoken Ward. *Stow's Annals*, p. 151. This in *Mon. Angl. par.* 2, fol. 82, a, is written *ennitene-geld*.

**KNIGHTS COURT.** A court baron, or honour court, held twice a year under the Bishop of Hereford, at his palace there; wherein those who are lords of manors, and their tenants, holding by knights service of the honour of that bishopric, are suitors; which court is mentioned in *Butterfield's Surv.* fol. 244. If the suitor appear not at it, he pays 2s. suit-silver for respite of homage. *Cowell*.

**KNIGHTHOOD.** See *Knight*.

**KNIGHT SERVICE.** See title *Tenure*, III. 2.

**KNIGHTS FEE, [Feodum militare.]** Is so much inheritance, as is sufficient yearly to maintain a knight with convenient revenue; which in Henry III.'s days was 15*l.* *Camd. Brit. p.* 111. In the time of Edward II. 20*l.* See *ante*, title *Knight*. Sir Thomas Smith (in his *Repub. Ang. lib.* 1. c. 18.) rates it at 40*l.* *Stow*, in his *Annals*, p. 285, says, there were founded in England, at the time of the conqueror, 60,211 knights fees, according to others 60,215; whereof the religious houses before their suppression were possessed of 28,015—*Octo carucate terre faciunt feodum unius militis. Mon. Ang. p.* 2, fol. 285 a. Of this see more in *Selden's Titles of Honour*, fol. 691; and *Bracton*, lib. 5, tract. 1, c. 2; also 1 *Inst.* 69 a. A knight's fee contained twelve plow-lands, 2 *Inst.* fol. 596; or 480 acres. Thus *Virgate terre continet 24 acres*, 4 *virgate terre* make a hide, and five hides make a knight's fee, whose relief is five pounds. *Cowell*. *Selden* insists that a knight's fee was estimable neither by the value nor the quantity of the land, but by the services or numbers of the knights reserved. *Tit. Hon. part* 2, c. 5, § 26.

**KNOPA.** A knob, nob, boss, or knot.

**KNOW-MEN.** The Lollards in England, called Heretics for opposing the church of Rome before the Reformation, went commonly under the name of Knowmen, and just-fast-men; which titles were first given them in the diocese of Lincoln, by Bishop Smith, anno 1500.

**KYDDIERS.** Mentioned in stat. 13 *Eliz.* c. 35. See *Kudder*.

**KYLYW.** Signifies some liquid thing, and in the north it is used for a kind of liquid victuals. It is mentioned as an exaction of foresters, &c. *Mon. Ang. tom.* 1. p. 722.

**KYSTE, [Sax.]** A coffin or chest for burial of the dead. *Ex. Reg. Episc. Lincoln. MS.*

**KYTH.** Kin or kindred. *Cognatus*.

## L.

### L.AB

### LAB

**L.AAS, [lacques, à lax, i. e. Fraus.]** A net, gin, or snare, *Lit. Dict.*

**LABEL, [appendix lemniscus.]** Is a narrow slip of paper or parchment, affixed to a deed, writing, or writ, hanging at or out of the

same; and an appending seal is called a label. See *Deed*.

**LABINA.** Watery land: *in qua facile labitur. Mon. Angl. tom.* 2. p. 372.

**LABORARIS.** Is an ancient writ against

persons refusing to serve and do labour, and who have no means of living; or against such as, having served in the winter, refuse to serve in the summer. *Reg. Orig.* 189.

**LABOUR.** Is the foundation of property. Bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. *2 Comm.* 5.

**LABOURERS.** Justices of peace and stewards of leets, &c. have power to hear and determine complaints relating to non-payment of labourers' wages. *4 Edw. 4. c. 1.* Labourers taking work by the great, and leaving the same unfinished, unless for non-payment of wages, or where they are employed in the King's service, &c. are to suffer one month's imprisonment, and forfeit 5*l.* The wages of labourers are to be yearly assessed for every county by the sheriff, and justices of peace in the Easter sessions, and in corporation by the head officers, under penalties. *5 Eliz. c. 4.* And the sheriff is to cause the rates and assessments of wages to be proclaimed. *1 Jac. 1. c. 6.*

All persons fit for labour, shall be compelled to serve by the day in the time of hay or corn harvest; and labourers in the harvest time may go to other counties, having testimonials. From the middle of March to the middle of September, labourers are to work from five o'clock in the morning till seven or eight at night, being allowed two hours for breakfast and dinner, and half an hour for sleeping the three hot months; and all the rest of the year from twilight to twilight, except an hour and an half for breakfast and dinner, on pain of forfeiting 1*d.* for every hour absent. See *5 Eliz. c. 4.*

So much of this stat. *5. Eliz. c. 4.* and *4 Jac. 1. c. 6.* as authorised magistrates to fix the price of wages, was repealed by *53 Geo. 3. c. 40*; as was also a clause in the former, relating to assaults by servants on their masters, by the *9 Geo. 4. c. 31.*

Justices of peace may hear and determine disputes concerning the wages of servants and labourers, not exceeding 10*l.* *20 Geo. 2. c. 19.*—Extended to the tanners in the stannaries, by *27 Geo. 2. c. 6.*—Justices may punish servants on complaint of their masters, *20 Geo. 2. c. 19. § 2.*—The *20 Geo. 2. c. 19.* shall extend to all servants employed in husbandry, though hired for less than a year, *31 Geo. 2. c. 11. § 3.*

The *20 Geo. 2. c. 19.* extends to labourers of all descriptions, and not merely those in the particular trades or business there enumerated, and therefore includes wages earned by a labourer who contracted to dig and stean a well,

to be paid for by the foot, and who employed another to assist him in the work, who is paid by the labourer originally contracted with. *8 East, 113.*

The powers of *20 Geo. 2. c. 19. § 4.* enabling magistrates to hear complaints of masters against their apprentices, and adjust the same, extends to a complaint in writing preferred by the master and certified by the oath of another person. *12 East, 248.*—If under this stat. a magistrate sentence an offender for misconduct to be committed, he must also sentence him to be corrected and held to hard labour. *14 East, 605.*

By *6 Geo. 3. c. 25.* artificers labourers, and other persons, absenting themselves from the service of their employers, before the expiration of the term contracted for, shall be punished by imprisonment for not less than one month, nor more than three. The court granted a mandamus to the justice of Kent, to hear an application of the journeymen millers, under *16 Car. 1. c. 4. § 2.* praying the justices to make a rate of wages. *14 East, 395.*

By the *6 Geo. 4. c. 129.* the statutes relating to combinations by workmen were repealed. It contains, however, a variety of provisions to protect persons from being compelled to leave their employment by violence or intimidation. See further *Apprentices, Combinations, Manufacturers, Servants.*

**LACE.** Mills used solely for the manufacture of lace, are not within the factory act (*3 & 4 W. 4. c. 103.*) As to gold and silver lace, see *Gold*; and further *Frames, Manufacturers.*

**LACERTA.** A fathom. *Domesday.*

**LACHES,** [From the Fr. *lascher*, i. e. *laxare*; or *lasche*, *ignavus*.] Slackness or negligence; as it appears in *Littleton*, where laches of entry means a neglect in the heir to enter. And probably it may be an old English word for when we say there is laches of entry, it is all one as if it were said, there is a lack of entry; and in this signification it is used. *Lit. 136.* See *Infant, Heir, &c.*

**LACTA.** A defect in the weight of money: whence is derived the word *Lach*. *Du Fresne.*

**LADA.** Hath divers significations; 1st, from the Saxon *lathian*, to convene or assemble, it is taken for a lath, or inferior court of justice. See *Lathe, Trüking-reve*. 2dly, It is used for purgation by trial, from *ladain*; and hence the *lada simplex*, and *lada triplex* or *lada plena*, among the Saxons, mentioned in the laws of King Ethelred and King Henry I.—3dly, *Lada* is applied to a lade or course of water; *Camden* uses water-lade or water-course: and *Spelman* says that *lada* is a canal to carry water from a wet ground; sometimes



lada signifies a broad way. *Spehn. Gloss. Mon. Ang. tom. 1. p. 854.*

LADE. Lode, i. e. The mouth of a river; from Sax. *ladian*, *purgare*, because the water is there clearer; from hence *Cricklade*, *Lech-lade*, &c.

LADIES. For the order of trial of duchesses, countesses, and baronesses, for treason, when indicted thereof, see the ancient stat. 2. *Hen. 4. c. 14.*, and tit. *Peers, Treason.*

LÆDORIUM. Reproach. *Girald. Camb. c. 14.*

LÆSÆ MAJESTATIS, CRIMEN. The crime of high treason. So denominated by *Glanvil, l. 1. c. 2.* See *Treason.*

LÆSIONE FIDEL. Suits *pro*. The clergy, so early as the reign of King Stephen, attempted to turn their ecclesiastical courts into courts of equity, by entering suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts, or breach of civil contracts. But they were checked by the constitutions of Clarendon, 10 *Hen. 2. c. 15.* See *Courts Ecclesiastical.*

LÆTARE JERUSALEM. See *Quadragesimalia.*

LAFORDSWICK, [Sax. *hlaford*, i. e. *dominus*, and *swic*, *proditio*; *infidelitas erga dominum*.] A betraying one's lord or master.—This word is found in King Canute's laws, *c. 61.* And in the laws of King *Hen. 1. Leg. 1. c. 13.*

LAGA, (*lex*). The law, *Magna Charta*.—Hence we deduce *Saxon-lage*, *Mercen-lage*, *Dane-lage*, &c.

LAGAN. Goods sunk in the sea, [from Saxon *liggan cubare*.] When mariners in danger of shipwreck cast goods out of the ship, and because they know they are heavy and sink, fasten a buoy or cork to them, that they may find and have them again, if the ship be lost, these goods are called *lagan*; and so long as they continue upon the sea, belong to the lord admiral; but if they are cast away upon the land, they are then a wreck, and belong to the lord entitled to the same. 5 *Co. Rep. 106.* *Lagan* is used in old authorities to denote that right which the chief lord of the fee had to take goods cast on shore by the violence of the sea, &c. *Bract. lib. 3. cap. 2.* See *Flotsam, Wreck.*

LAGEDAYUM, *Laghday*. A law-day, or time of open court. *Cowell, edit. 1727.*

LAGEMAN. [*Legamanus*; *Legamannus*, *Spelm. Homo habens legem*; *homo legalis seu legitimus*; such as we call now good men of the jury.] The word is frequently used in *Domesday*, and the laws of *Edward the Confessor, c. 38.* Sir *Edw. Coke* says, A *Lageman* was he who had *socum et sacam super homines suos*, i. e. a jurisdiction over their persons and

estates; of which opinion were *Sommer* and *Lambard*, and that it signifies the *Thanes*, called afterwards *Barons*, who sat as judges to determine rights in courts of justice. In *senatus consulti de Monticulis Wultia, c. 3.* it is said, let twelve *laghmen*, which *Lambard* renders men of law, viz. six English and six Welsh, do right and justice, &c. *Blount.*

LAGEN, [*lagena, Fleta, lib. 2. c. 8, 9.*] In ancient times it was a measure of six sextarii. Hence perhaps our *flagon*. The lieutenant of the Tower has the privilege to take *unum lagenam vini, ante malum et retro*, of all wine ships that come up to the Thames. Sir *Peter Leycester*, in his *Antiquities of Cheshire* interprets *lagena vini*, a bottle of wine.

LAGHDAY, or *Lahdy*. See *Lagedayum* *Low-day*: *Laghtman*, see *Lageman*.

LAGHSLITE, LAGSLITE, LASHLITE. [Sax. *lag*, *lex*, et *slite*, *ruptio*.] A breaking or transgressing of the law; and sometimes the punishment inflicted for so doing. *Leg. H. 1. c. 13.*—*Spelman*, and tit. *Overherness*.

LAGON. See *Lagan*.

LAIA. A broad way in a wood; the same with *lada*, which see, *Mon. Ang. tom. 1. p. 483*.

LAIRWITE, LECHERWITE, LEGERELDUM. [From Sax. *legan*, *concupere*, and *mite*, *mulcta*.] *Pœna vel mulcta offendentium in adulterio et fornicatione*; and the privilege of punishing adultery and fornication did anciently belong to the lords of some manors, in reference to their tenants. *Fleta, lib. 1. c. 47*; 4 *Inst. 206.*

LAMMAS-DAY. The first of August, so called *quasi lamb-mass*; on which day the tenants that held land of the cathedral church of York (which is dedicated to St. Peter ad Vincula) were bound by their tenure to bring a live lamb into the church at high mass. It is otherwise said to come from the Sax. *hluff-masse*, viz. *loaf-mass*, as on that day the English made an offering of bread made with new wheat.

LAMPRAYS. See *Fish*.

LAMPS. None but British oil to be used for lamps in private houses, under penalty of 40s. 8 *Ann. c. 9. § 18.* See *Candles*. By 11 *Geo. 3. c. 29.* for paving and lighting London, the wilfully breaking or extinguishing any lamp incurs the penalty of 20s. for each lamp or light destroyed or extinguished. See *London*.

LANCASTER. Was erected into a county palatine, anno 50 *Edw. III.* and granted by the king to his son John for life, that he should have *jura regalia*, and a king-like power to pardon treasons, outlawries, &c. and make justices of the peace and justices of assize within the said county, and all processes and indictments to be in his name. See *Counties Palatine*.

There is a seal for the county palatine and another for the duchy, i. e. such lands as lie out of the county palatine, and yet are part of the duchy: for such there are, and the dukes of Lancaster hold them, but not as counties palatine, for they had not *jura regalia* over those lands 2 *Lutw.* 1236; 3 *Salk.* 110, 111. See *Chancellor of the Duchy*. The stat. 37 *Hen. 8. c.* 16. annexed lands to the duchy of Lancaster, for the enlargement of it. Process against an outlawed person in the county palatine of Lancaster, is to be directed to the chancellor of the duchy, who shall thereupon issue like writs to sheriff, &c. 5 & 6 *Edw. 6. c.* 26. The 17 *Car. 2.* concerning causes of replevin shall be of force in the Court of Common Pleas for the county palatine of Lancaster, 19 *Car. 2. c.* 5. By 17 *Geo. 2. c.* 7. the chancellor or vice-chancellor may by commission empower persons to take affidavits in any cause, &c. depending in the Chancery or Courts of Sessions, in any plea whatsoever, civil or criminal.—A quay to be made at Lancaster, 23 *Geo. 2. c.* 12. See 19 *Geo. 3. c.* 45; 27 *Geo. 3. c.* 34. enabling the chancellor and council of the duchy to sell fee-farm rents.—By 34 *Geo. 3. c.* 46. the chancellor or vice-chancellor of the duchy and county may authorize persons to take special bail in actions depending in the Court of Common Pleas of the said county. The justices of the said court to make rules as to justifying bail, &c. By 34 *Geo. 3. c.* 58. to prevent the removal of suits from the inferior courts of the county into the said Court of Common Pleas, security is to be given by the defendants removing such suits for payment of the sum demanded, if recovered in the Court of Common Pleas.

By the 4 & 5 *Wm. 4. c.* 62. the practice of the Court of Common Pleas at Lancaster has been greatly improved, and the process for the commencement and prosecution of personal actions assimilated to that recently adopted in the superior courts.

By § 16. power is given to the parties in any action to state a special case without proceeding to trial.

§ 17. The judges of the said court may make rules for altering and regulating the mode of pleading and transcribing records, and touching the admission of documents in evidence.

§ 18. Writs of Inquiry under the 8 & 9 *Wm. 3. c.* 11. are to be executed before the sheriff, unless otherwise ordered.

§ 39. Every other writ of inquiry shall be made returnable on any day certain, to be named in the writ.

§ 20. In any action in which the sum sought to be recovered shall not exceed 20*l.*, the said court may direct the issue joined to

be tried before the sheriff, or any judge of any court of record, for the recovery of debt in the county.

§ 23. The defendant in all personal actions, except for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of plaintiff's daughter or servant, may pay money into court.

§ 24. The king, in right of his duchy and county palatine of Lancaster, may appoint all or any of the judges of the courts at Westminster, judges of the Court of Common Pleas at Lancaster.

§ 25. empowers the judges of the courts at Westminster to regulate the fees to be taken in the C. P. at Lancaster.

By § 26 rules for new trials may be moved for before any of the courts at Westminster; but by § 27. judgment and execution are not to be stayed, unless the party moving enters into recognizances with sureties. And by § 28. nothing therein contained shall prevent the Court of C. P. at Lancaster from granting any new trial, &c.

§ 29. Service of subpoenas on witnesses in any part of England and Wales shall be valid, to compel their appearance; but, § 30. they shall not be proceeded against for making default, unless their expenses were tendered at the time of serving the subpoenas.

§ 31. Where final judgment shall be obtained in the C. P. at Lancaster, and the person or effects cannot be found within the jurisdiction, any of the courts at Westminster may issue execution, &c.

And by § 32. if the rules of the Court of C. P. at Lancaster cannot be enforced, they may be made rules of one of the courts at Westminster.

§ 34. Rules made for the courts of Westminster may be adopted by the judges of the C. P. at Lancaster.

§ 35. The same costs for preparing pleadings in the C. P. at Lancaster are to be allowed as in the courts at Westminster.

The king has the same privileges and immunities in respect of property held by him as duke of Lancaster as in respect of crown property. An immediate grant under the duchy seal, of property then under lease, the lease not being recited in the grant, was held void. Held also, that, as it appeared, that the property had been in the crown *temp. Car. I.*, a user from that time could not establish a prescription. *Alcock v. Cooke*, 5 *Bingh.* 340.

See further, *Counties Palatine, Durham*.

LANCETI. *Agricolæ quidam, sed ignotæ speciei*. A sort of servile tenants under the ancient feudal system. See *Spelm.* in *v. Larceta*.

LAND [*terra*.] Signifies generally not only

arable ground, meadow, pasture, woods, moors, waters, &c. but also messuages and houses; for in conveying the land, the buildings pass with it. *Co. Lit.* 4, 19. In a more restrained sense it is arable ground: and the land of every man is said in the law to be inclosed from that of others, though it lie in the open field; so that for any trespass therein he shall have the writ *quare clausum fregit*, &c. *Doct. & Stud.* 8. In a grant land may extend to meadow, or pasture, &c. But in writs and pleadings it signifies arable only. 1 *Vent.* 260.

*Coke on Lit. lib. 1. cap. 2. sect. 14.* says, *Terra est nomen generalissimum & comprehendit omnes species terræ*, but properly *terra dicitur à terrendo, quia vomere teritur*; and anciently it was written with a single *r*, and in that sense includes whatever may be ploughed. The earth bath in law a great extent upwards, for *cujus est solum ejus est usque ad cælum*. *Co. 9 Rep.* *Alured's* case. See 2 *Comm.* cc. 1, 2; and *Hereditaments*.

**LANDA.** A lawn or open field without wood. *Cowell.*

**LANDBOC** [from the Saxon *Land* and *Boc*, Liber.] Was a charter or deed whereby land was held. *Spelm. Gloss.*

**LANDCHEAP** [Saxon, *Land-Ceap*, from *Ceapan*, to buy and sell.] An ancient customary fine, paid at every alienation of land lying within some manor, or liberty of a borough. At Malden in Essex, there is to this day a custom called by the same name, that for certain houses and lands sold within that place, thirteen pence in every mark of the purchase-money shall be paid to the town; and this custom of *land-cheap* they claim (*inter alia*) by a grant from the Bishop of London, made anno 5 *Hen. 4.*

**LANDEA.** A ditch in marshy lands to carry water into the sea. *Du-Cange.*

**LANDEFRICUS** [*Lanfricus*.] The lord of the soil, or the landlord: from Saxon *land*, and *riga rector*. *Leg. Ethelred.* c. 6.

**LANDEGANDMAN.** One of the inferior tenants of a manor. See *Spelman*.

**LAND-GABLE.** A tax or rent issuing out of land, according to *Domesday*. *Spelman* says a penny for every house; the *Welsh* used *prid-gavel* or *landgavel*.

This *Landgavel* or *Landgabel*, in the register of *Domesday*, was a quit-rent for the site of a house, or the land whereon it stood, the same with what we now call ground-rent. *Domesday*; in *Lincoln*.

**LANDIMERS, Agrimensores.** Measures of land, so called of old; from the Sax. *Gemæra*, i. e. *Terminus*; and hence we say *Meers*.

**LANDIRECTA.** In the Saxon times the duties which were laid upon all that held land were termed *Trinoda necessitas*, viz. expedition,

*burghbote* and *brighbota*: which duties the Saxons did not call *servitia*, because they were not feudal, arising from the condition of the owners, but *landirecta*, rights that charged the very land, whoever did possess it. *Spelm. of Feuda.* See *Trinoda Necessitas*.

**LANDLORD.** He of whom lands or tenements are holden; and a landlord may distrain on the lands of common right, for rent services, &c. *Co. Lit.* 57, 205. In London, if a tenant commit felony, &c. whereby his goods and chattels become forfeit; the landlord shall be paid his rent for two years, before all other debts, except to the King, out of the goods found in the house. *Priv. Lond.* 75. See *London*.

**LANDLORD and TENANT.** For the law relating to, see *Distress, Ejectment, Lease, Rent, Replevin*, &c.

**LAND-MAN, Terricola.** The terre-tenant.

**LAND-TAX.** A tax imposed in Great Britain on lands and tenements (and on personal property,) by acts formerly passed annually for that purpose.

The assessment or valuation of estates hereafter mentioned, made in the year 1692, though by no means a perfect one, had this effect, that a supply of half a million sterling was equal to 1s. in the pound of the value of the estates given in. And according to this valuation, from the year 1693 to 1798, the land-tax continued an annual charge upon the subject, above half the time at 4s. in the pound; sometimes at 3s.; sometimes at 2s.; twice at 1s. (A. D. 1732 and 3;) but without any total intermission.

By statute 38 *Geo. 3. c. 60.* this tax, as imposed by the last annual act, 38 *Geo. 3. c. 5.* on lands and tenements in Great Britain, is made perpetual; being fixed under that act at 4s. in the pound.—A duty of 4s. in the pound on pensions, offices, and personal estates, in England and Wales, has since that time been annually granted.

By the act 38 *Geo. 3. c. 60.* the land-tax, so by that act made perpetual, is also made subject to redemption or purchase, either by the owner of the land liable to the tax, or on failure of redemption by him within certain periods, then by any other person inclined to purchase: the sums paid for such redemption or purchase are made applicable to the decrease of the national debt: the purchase-money being in all cases so regulated by the price of the funds as to produce an interest one-eleventh part more than the amount of the land-tax redeemed or purchased.—Two modes of sale are allowed, the one by which the land is actually exonerated from the tax, and the other by which the tax remains chargeable on the land, but becomes payable to the person pur-



chasing: the first of these is therefore properly *redemption*: the latter *purchase*.

The act 38 *Geo. 3. c. 60.* was amended by several subsequent acts; and by 42 *Geo. 3. c. 116.* (and acts still subsequent, viz. 45 *Geo. 3. c. 77*; 46 *Geo. 3. c. 133*; 49 *Geo. 3. c. 67*; 50 *Geo. 3. c. 58*; 51 *Geo. 3. c. 99*; 52 *Geo. 3. c. 80*; 54 *Geo. 3. c. 173*; 57 *Geo. 3. c. 100.*) more effectual provisions are made for carrying the measure into effect. By all these several acts powers are given to corporations, tenants in tail, &c. to sell part of their estate for the purpose of exonerating the remainder from the land-tax.—By 46 *Geo. 3. c. 133.* small living and the lands of charitable institutions may be exonerated gratis.

By the 7 & 8 *Geo. 4. c. 75*; 9 *Geo. 4. c. 38*; 2 & 3 *W. 4. c. 127*; 3 & 4 *W. 4. c. 95*; and 4 & 5 *W. 4. c. 60.*, various additional commissioners have been appointed, and a number of new regulations made, for carrying the acts relating to the land-tax into execution.

By the 4 & 5 *W. 4. c. 11.*, continuing the duties on offices and pensions, those on personal estates having been taken off by the 3 & 4 *W. c. 121.*, the sums paid into the Exchequer in contracts for the redemption of the land-tax, under the directions of the 42 *Geo. 3. c. 116.* are hereafter to be placed to the account of the consolidated fund.

The ancient method of taxation was by *escuage*, which was on land held by *right service*; and by talliage on the cities and boroughs; and it was made in this manner: when the king wanted money for his wars, those tenants that did not attend him in person paid him an aid, and the aid was assessed before the justices itinerant. It was generally a gift of all the inhabitants as a body corporate; if they did not give according to the wants of the crown, the justicar inquired into their behaviour, and if there were any forfeitures of their charters, *quo warrantos* came out, to seize their liberties into the king's hands. But Edward I. found this way of taxing by *escuage* and talliage to be very incomplete, because wars were drawn out into great length and expense; and therefore he formed into distinct bodies the tenants *in capite* that held great baronies, and these were called the *barones majores*, (the now Peers of Parliament,) and the representatives of the *barones minores* and of several corporations, viz. the citizens and burgesses, of whom he made one body; which now composes the House of Commons. *Gib. Treat. of the Excheq. 192.*

King Edward I. confirmed to the people *Magna Charta*, which they had long contended for, and also the charter of the forests; and for *Magna Charta* they granted the king a

*omnium bonorum*; so that instead of particular assessments in cities and boroughs, there was one universal assessment of the fifteenth of all their substance: this fifteenth seems to have been at first made out of the ecclesiastical tenth; for the popes claimed the tenths of all benefices; it was therefore easy to know, by the pope's collections of his tenths, what was the value of every ecclesiastical benefice, for the pope's tenth was reckoned at 2s. per pound, and therefore the fifteenth must be 1s. 4d. The benefice consisted of the glebe and the tenth part of the township; therefore by the value of the benefice, deducting the glebe, they knew the true value of the township, and how to set a fifteenth upon it: so that the fifteenth of the townships were certain sums, set by the king's taxors and collectors under the act of parliament; and commissions were granted to the taxors and collectors of them under the great seal; but in collecting of the fifteenths the sums only appeared in the books below. And the collectors of every township either returned their collection into the Exchequer, or else there were head collectors for the whole county, who returned it thither; there were likewise commissioners appointed, to supervise such taxation and collections.—But about the time of Edward III. there were certain established sums set upon every township; and so as the king's wants increased, they gave one, two, or three fifteenths. See *Gibb. 193, 194.*

We find in the times of Henry VIII., Queen Elizabeth, and King James I., that they raised both subsidies and fifteenths; this was, because the value of things increased, and therefore the old fifteenths were not according to the then true value of townships. And therefore they contrived that the subsidy should be raised by a pound-rate upon lands, and likewise a pound-rate upon goods; and we find in the subsidy 4 Charles I. (which is said to be the greatest subsidy that ever was given, and which passed upon the petition of right,) there was 4s. in the pound laid upon land, and 2s. 8d. upon goods. Now 4s. upon land amounts to three fifteenths, and 2s. 8d. which was upon goods, to two fifteenths; but in this they had no regard to the old rates made in the tax-book of the several townships, otherwise than to discover the value of the lands; but a method is chalked out by the act of parliament to appoint commissioners, assessors, and collectors, in order to rate and get in the said subsidy. *Ibid.*

This was found very inconvenient, because the commissioners used to be favourable to their own county, therefore it was found necessary to revive so far the ancient method as to appoint a certain sum; and in the time of the civil war the Long Parliament would not

settle any persons to appoint commissioners, but the appointment of commissioners was made in the act itself: and in this new manner of taxing, they appointed the sum to be levied on each particular county, in the act itself, as well as the commissioners' names, and where to levy it; and the six associated counties, viz. London, Middlesex, Kent, Sussex, Surrey, and Hertford, being not spoiled and pillaged in the civil wars, and more hearty to the parliament interest, were taxed higher than any other counties in England. *Gillb.* 194, 195, 196.

After the Revolution, to support King William in his wars with France, it was necessary to come into a land-tax; and from 1684 to 1693 the tax was made by a pound-rate, like the former subsidies; but when the people found that the war was likely to hold, about 1693, the tax was mightily lessened, every body being willing to ease his neighbour; and then they came to lay a rate upon every county, and the associating counties, being very zealous for the government in the Revolution, and having taxed themselves higher than their neighbours in 1693, it was argued that those counties were better able to bear the tax, and therefore in 1693 they laid the disproportioned sums which became the standard of the land-tax. *Ib.*

**LAND-TENANT.** He that possesses land let, or hath it in his manual occupation. 14 *Edw. 3. stat. 1. c. 3.* See *Tertenant*.

**LANGEMANNI.** Lords of manors; the word is thus interpreted by Sir Edward Coke. 1 *Inst.* 5. They are mentioned in *Domesday*.

**LANGEOLUM.** An under garment made of wool, formerly worn by the monks, which reached down to their knees; so called because *lanca fit*. *Mon. Ang. tom. 1. p. 419.*

**LANGUAGE** of Law Records, Pleadings, &c. See *Pleading*, I. 3.

**LANIS DE CRESCENTIA WALLIÆ TRADUCENDIS ABSQUE CUSTUMA, &c.** An ancient writ that lay to the customer of a port, to permit one to pass wool without paying custom, he having paid it before in Wales. *Reg. Orig.* 279.

**LANTERIUM.** The lantern, cupola, or top of a steeple. *Cowell. edit. 1727. Angl. Sacr. p. 1. pag. 775.*

**LANO NIGER.** A sort of base coin, formerly current in this kingdom. *Mem. in Scac. Mich. 22 Edw. 1.*

**LAPIS CALAMINARIS.** Stealing, or removing with such intent, from any mine, bed, or vein, is felony by *stat. 7 & 8 Geo. 4. c. 29. § 37.* and punishable as simple larceny.

**LAPIS MARMORIUS.** A marble stone about twelve feet long and three feet broad, placed at the upper end of Westminster-hall, where was likewise a marble chair erected on the middle thereof, in which our kings ancient-

ly sat at their coronation dinner, and at other times the Lord Chancellor. Over this marble table are now erected the Courts of Chancery and King's Bench. *Orig. Juridical.*

**LAPIS PACIS.** The same with *Osculum pacis*. *Du Fresne.*

**LAPSE** [*Lapsus*.] A slip or omission of a patron to present to a church, within six months after it becomes void. See *Advowson*, II.

**LAPSED LEGACY.** See *Legacy*.

**LARCENY** [*Fr. Larrecin*; *Lat. Latrocinium*.] A theft or felony of another's goods.

Blackstone, with more immediate reference to its derivation, *Latrocinium*, always spells the name thus, *LARCINY*; and distinguishes the offence into two sorts, *simple Larciny*, or plain theft unaccompanied with any other atrocious circumstance, and *mixed or compound Larciny*; which also includes in it the aggravation of a taking from the house, or person. 4 *Comm. c. 17.* As to that species of the latter which consists in an *open and violent* taking from the person, see *Robbery*.

Formerly this offence was designated, either grand or petit larceny, according to the value of the thing stolen: the former being the technical description if the value exceeded twelve pence; the latter, if not amounting to that sum. But now, by the 7 & 8 *Geo. 4. c. 39. § 2.* the distinction between grand and petit larceny is abolished, and every larceny, whatever be the value of the property stolen, shall be subject to the same incidents in all respects as grand larceny; and every Court whose power was before limited to the trial of petty larceny, shall have power to try every larceny, the punishment of which cannot exceed the punishment mentioned in the act for simple larceny, and also to try all accessories to such larceny.

The offence of larceny or larciny, then (for either mode of spelling may be adopted) shall be considered according to the following arrangement:

- I. 1. *Of Simple Larceny.*  
2. *Of its Punishment.*

- II. *Of mixed or compound Larceny.*  
1. *In a Dwelling House, &c.*  
2. *From the Person.*

I. 1. Simple Larceny is, "the felonious taking and carrying away of the personal goods of another."

First, It must be a *taking*. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A. lends B. a horse, and he rides away with him; or if one sends goods by a carrier, and he carries them away, these are

no larcenies. 1 *Hal. P. C.* 504. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies; for here the *animus furandi* is manifest, since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. 3 *Inst.* 107.— But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But if he had not the possession but only the care and oversight of the goods, as the butler of plate, and the shepherd of sheep, and the like, the embezzling of them is felony and larceny at common law. 1 *Hal. P. C.* 506, 3 *Inst.* 108. So if a guest rob his inn or tavern of a piece of plate, it is larceny, for he hath not the possession delivered to him, but only the use. 1 *Hawk. P. C.* 33. § 6.

By the 7 & 8 *Geo.* 4. c. 29. § 45. (repealing 3 & 4 *Will. & Mary*, c. 9. the former stat. relating to this subject,) it is declared to be felony if a tenant or lodger steal any chattel or fixture let to be used by him in or with any house or lodging, and the indictment may be in the common form for larceny.

It was decided upon the former statute, that a wife could not be guilty with her husband, for she was under his coercion. *O. B.* 1783, No. 30. Nor without her husband, if it appeared that the lodgings were let to him. *O. B.* 1761, No. 17. Nor even if it appeared that the lodgings were let jointly to both the husband and wife, for that was construed to be the act of the husband only. *O. B.* 1758, No. 105. But now, by the recent statute, the wife may be found guilty without her husband, although the lodgings were taken by him. Under the former act it was held that the offender must be a lodger at the time the larceny is committed. *O. B.* 1785, No. 74; and the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. *Leach's Hawk. P. C.* 1 c. 33. § 13. *in n.*

If the clerk of a banker or merchant has the care of money, or if he has access to it, for special and particular purposes, and is sent to the bag or drawer for money, for the purpose of paying a bill, or if he is sent for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings that money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had no

permission or access to it whatever. So if a servant be sent to a library for one particular book, and he takes another, or being sent for a hat and sword, and he steals a cane; in all these cases it has been said the offenders are guilty of felony, for though the property is delivered, the possession of it remains in the true owners. *O. B.* 1784, p. 1295, 1304. So also where a person being left in an apartment pawns the furniture or other property under his care, with a felonious design to steal it, it is felony. *O. B.* 1785, p. 717; *O. B.* 1786; *Leach's Hawk. P. C.* 1. c. 33. § 6. *in n.*

Where by a delivery of goods not only the possession but the right of property passes, it is clear no subsequent conversion can be construed into larceny, whatever the intent of the party may be. Thus, where the defendant bought a horse at a fair, of the prosecutor, to whom he was known, and, having mounted the horse, said to the prosecutor, that he would return immediately and pay him, to which the prosecutor answered "very well;" the defendant rode the horse away, and never returned: this was holden to be larceny, because the property as well as the possession was parted with. *R. v. Harvey*, 1 *Leach*, 467. 2 *East, P. C.* 669. So where the defendant bought goods and desired them to be sent to him, with a bill and receipt; and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property as well as the possession, upon receiving what was deemed at that time, by his servant, to be payment. *R. v. Purkes*, 2 *Leach*, 614. 2 *East, P. C.* 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny. *R. v. Jackson*, *R. & M.* 119. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger, upon the credit of the customer; the judges held, that this was not larceny, the owner having parted with his property in the hat. *R. v. Adams*, *R. & R.* 225.

Under some circumstances a man may be guilty of felony in taking his own goods; as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on



the road, with intent to charge the hundred with the loss according to the statute of Winchester (now repealed.) *Fost.* 123, 4.

So where the owner delivers goods to a carrier, and afterwards secretly steals them from him with an intent to charge him with them, &c. because the carrier had a special property, and the possession for a time. 3 *Inst.* 110; *Dalt.* 373; *Pult.* 126.

In further explanation of this part of the subject the following is deserving of attention:

To make the crime of larceny there must be a felonious taking; or an intent of stealing the thing, when it comes first to the hands of the offender, at the very time of receiving. 3 *Inst.* 107; *Dalt.* 367. And if one intending to steal goods, gets possession of them by ejectment, replevin, or other process at law unduly obtained, by false oath, &c. it is a felonious taking. 3 *Inst.* 64; *Kel. Rep.* 43, 44. If a man hath possession of goods once lawfully, though he afterwards carry them away with an ill intention, it is no larceny; where a tailor embezzles cloth delivered to him to make a suit of clothes, &c. it is not felony. *H. P. C.* 61; 5 *Rep.* 31. And if I lend a person my horse to go to a certain place, and he goes there, and then rides away with him, it is not larceny; but remedy is to be had by action for the damage; though if one comes on pretence to buy a horse, and the owner gives the stranger leave to ride him, if he rides away with the horse, it is felony; for here an intention is implied. *Wood's Inst.* 364, 365. In the above cases, there is a lawful possession by delivery, to exterminate the offence; but persons, having the possession of goods by delivery, may in some instances be guilty of felony, by taking away part thereof; as if a carrier open a pack, and take out a part of the goods; a miller, who has corn to grind, takes out a part of the same, with an intent to steal it, &c. in which cases the possession of part, distinct from the whole, was gained by wrong, and not delivered by the owner, &c. *H. P. C.* 62; *S. P. C.* 25; 1 *Hawk. P. C. c.* 33, § 5.

To constitute larceny the property must also be taken from the possession of the owner; therefore, to state a case more at large which has already been repeatedly alluded to, where A. intending to go a distant journey, hires a horse fairly and *bonâ fide* for that purpose, and evidences the truth of such intention by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery; and the delivery having been obtained without fraud or design, the owner parted with his possession as well as his property. *O. B.* 1784, p. 1294; and thereby gave to A. dominion over the horse; upon trust that he

would return him when the journey was performed. *O. B.* 1786, p. 333, 4. But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains in law the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use, and it appearing upon the evidence that the owner never meant to part with possession, it was held to be felony. *O. B.* 1784, p. 294. So also where a horse was obtained with the same design, upon pretence of trying its paces. *O. B.* 1779, p. 363; *O. B.* 1784, p. 293. So also to obtain the delivery of money, with design feloniously to take it away, under the false pretence of having found a diamond ring of great value, has been determined by nine judges to be a taking from the possession of the owner, and consequently felony. *O. B.* 2785, p. 160. So also to obtain the delivery of goods under the pretence of purchasing them, and then to run away with them. *Raym.* 276. And in general where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside, unparted with in the first proprietor. Therefore, where a master delivers goods to his servant to carry to a customer, but instead of so doing he converts them on his way to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, and therefore the possession remained in him at the time of the conversion. *O. B.* 1782, No. 375; *O. B.* 1783, No. 28. So also if a watchmaker steals a watch, delivered to him to clean. *O. B.* 1779, No. 83. Or if one steals clothes delivered for the purpose of being washed. *O. B.* 1758, No. 18. Or goods in a chest delivered with the key for safe custody. *O. B.* 1770, No. 83. Or guineas delivered for the purpose of being changed into half guineas. *O. B.* 1778, No. 52. Or a watch delivered for the purpose of being pawned. *O. B.* 1784, No. 613. In all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony. *Leach's Hawk. P. C. c.* 33, § 5, in n. So where a person employed to drive cattle, sells them, it is larceny, for he has the custody merely, and not the right to the possession. *Moody's C. C.* 368. Also where a carter went and disposed of his master's cart, it was adjudged to be felony. 2 *East. P. C.* 565.

If one servant delivers goods to another servant, this is a delivery by the master; yet if the master or another servant delivers a bond

or cattle to sell, and the servant goes away with the bond, and receives the money thereon due, or receives the money for the cattle sold, and goes away with the same, this was held to be no felony or larceny within the stat. 21 Hen. 8. c. 7. (which is now repealed by the 7 & 8 Geo. 4. c. 27.) *Dalt.* 383; *H. P. C.* 62. 3 *Inst.* 105. So if a servant receives his master's rents; for the master did not deliver the money to the servant, and it must be of things delivered to keep: and if things delivered to the servant to keep, are under 40s. value, and he goes away with them, this is only a breach of trust, by reason of the delivery; but if the goods were not delivered to him, it is felony and larceny to go away with or embezzle them, though under the value of 40s. &c. *Dalt.* 369. Where, however, goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house or the like, converts them to his own use, this is no larceny at common law. 2 *East, P. C.* 568. Therefore, if a shopman receive money from a customer of his master, and instead of putting it into the till secrete it; 2 *Leach*, 811; or if a banker's clerk receive money at the counter, and instead of putting it in the proper drawer, purloins it, 2 *Leach*, 835; or receive a bond for the purpose of being deposited in the bank, and convert it to his own use, 1 *Leach*, 28; 2 *East, P. C.* 570: in these cases, it has been held that the clerk or shopman is not guilty of larceny.

Now, by the 7 & 8 Geo. 4. c. 27. § 47. a clerk or servant receiving any cattle, money, or valuable security, for or on account of their master, and fraudulently embezzling the same, is to be deemed to have stolen such chattel, &c.; but the offence is still treated as an embezzlement, and ranked under that head.—See *Embezzlement*.

Secondly, There must not only be taking, but a carrying away; *cepi et asportavit*, was the old law Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact, or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs, these have been adjudged sufficient carryings away to constitute a larceny. 3 *Inst.* 108, 109. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny. 1 *Hawk. P. C. c.* 33. § 18.

A man was detected in taking the contents

of a bale of goods in a wagon. It appeared that the bale laid horizontally, and that he had set it on its end; but as it had not been removed from the spot, this was held, upon case reserved, not to be a sufficient carrying away. But where a man with a felonious intention had removed goods from the head to the tail of a wagon, it was held a sufficient removal to constitute a carrying away. *O. B.* 1784, p. 734. So a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a sufficient asportation. *O. B.* 1784, No. 537; *Leach's Hawk. P. C. c.* 33. § 18. *in n.* And where the prisoner drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the latter suddenly raised his hand, whereupon the prisoner let the book drop, and it fell again into the pocket: this was considered a sufficient asportation to constitute larceny. *R. & M.* 78.

Thirdly, This taking and carrying away must also be felonious; that is, done *animus furandi*. This requisite, besides excusing those who labour under incapacities of mind or will, encompasses also mere trespassers, and other petty offenders. As if a servant take his master's horse, without his knowledge, and brings him home again; if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it; if under colour of arrear of rent, where none is due, one distrain another's cattle or seize them; all these are misdemeanors and trespassers, but no felons. 1 *Hal. P. C.* 509. The ordinary discovery of a felonious intent, is where the party doth it clandestinely; or, being charged with the fact, denies it; but this is by no means the only criterion of criminality, for in cases that may amount to larceny, the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animus furandi*; wherefore they must be left to the due and attentive consideration of the Court and Jury.

Fourthly, This felonious taking and carrying away must be of the personal goods of another: for if they are things real, or savour of the reality, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot, in their nature, be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many

things is still, merely a trespass; which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable. And if they were severed by violence so as to be changed into moveables, and at the same time by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor in this their newly acquired state of nobility (which is essential to the nature of larceny,) being never, as such in the actual or constructive possession of any one but of him who committed the trespass. He could not, in strictness, be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief sever them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and come again at another time, when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner, or any one else, has severed them. *3 Inst.* 109: *1 Hal. P. C.* 510. See *8 Rep.* 33; *Dalt.* 372. This question is now, however, very much put at rest by the statute law. (*7 & 8 Geo. 4. c. 29.*) See several of its provisions under *tits. Fences, Fixtures, Gardens.*

By § 37 of the same statute, to steal or sever with such intent any metal, lapis calamaris, manganese, mundick, wad, black cauke, black lead, or coal, from any mine, bed or vein, is felony, punishable as simple larceny; and by § 23, to steal any paper or parchment, written or printed, being evidence to the title or any part of the title to any real estate, is made a misdemeanor punishable by transportation for seven years, fine or imprisonment. By § 21, stealing or fraudulently taking from the place of its deposit, or obliterating, &c. any record, writ, panel, process, interrogatory, affidavit, &c. or original document, is a misdemeanor, in like manner. By § 22, stealing, or for any fraudulent purpose destroying, or concealing, any will, codicil, or testamentary instrument, is likewise made a misdemeanour, punishable by transportation, imprisonment, &c.

In indictments for stealing any of the things mentioned in the three last sections of the above act, it is not necessary to allege that they are the property of any person, or are of any value.

*Bonds, Bills, and Notes*, being mere choses in action, were held also at the common law not to be such goods whereof larceny might be committed; being of no intrinsic value, and

not importing any property in possession of the person from whom they are taken. *8 Rep.* 33. But by *2 Geo. 2. c. 25.* they were put upon the same footing with respect to larcenies as the money they were meant to secure. This statute was repealed by the *7 & 8 Geo. 4. c. 27.*, but by the *7 & 8 Geo. 4. c. 29. § 5.*, if any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposits in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever, for money, or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature, in the same degree, and punishable in the same manner, as if he had stolen any chattel of the like value, with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or valuable thing mentioned in the warrant or order.

Larceny also cannot at common law be committed of treasure-trove, or wrecks, waifs, estrays, &c. till seized by the king, or him who hath the franchise: for till such seizure no one hath a determinate property therein. See *Dalt.* 370; *3 Inst.* 208; *H. P. C.* 67.—By the *7 & 8 Geo. 4. c. 29. § 18.* plundering or stealing from any ship in distress, or wrecked, &c. or any goods, &c. belonging thereto, is a felony, punishable with death; but where there are no circumstances of cruelty, or the goods are of small value, the offender may be prosecuted and punished as for simply larceny.

Larceny cannot also be committed of such animals in which there is no property either absolute or qualified, as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chace, or warren; fish in an open river or pond; or wild fowl at their natural liberty. *1 Hal. P. C.* 511: *Fost.* 366. But if they are reclaimed and confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. *1 Hawk. P. C. c.* 33. § 26: *1 Hal. P. C.* 511. See *Deer Stealers, Fish.* It is said that if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise



felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. *Dalt. Jus. c. 156*. But, of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domite naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool, larceny may be committed. *Dolt. 21*; *Crompt. 36*; *1 Hawk. P. C. c. 33. § 28*; *1 Hal. P. C. 507*; *the King v. Martin*, by all the judges, *P. 17 Geo. 3*. And also of the flesh of such as are either *domite* or *feræ naturæ* when killed. *1 Hal. P. C. 511*. As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as *dogs* of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny. *1 Hal. P. C. 512*. For the punishment now inflicted by statute for stealing dogs or other animals, not the subject of larceny at common law, see tit. *Dogs*.

As to stealing oysters, see that title.

Notwithstanding, however, that no larceny can be committed unless there be some property in the thing taken, and an owner, yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie for the larceny of the goods of a person unknown. *1 Hal. P. C. 512*. This is the case of stealing a shroud out of a grave, which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency,) was no felony, unless some of the grave-clothes were stolen with it. It was, however, punishable by indictment as a misdemeanor, even though the body were taken for the improvement of the science of anatomy; it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. See *2 Term Rep. 733*.

Where a person finds the goods of another that are lost, and converts them to his own use, it is no larceny; *H. P. C. 61*; even should he deny the finding of them, or secrete them. *1 Hale, 506*. But it seems that in some extraordinary cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape justice. *1 Hawk. P. C. c. 33. § 29*.

And the above doctrine does not apply if he knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it which he converted to his own use, it was held to be a fe-

lony. *8 Ves. 105*, *2 Leach, 252*. So if a hackney-coachman convert to his own use a parcel left by a passenger in his coach, by mistake, it is a felony if he know the owner; or if he took him up or set him down at any particular place where he might inquire for him. *2 East P. C. 664*; *1 Leach, 413, 415, n*. And in all cases where there are marks on the property by which the owner may be traced, a conversion of it by the finder will be a larceny. *2 Russ. 102*.

It must be proved on the trial that the goods stolen are the absolute or special property of the person named in the indictment. If he be described as a certain person to the jurors unknown, and it appears in evidence that his name is known, the prisoner will be acquitted. See *3 Camp. 264*; *1 Holt, 595*; *2 East, P. C. 651*.

Where goods are stolen from a bailee, they may be described either as the property of the bailor or bailee, *2 Hale, 181*, although they were never in the real owner's possession, but in that of the bailee merely. *R. & R. 136*. The property must not, however, be laid in one who has neither the actual nor constructive possession of the goods. *R. & R. 225*. Thus if it appear the person named is merely servant to the owner, the prisoner must be acquitted, for the possession of the servant is the possession of the master. *R. & R. 412*.

By the *7 & 8 Geo. 4. c. 29 § 44*. (before noticed) in case of the larceny of any fixtures in any square, street, or other like place, it is not requisite to allege the same to be the property of any person. See further, *Indictment, VI*.

2. Many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. The natural punishment for injuries to property seems to be the loss of the offender's own property; and might be universally the case were all men's fortunes equal. But as those who have no property themselves are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment.

Our ancient Saxon laws nominally punished theft with death, if above the value of twelve-pence; but the criminal was permitted to redeem his life by a pecuniary ransom; but in the ninth year of Henry I. this power of redemption was taken away, and all persons guilty of larceny above the value of *15d.* were directed to be hanged. *1 Hal. P. C. 12*; *3 Inst. 53*. And grand larceny, or the stealing above the value of *12d.* continued liable to be visited with death at common law until the passing of

the late statute, already mentioned, by which the distinction of grand and petit larceny was abolished. The value of goods stolen is now immaterial, and every theft, whatever be the amount of property taken, is punishable under the third section of the same act, which provides that every person convicted of simple larceny, or of any felony by that act made punishable like simple larceny, shall (except as otherwise provided in the act) be liable to be transported for seven years, or be imprisoned not exceeding two years, and if a male to be once, twice, or thrice publicly whipped in addition to such imprisonment: and by § 4 such offenders (and persons convicted of any misdemeanor punishable under the act) may be sentenced to be imprisoned, or imprisoned and kept to hard labor in the common gaol or house of correction, and may also be kept in solitary confinement for the whole or any portion of such imprisonment, or such imprisonment with hard labor.

By 7 & 8 Geo. 4. c. 28. § 7. no person convicted of felony shall suffer death unless for some felony, which was excluded from the benefit of clergy before or on the first day of the then session of parliament, or which is made punishable with death by some statute passed after that day.

An acquittal of larceny in one county may be pleaded in bar of a subsequent prosecution for the same stealing in another county: and an averment that the offences in both indictments are the same, may be made out by witnesses, or inquest of office, without putting it to a new trial by jury; though that of later years hath been the usual method. 2 Hawk. P. C. c. 35. § 4. But it is no plea in appeal of larceny, that the defendant hath been found not guilty in an action of trespass brought against him by the same plaintiff for the same goods; for larceny and trespass are entirely different; and a bar in an action of an inferior nature will not bar another of a superior. 2 Hawk. P. C. c. 35. § 5. If a person be indicted for felony or larceny generally, and upon the evidence it appears that the fact is but a bare trespass, he cannot be found guilty, and have judgment on the trespass, but ought to be indicted anew; though it may be otherwise where the jury find a special verdict, or when the fact is specially laid, &c. In trespass, where the taking is felonious, no verdict ought to be given unless the defendant hath before been tried for the felony. 2 Hawk. P. C. c. 47. § 6. All felony includes trespass so that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony or larceny in carrying them away; and in every indictment of larceny there must

be the words *felonice cepit & asportavit, &c.* H. P. C. 61; 1 Hawk. P. C. c. 33. § 2.

II. 1. Larceny in the *dwelling-house*, though it seems to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law; unless where it is accompanied with the circumstance of breaking the house by night, and then it falls under another description, viz. that of *Burglary*.

By the 7 & 8 Geo. 4. c. 29. § 11 & 12. breaking and entering any dwelling-house, and stealing to any amount; stealing in a dwelling-house, any person being put in fear; or stealing therein to the value of 5*l.*, were made capital felonies. But by the 2 & 3 Wm. 4. c. 62. the punishment of death for stealing to the value of 5*l.* in a dwelling-house was abolished, and transportation for life substituted. And the 3 & 4 Wm. 4. c. 44. takes away the capital punishment for breaking and entering any dwelling-house and stealing to any amount, and in lieu thereof subjects the offender to transportation for life, or for not less than seven years, or previously to transportation to imprisonment for not exceeding four years or less than one year, with or without hard labor. See further as to stealing in dwelling-houses, &c. *Buildings, Burglary, &c.*

By the 7 & 8 Geo. 4. c. 29. § 14. offenders breaking and entering any building within the same curtilage as the house, but not being considered as part thereof, for the purposes mentioned in § 12 of the statute, and stealing therein any chattel, may be transported for life, &c. See *Buildings, House*. And by § 15. persons breaking and entering any shop, warehouse, or *counting-house*, and stealing therein any chattel, &c. are liable to the same punishment.

2. The offence of *privately stealing from a man's person*, as by picking his pocket, or the like, privily without his knowledge, was debarred the benefit of clergy, so early as 8 Eliz. c. 4. which was repealed by 48 Geo. 3. c. 129. But then it must have been such a larceny as stood in need of benefit of clergy, viz. of above the value of 12*d.* else the offender would not have judgment of death, for the statute created no new offence; but only prevented the prisoner from praying the benefit of clergy, and left him to the regular judgment of the ancient law. This severity seemed to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when the former statute was made; besides that it was an infringe-

ment of property in the manual occupation or corporal possession of the owner, which was an offence even in a statute of nature. 4 *Comm. c. 17.*

Now by the stat. 7 & 8 *Geo. 4. c. 23. § 6.* to steal any chattel, &c. from the person of another renders the offender liable to transportation for life, &c., or not less than seven years imprisonment and whipping. See further on the subject of larceny, *False Pretences, Felony, Indictment, &c.*

**LARDARIUM.** The larder, or place where the lard and meat were kept. *Puroch. Antiq. 496.*

**LARDERARIUS REGIS.** The king's larderer, or clerk of the kitchen. *Cowell.*

**LARDING-MONEY.** In the manor of Bradford, in the county of Wilts, the tenants pay to their lord a small yearly rent by this name, which is said to be for liberty to feed their hogs with the masts of the lord's woods, the fat of a hog being called lard; or it may be a commutation for some customary service of salt or meat to the lord's larder. This was called *lardarium* in old chapters; *et deciman lardarii de haga. Mon. Ang. tom. 1. p. 321.*

**LARONS** [*Fr.*] Thieves; mentioned in the 18 *Edw. 2.* for a view of frankpledge.

**LASCARS.** By the 3 & 4 *Wm. c. 4. 54.* (for the encouragement of British shipping and navigation,) § 18, ships trading eastward of the Cape of Good Hope, within the limits of the East India Company's charter, may be navigated by Lascars, or other natives of countries within those limits.

**LASTATINUS.** Often occurs in *Walsingham*, and signifies an assassin or murderer. *Anno 1271.*

**LAST** [*Sax. hlæstan, i. e. onus, Fr. lest.*] Denotes a burden in general, and particularly a certain weight or measure of fish, corn, wood, leather, pitch, &c. As a last of white herrings is twelve barrels; of red herrings twenty cades or a thousand; and of pilchards, ten thousand; of corn, ten quarters, and in some parts of England twenty-one, quarters; of wool, twelve sacks; of leather twenty dickers, or ten score; of hides or skins, twelve dozen; of pitch, tar, or ashes, fourteen barrels; of gunpowder, twenty-four firkins, weighing one hundred pounds each, &c. See 32 *Hen. 8. c. 14.* (repealed); 1 *Jac. 1. c. 33*; 15 *Car. 1. c. 7*; and tit. *Weights and Measures.*

**LAST COURT.** In the marshes of Kent, is a court held by the twenty-four jurats, and summoned by the bailiffs wherein orders are made to lay and levy taxes, impose penalties, &c. for the preservation of the said marshes. *Hist. of Imbanking and Draining, 54.*

**LASTAGE** [*lastagium.*] A custom exacted in some fairs and markets to carry things

bought where one will by the interpretation of *rastal*; but it is more accurately taken for the ballast or lading of a ship. Lastage is also defined to be that custom which is paid for wares sold by the last; as herrings, pitch, &c.

**LASTAGE AND BALLASTAGE.** See *Ballast.*

**LAST HEIR** [*Ultimus hæres.*] He to whom lands comes by escheat for want of lawful heirs; that is, in some cases the lord of whom they held, but in others the king. *Bract. 7. 7. c. 17.* See *Descent, Escheat, Heir, Tenure.*

**LATERA.** Sides-men, companions, assistants. *Cowell.*

**LATERARE.** To lie side-ways in opposition to lying end-ways, used in the description of lands. *Chart. Antiq.*

**LATHE, LETHIE, LEID, or LETHIEN** [*Læstum, Leda, Sax. læthe.*] A great part of a county, containing three or four hundreds or wapentakes, as it is used in Kent and Sussex, in the latter of which is called a rape. 1 *Comm. 116*; *Leg. Edw. Confess. c. 35*; *Pat. 1 Hen. 4. par. 8. m. 8.* See *Trithring.*

**LATHREVE, LEDGREVE, or TRITHINGREVE.** The officer under the Saxon government who had authority over that division called a lathe. See *Trithingreve.*

**LATIMER.** Is used by Sir Edward Coke for an interpreter. 2 *Inst. 515.* It seems that the word is mistaken, and should be *latiner*, because heretofore he had understood Latin, which in the time of the Romans was the prevailing language, might be a good interpreter. *Camden* agrees, that it signifies a Frenchman or interpreter, and says the word is used in an old inquisition. *Britan. fol. 598.* It may be derived or corrupted from the *Fr. latinier, q. d. latiner. Cowell.*

**LATIN.** There are three sorts of Latin. 1. Good Latin, allowed by grammarians and lawyers. 2. False or incongruous Latin, which in times past would abate original writs, though not make void any judicial writ, declaration, or plea, &c. And, 3. Words of art, known only to the sage of the law, and not to grammarians, called Lawyers' Latin. 1 *Lil. Abr. 146, 147.* See 37 *Edw. 3. c. 15.* which directed all pleas, &c. to be debated in English, and recorded in Latin; but now, by 4 *Geo. 2. c. 26*; 6 *Geo. 2. c. 14.* the records and proceedings are to be in English. Formerly the use of a word not Latin at all, or not so in the sense in which used, might in many cases be helped by an *Anglicè*; though where there was a proper Latin word for the thing intended to be expressed, nothing could help an improper one. And when there was no Latin for a thing, words made which had some countenance of Latin were allowed good,



as *velvetum*, *Anglicè*; velvet, &c. 10 *Rep.* 133. See *Plending*, I. 3, *Process*.

**LATINARIUS.** An interpreter of Latin, or Latiner, from the Fr. *latnier*. 2 *Inst.* 515. See *Latimer*.

**LATITAT.** A writ whereby all men are originally called to answer in personal actions in the King's Bench; having its name upon a supposition that the defendant *doth lurk and lie hid*, and cannot be found in the county of Middlesex to be taken by bill, but is gone into some other county, to the sheriff of which this writ is directed, to apprehend him there. *F. N. B.* 78. *Terms de Ley*.

The origin of this: In ancient time, while the King's Bench was moveable, when any man was sued, a writ was sent forth to the sheriff of Middlesex, or any other county where the court was resident, called a bill of Middlesex, to take him; and if the sheriff return *non est inventus*, then a second writ was sued out, reciting that it was testified that the defendant lurked and lay hid in another county, and thereby the sheriff of that county was commanded to attach the party in any other place where he might be found; and when the tribunal of the King's Bench came to be settled at Westminster, the same course was observed for a long time; but afterwards, by the contrivance of clerks, it was devised to put both these writs into one, and so attach the defendant upon a fiction that he was not in the county of Middlesex, but lurking elsewhere; and that therefore he was to be apprehended by the sheriff of the county where he was suspected to be, and lie hid.

As this writ is in effect abolished by the Uniformity of Process Act. 2 *Wm.* 4. c. 39, by which a writ of summons is made the only process for commencing non-bailable actions, and a writ of *capias* the process for commencing those where the defendant is arrested, it is unnecessary further to expound the law relating to *latitats*, which will be found at large in *Mr. Tidd's Book of Practice*, 9th ed.

For other matters connected with and explanatory of the subject of this title, see *Actiam*, *Capias*, *Common Pleas*, *King's Bench*, *Practice*, *Process*, &c.

**LATRO** [*Latrocinium*.] He who had the sole jurisdiction *de latrone* in a particular place; it is mentioned in *Leg. Wm.* 1. See *Infangthef*.

**LAVATORIUM.** A laundry, or place to wash in. Applied to such a place in the porch or entrance of cathedral churches, where the priest and other officiating members were obliged to wash their hands, before they proceeded to Divine service. See *Liber. Statut. Eccl. Paul. London.* MS. f. 50.

**LAVERBREAD.** In the county of Cla-

morgan, and some other parts of Wales, they make a sort of food of a sea-plant, which seems to be the oyster-green, or sea liverwort; and this they call laverbread.

**LAVINA.** See *Labina*.

**LAUDARE.** To advise or persuade. *Leg. Edw. Confess.* c. 39; *Hoveden*, 729. *Laudare* signifies also to arbitrate; and *laudator*, an arbitrator. *Knight*, 25, 26.

**LAUDUM.** An arbitrament or award. *Walsingham*, 60.

**LAUNCEGAYS.** A kind of offensive weapons now disused, and prohibited by the 7 *Rich.* 2. c. 13.

**LAUND or LAWND** [*landa*.] An open field without wood. *Boun*.

**LAURELS.** Pieces of gold coined in the year 1619, with the king's head laureated, which gave them the name of laurels; the twenty-shilling pieces whereof were marked with XX., the ten shilling X., and the five shilling piece with V. *Camd. Annal. Jack.* 1. MS.

**LAW** [*Sax. lag*; *Lat. lex*, from *lego*, or *legendo*, choosing; or rather *à ligando*, from binding.] The rule and bond of men's actions; or it is a rule for the well-governing of civil society, to give every man that which doth belong to him.

Law, in its most general and comprehensive sense, is thus defined by *Blackstone* in the *commentaries*: A rule of action; and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey. 1 *Comm. Introd.* § 2.

Laws in their more confined sense, and in which it is the business of works of this nature to consider them, denote the rule, not of action in general, but of human action or conduct. And this perhaps (it has been acutely observed) is the only sense in which the word *law* can be strictly used; for in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term (as *quality* or *property*) may be found. When the law is applied to any other object than man, it ceases to contain two of its essential ingredients, *disobedience* and *punishment*. 1 *Comm. Introd.* § 2, and *Mr. Christian's notes* there.

Municipal law is by the same great commentator defined to be—"A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." The latter clause of this sentence seems to *Mr. Christian* to be either superfluous or defective. If we attend to the learned judge's exposition, perhaps we

may be inclined to use the words "*establishing* and *ascertaining* what is right or wrong;" and all cavil or difficulty will vanish. See 8 *Comm.* 43—53.

Every law may be said to exist of several parts; Declaratory, whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: Directory, whereby the subject of a state is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: Remedial, whereby a method is pointed out, to recover a man's private rights or redress his private wrongs: Vindictory, which imposes the sanction whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty. See 1 *Comm.* 53.

According to Bracton, *Lex est sanctio justa, jubens honesta et prohibens contraria*: And the school-man says, *Lex humana est quoddam dictamen rationis, quo diriguntur humani actus*. This law is *rectum*, as it discovers that which is crooked or wrong: And *justa* requires five properties; *possibilis, necessaria, conveniens, manifesta, nullo privato commodo*. 2 *Inst.* 56, 587.

Laws are arbitrary or positive, and natural; the last of which are essentially just and good, and bind every where and in all places where they are observed: Arbitrary laws are either concerning such matter as is in itself morally indifferent, in which case both the law and the matter, and subject of it, is likewise indifferent, or concerning the natural law itself, and the regulation thereof; and all arbitrary laws are founded in convenience, and depend upon the authority of the legislative power which appoints and makes them, and are for maintaining public order. Those which are natural laws are from God; but those which are arbitrary, are properly human and positive institutions. *Selden on Fortescue*, c. 17.

The laws of any country begun, when there first began to be in a state in the land: and we may consider the world as one universal society, and then that law by which nations were governed, is called *jus gentium*: if we consider the word as made up of particular nations, the law which regulates the public order and right of them, is termed *jus publicum*: and that law which determines the private rights of men, is called *jus civile*. *Selden*, ubi supra.

No law can oblige a people without their consent; this consent is either *verbis* or *factis*, i. e. it is expressed by writing, or implied by deeds and actions; and where a law is grounded on an implied assent, *rebus et factis*, it is either common law or custom: if it is universal, it is common law; and if particular to

this or that place, then it is custom. 3 *Salk.* 112.

The law in this land hath been variable; the Roman laws were in use anciently in Britain when the Romans had several colonies here, each of which was governed by the Roman laws: afterwards we had the laws called *Merchenlage*, *West Saxonlage*, and *Danelage*; all reduced into a body, and made one by King *Edw. Confess. Magna Charta*, c. 1. & 14: *Cumdr. Britain.* 94.

At present the laws of England are divided into three parts: 1. The common law, which is the most ancient and general law of the realm, and common to the whole kingdom; being appropriate thereto, and having no dependence upon any foreign law whatsoever. See *Common Law*.

2. Statutes or acts of parliament, made and passed by the king, lords, and commons in parliament; being a reserve for the government to provide against new mischiefs arising through the corruption of the times: and by this the common law is amended where defective, for the suppression of public evils; though where the common law and statute law concur or interfere, the common law shall be preferred. See *Statutes*.

3. Particular customs; but they must be particular, for a general custom is part of the common law of the land. *Co. Lit.* 15, 115. See *Custom*.

*Blackstone* divides the municipal law of England into two kinds, *lex non scripta*, the written or common law; and the *lex scripta*, the written, that is the statute law.

The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law, properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions. 1 *Comm. Introd.* § 3.

There is another division of our laws more large and particular; as into the prerogative or crown law; the law and custom of parliament; the common law; the law; the statute law; reasonable customs; the law of arms, war, and chivalry; ecclesiastical or canon law; civil law, in certain courts and cases; forest law; the law of marque and reprisal; the law of merchants; the law and privilege of the stannaries, &c. But this large division may be reduced to the common division: and all is founded on the law of nature and reason, and the revealed law of God, as all other laws ought to be. 1 *Inst.* 11.

The law of nature is that which God at man's creation infused into him, for his preservation and direction; and this is *lex eterna*, and may not be changed: and no laws shall

be made or kept, that are expressly against the law of God, written in his scripture; as to forbid what he commandeth, &c. 2 *Shep. Abr.* 356.

All laws derive their force *à lege nature*; and those which do not, are accounted as no laws. *Fortescue*. No law will make a construction to do wrong; and there are some things which the law favours, and some it dislikes; it favoureth those things that come from the order of nature. 1 *Inst.* 183, 197. Also our law hath much more respect to life, liberty, freehold inheritance, matters of record, and of substance, than to chattels, things in the personalty, matters not of record, or circumstances. *Ibid.* 137; 4 *Rep.* 124.

As to the mode of interpreting laws, see 1 *Comm.* § 2.—Of the general foundation of the laws of England, *Id.* § 3.—And of the countries subject to the laws of England, *Id.* § 4.—See also *Ireland, Scotland, Plantations, Statutes, Common Law, Canon Law, Civil Law, &c. &c.*

LAW hath also a special signification, wherein it is taken for that which is lawful with us, and not elsewhere; as tenant by the curtesy of England, is called tenant by the law of England.

**LAW OF ARMS,** [*Lex armorum.*] Is that law which gives precepts how to proclaim war, make and observe leagues and treaties, to assault and encounter an enemy, and punish offenders in the camp, &c. The law and judgment of arms are necessary between two strange princes of equal power, who have no other method of determining their controversies, because they have no superior or ordinary judge, but are supreme and public persons; and by the law of arms, kings obtain their rights, rebels are reduced to obedience, and peace is established: but when the laws of arms and war do rule, the civil laws are of little or no force. *Treat. Laws*, 57.

It is a kind of law among all nations, that in case of a solemn war, the prince that conquers gains a right of dominion, as well as property, over the things and persons he has subdued; and it is for this reason, because both parties have appealed to the highest tribunal that can be, viz. the trial by arms and war; wherein the great judge and sovereign of the world, in a more especial manner, seems to decide the controversy. *Hale's Hist. L.* 73, 74.

Common things concerning arms and war, are under the cognizance of the constable and marshal of England, 13 *R. 2. st. 1. c. 2.* See *Constable, Court of Chivalry.*

**LAW-BOOKS.** All books written in the law are either historical, as the *Year-Books*;

explanatory, such as *Staundforde's Treatise of Royal Prerogative*; miscellaneous, as the abridgments of the law; monological, being on one certain subject, such as *Lambard's Justice of Peace, &c.*—*Fulbeck's Parallel*, c. 3. The books of reports have such great weight with the judges, that many of them are as highly valued as the *Responsa Prudentum* among the Romans, which were authoritative. *Wood's Inst.* 10.

The decisions of courts (says *Blackstone*) are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determinations. And these serve as indexes to, and also to explain the records, which always, in matters of consequence and nicety, the judges direct to be searched.

These reports are extant in a regular series, from the reign of King Edward II. inclusive; and from this time to that of King Henry VIII. were taken by the prothonotaries or chief scribes of the court at the expense of the crown, and published annually; whence they are known under the denomination of the *Year-Books*. *Blackstone* proceeds to express his wish that this beneficial custom had been continued. He laments the deficiency and inaccuracy of the many reports from that time to the period in which he wrote; and the neglect of the appointment which King James I., at the instance of Lord Bacon, made of two reporters, with a stipend for that purpose. 1 *Comm. Introd.* § 3.

This evil has however been since, in a great measure, remedied, by several periodical publications of reports of the cases determined in the courts of law and equity, soon after the end of the terms in which they are decided. The public encouragement given to these works is perhaps a more adequate mode of reward than royal munificence could devise, even in a reign distinguished for the patronage of learning and genius.

Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke; and these are generally cited, by way of excellence, as *The Reports*; thus, 1 *Rep.*; 2 *Rep.* &c., while other reports are cited by the name of the reporter, 1 *Ventr.*; 1 *Salk.* &c.

Besides the reporters, there are also other authorities to whom great veneration and re-



spect are paid by the students of the common law. Such are *Glanvil*, *Bracton*, *Britton*, *Pleta*, *Hengham*, *Littleton*, *Statham*, *Brooke*, *Fitzherbert*, *Staundforde*, and others of ancient date.—(*Hale*, *Hawkins*, *Foster*, and others of more modern times, among whom the author of the *Commentaries* holds an honourable rank.) Their treatises are cited as authority, and are evidences that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers (according to *Blackstone*) in point of time, whose works are of any intrinsic authority in the courts of justice, is *Sir Edward Coke*; commonly called *Lord Coke*, from his having been, as was already mentioned, lord chief justice.—He left four volumes of institutes; the first being a very extensive comment upon a little excellent treatise of *Tenures* compiled by Judge *Littleton*, in the reign of *Edward IV.* This is generally called *Coke-Littleton*, (meaning *Coke upon Littleton*) and is so cited by lawyers, or still more usually as *First Institute*. This has been since enlarged by the very learned and laborious notes of *Mr. Hargrave* and *Mr. Butler*, and, taken altogether, is book of the greatest value and highest authority in the law.

There have also appeared a vast variety of abridgments of general law; and systems of particular branches of it; the most valuable of which are *Sir John Comyns' Digest*, and *Bacon's Abridgment*, the latter founded chiefly on *MS. treatises* of Chief Baron *Gilbert*, and lately edited by *Sir H. Gwillim* and *C. E. Dodd, Esq.* These with the statutes at large, and other publications, swell lawyers' libraries to a size which they perhaps, as well as their clients, would be glad to see lessened. But the delay imputed to, rather than suffered in, courts of justice, and the multiplication of cases and determinations, are a price which every free and opulent commercial nation must pay for the innumerable blessings it enjoys, under such a government as that long established in this country. See *Montesquieu's Spirit of Laws*, lib. vi. c. 2.

**LAW-DAY**, [*Lagedayum*.] Called also *View of Frankpledge* or *court-leet*; was any day of open court, and commonly used for the courts of a county or hundred.

**LAWING OF DOGS**. The cutting off several claws of the fore-feet of dogs, in the forest. See *Forest*.

**LAWLESS COURT**. A Court held on *King's Hill*, at *Rochford* in *Essex*, on Wednesday morning next after *Michaelmas-Day* yearly, at cock-crowing; at which court they whisper and have no candle, nor any pen and ink, but a coal; and he that owes suit or

service there, and appears not, forfeits double his rent. This court is mentioned by *Camden*, who says, that his servile attendance was imposed on the tenants, for conspiring at the like unreasonable time to raise a commotion. *Camd. Britan.* It belongs to the honour of *Raleigh*, and is called *Lawless*, because held at an unlawful hour, or *quia dicta sine lege*. The title of it is in rhyme, and in the court rolls runs thus:—

King's-hill in }  
Rochford. } ss. *Curia de Domino Rege,*  
*Dicta sine lege,*  
*Tenta est in idem*  
*Per ejusdem consuetudinem,*  
*Ante ortum solis*  
*Luceat nisi solus,*  
*Senescillus solus*  
*Nil scribit nisi colis*  
*Toties voluerit*  
*Gallus ut cantaverit,*  
*Per cujus soli sonitus*  
*Curia est summonitus;*  
*Clamat clam pro rege*  
*In curia sine lege,*  
*Et nisi cito venerint*  
*Citius perituerint,*  
*Et nisi clam accedant*  
*Curia non attendat.*

*Qui venerit cum lumine erat in regimine*  
*Et dum sunt sine lumine, capti sunt in crimine,*  
*Curia sine cura.*  
*Jurata de injuria.*

*Tenta in idem die Mercurii ante dum) proximi post festum Sancti Michaelis, anno regni regis, &c.*

**LAWLESS MAN**. [*Exlex*.] An outlaw. *Bract. lib. 3. c. 11.*

**LAW OF MARQUE**, [from the Germ. *march*, i. e. *limes*.] Is where they that are driven to it do take the shipping and goods of that people of whom they have received wrong, and cannot get ordinary justice in another territory, when they can take them within their own bounds and precincts. 27 *Edw. 3. st. 2. c. 17.* See *Letter of Marque*.

**LAW MARTIAL**. See *Courts Martial*.

**LAW MERCHANT**, [*lex mercatoria*.] A special law differing from the common law of England, proper to merchants, and part of the law of the realm. And the *charta mercatoria*, 13 *Edw. 1. st. 3.* grants this perpetual privilege to merchants coming into this kingdom. See also 27 *Edw. 3. st. 2. cc. 2.* (repealed) 13. 17. 19. 20.; *Co. Lit.* 182; and *tit. Custom of Merchants*.

**LAW PROCEEDINGS**. Of all kinds, as writs, processes, pleadings, &c. are to be in the English language, by 4 *Geo. 2. c. 26*; 5 *Geo. 2. c. 27.* Except known abbreviations

and technical terms, 6 *Geo. 2. c. 14.* See *Pleadings*, I. 3.

**LAW SPIRITUAL**, [*lex spiritualis*.] The ecclesiastical law, allowed by our laws where it is not against the common law, nor the statutes and customs of the kingdom; and regularly according to such ecclesiastical or spiritual laws, the bishops and other ecclesiastical judges proceed in causes within their cognizance. *Co. Lit.* 344. It was also called Law Christian, and, in opposition to it, the common law was often called *Lex Terrena*, &c. See *Canon Law, Courts Ecclesiastical*.

**LAW OF THE STAPLE**, [mentioned in 27 *Edw. 3. st. 2. c. 22.*] Is the same with Law Merchant. See 4 *Inst.* 237, 238, and *tit. Staple*.

**LAWYER** [*Legista, Legispiritus, Jurisconsultus*. By the Saxons called *lahman*.] A counsellor, or one learned in the law. See *Attorney, Barrister*.

**LAY-CORPORATIONS**. Are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he hath directed. See *Corporation*.

**LAY INVESTITURE** of BISHOPS. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy, till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected bishops could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A. D. 773, by Pope Hadrian I. and the council of Lateran, and universally exercised by other Christian princes: but the policy of the Court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England (as well as other kingdoms in Europe)

even in the Saxon times: because to rights of confirmation and investiture were in effect (though not in form) a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting those investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum*, and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the Court of Rome found it prudent to suspend for a while its other pretensions.

This concession was obtained from King Henry I. in England, by means of that obstinate and arrogant prelate Archbishop Anselm: but King John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops, reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect (which is the original of our *congé d'élire*), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause. This grant was expressly recognized and confirmed in King John's *Magna Charta*, and was again established by statute 25 *Edw. 3. st. 6. § 3*.

But by the 25 *Hen. 8. c. 20*, the ancient right of nomination was in effect restored to the crown. See 1 *Comm.* 377; and *Bishop*.

**LAY-FEE** [*feodum laicum*.] Lands held in fee on a lay-lord, by the common services to which military tenure was subject; as distinguished from the ecclesiastical holding in

*frankalmoign*, discharged from those burdens. *Kennet's Gloss.* See *Tenures*.

**LAYMAN.** One that is not of the clergy; the Latin word *laicus* signifying as much as *populus*, that which is common to the people, or belongs to the laity. *Lit. Dict.*

**LAYSTALL** [Sax.] A place to lay dung or soil in.

**LAZARETS.** Places where quarantine is to be performed by persons coming from infected countries. Escaping from them felony. See 1 *Jac.* 1. c. 31; 26 *Geo.* 2. c. 6; 29 *Geo.* 2. c. 8; and *Plague*.

**LAZZI.** The Saxons divided the people of the land into three ranks: the first they called *Edilingi*, which were such as are now nobility; the second were termed *Frilingi*, from *friling*, signifying that he was born a freeman, or of parents not subject to any servitude, which are the present gentry: and the third and last were called *Lazzi*, as born to labour, and being of a more servile state than our servants, because they could not depart from their service without the leave of the lord, but were fixed to the land where born, and in the nature of slaves; hence the word *lazzi*, or *lazy*, signifies those of a servile condition. *Nithardus de Saxonibus*, lib. 24.—It is remarkable that the lower class of people at *Naples* are called *Lazaroni*.

**LEA OF YARN.** A quantity of yarn so culled; and at Kidderminster it is to contain 200 threads on a reel four yards about. See 22 & 23 *Car.* 2. c. 8.

**LEAD.** By the 7 & 8. *Geo.* 4. c. 29. § 44. stealing, ripping, cutting, or breaking with intent to steal, any lead, iron, brass, or other metal, or any utensil or fixture, fixed in or to any building, or any thing made of metal, fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, &c. is felony, and the offender punishable as in the case of simple larceny.

**LEAGUE.** An agreement between princes, &c. Also a measure of way by sea, or an extent of land, containing most usually three miles. Breakers of leagues and truces, how punished for offences done upon the seas. See 4 *H.* 5. c. 7; 31 *H.* 6. c. 4. See *Conservator of the Truce*; *Truce*.

**LEAK, or LECHE** [from Sax. *Laccian*, to let out water.] In the bishoprick of Durham is used for a gutter; so in Yorkshire any slough or watery hole upon the road is called by this name; and hence the water-tub to put ashes in to make a lee for washing of clothes, is in some parts of England termed a *leche*. *Cowell*.

**LEAKAGE.** An allowance to merchants importing wine out of the customs for the waste and damage it is supposed to receive by

being kept. See 3 & 4 *W.* 4. c. 57. § 19. and tit. *Warehousing of Goods*.

**LEAP.** A net, engine, or wheel, made of twigs, to catch fish in. 4 & 5 *W. & M.* c. 23. See *Lepa*.

**LEAP-YEAR.** See *Bissextile, Year*.

**LEASE** [from *locatio*, letting; otherwise called a *demise*, *dismissio*, from *dimittere*, to depart with.] A letting of lands, tenements, or hereditaments, to another for term of life, years, or at will, for a rent reserved. *Co. Lit.* 43.

A **LEASE** is properly a conveyance of any lands or tenements, usually in consideration of rent, or other annual recompence, made for life, for years, or at will; but always for a less time than the lessor hath in the premises; for if it be for the whole interest it is more properly an assignment than a lease. He that letteth is called the *lessor*, and he to whom the lands, &c. are let is called the *lessee*. *Shep. Touchst.* c. 14; 2 *Comm.* c. 20.

A lease for years is also thus defined: a contract made between lessor and lessee for the possession and profit of lands, &c. on the one side, and a recompence for rent or other income on the other. *Bac. Abr. Leases*.

This word is also sometimes, though improperly, applied to the estate, *i. e.* the title, time, or interest the lessee hath in the thing demised; and then it is rather referred to the thing taken or had, and the interest of the taker therein; but it is more accurately applied rather to the manner or means of attaining or coming to the thing letten. See *Shep. Touchst.* c. 14.

The usual words of operation in a lease are "demise, grant, and to farm let,—*dimisi, concessi, & ad firman tradidi*." *Farm* or *feorme* is an old Saxon word signifying provisions. *Spelm. Gloss.* 229. And it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like, till the use of money became more frequent; so that a farmer, *firmarius*, was one who held his lands on payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word *farm* is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, *viz.* leases for life of corporeal hereditaments, but to no other.

Whatever restriction, by the severity of the feudal law, might, in times of very high antiquity, be observed with regard to leases, (see *Tenures*), yet by the common law, as it has stood for many centuries, all persons seised of



any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore, tenant in fee-simple might let leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner: nor could a husband, seised *jure uxoris*, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple; such as parsons and vicars, with consent of the patron and ordinary. *Co. Lit.* 44. So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of land in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years or for life, estates in tail or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now by several statutes, this power, where it was unreasonable, and might be made an ill use of, is restrained; and where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling*, statute. 2 *Comm. c.* 20. See *post*, II.

Further information on this subject may be conveniently classed under the following divisions:

I. Of leases in general, and of what things they may be made.

1. How a lease may be made; of the nature of a lease, and leasehold estate; and the construction of words in granting thereof.
2. By whom leases may be granted; and herein shortly of leases under powers. [See *Power*.]
3. Of the liability of lessees to repairs; of covenants in leases, and how far assignees are affected by them. [See *Covenant, Assignment*.]
4. Of the expiration, surrender, &c. of leasehold tenures, and of notices to tenants to quit.—[See *Ejectment*.]

II. Of leases under the enabling and restraining statutes.

III. Of acceptance of rent.

1. Where it shall } confirm
2. Where it shall not } a lease.

For other matters relative to leases, see *Bac. Abr. "Leases and Terms for Years,"* recommended by Blackstone to particular notice; *Shep. Touchst. c.* 14; and *Deed, Rent, Surrender*, and the other titles above referred to. See also 4 *Geo. 2. c.* 28: 11 *Geo. 2. c.* 19. (amended by 4 & 5 *W. 4. c.* 22.) under tit. *Rent*.

I. Generally, to the making of a good lease several things necessarily concur; there must be a lessor not restrained from making a lease; a lessee not disabled to receive; a thing demised which is demisable, and a sufficient description of the thing demised, &c. If it be for years, it must have a certain commencement and determination; it is to have all the usual ceremonies, as sealing, delivery, &c. and there must be an acceptance of the thing demised. *Lit.* § 56; 1 *Inst.* 46; *Plowd.* 273. 523. Whether any rent be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons under 32 *Hen. 8. c.* 28. (See *post*, II.) *Shep. Touchst. c.* 14.

A lessor who hath the fee cannot reserve rent to any other but himself, his heirs, &c. And if he reserves a rent to his executors, the rent shall be to the heir, as incident to the reversion of the land. 1 *Inst.* 47.

Neither can a power of re-entry upon a breach of covenant in a lease be reserved to a stranger to the estate. 4 *Taunt.* 23.

The lessor may take a distress on the tenements let for the rent; or may have action of debt for the arrears, &c. Also land leased shall be subject to those lawful remedies which the lessor provides for the recovery of his rent, possession, &c. into whose hands soever the land comes. *Cro. Jac.* 300.

Leases for lives or at will, or for years, may be made of any thing corporeal or incorporeal that lieth in livery or grant. *Shep. Touch.* 268. Consequently land, advowsons, tithes, commons, franchises, estovers, annuities, rent charges, or corodies, may be leased for years.

Some incorporeal hereditaments, however, form an exception to the above rule. Dignities which are only grantable by the crown cannot be granted for years. *Co. Lit.* 16 b.; 9 *Rep.* 97 b. Neither can offices of public trust, particularly those relating to the administration of justice. 9 *Rep.* 97 b.; *Cro. Car.* 587. *S. P.* But as the inconvenience and danger of their passing to unskilful executors, &c. are avoided by leasing them for years during the life of the grantee, such form of demise has been held good. 6 *Mod.* 57. *S. C.* *Ld. Ray.* 1005.

But offices requiring mere common diligence, and which may be executed by deputy

without affecting the public, may be leased for *mini*, or future interest.—At will; *i. e.* when a year, as the offices of postmaster general; lease is made of land to be held at the will and *Hutl* 352; king's printer, *ibid.* 352; where in pleasure of the lessor and lessee together; and of ports and highways, *ib.* 354; and such as are such a lease may be made by word of mouth, not entered in courts of justice, as surveyor of as well as the farmer. *Sheph. Touchst. c. 14.* the groom-wax, sealer of writs and subpoenas, &c. *Bro. Abr. Leases, 10.* If the lease be but for half a year, or a quarter, or any less time, this lessee is respected

as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of. *Lit. § 58.* These estates for years were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord; and yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own; and, therefore, they were not allowed to have a freehold estate; but their interest (such as it was, vested after their deaths in their executors, who were to make up the accounts of their testator with the lord and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery, suffered by the tenant of the freehold, which annulled all leases for years then subsisting, unless afterwards renewed by the recoverer, whose title was supposed superior to his by whom those leases were granted. *Co. Lit. 46.*

No tenant shall take leases of above two farms, in any town, village, &c. nor hold two unless he dwell in the parish, under penalties and forfeitures, by 25 *Hen. 8. c. 13. § 11.* See also 21 *Hen. 8. c. 13.* to which statutes there is not any regard now paid.

1. A lease may be made in writing or by word of mouth. It is sometimes made and done by record, as *fine, recovery* (now abolished,) &c. and sometimes and most frequently by writing, called a lease by indenture; albeit, it may be also made by deed poll; and sometimes also it is, as it may be of land or any such like thing grantable without deed for life, or never so many years, by word of mouth, without any writing, and then it is called a lease parol. *Sheph. Touchst. c. 14.*—But by the statute of frauds, 29 *Geo. 2. c. 3.* leases of lands must be in writing, and signed by the parties themselves, or their agents duly authorised, otherwise they will operate only as leases at will; except leases not exceeding three years.

A parol agreement to lease lands for four years creates only a tenancy at will. 4 *Term Rep.* 680.—But see 8 *Term Rep.* 3. that a lease by parol enures as a tenancy from year to year; the meaning of the statute of frauds being that such an agreement should not operate as a term.

A lease may be made by all the ways above mentioned, either for life, for years, or at will. For life; as for life of the lessee, or another, or both. For years, *i. e.* for a certain number of years, as 10, 100, 1000, or 10,000 years, months, weeks, or days, as the lessor and lessee agree. And then the estate is properly called a term for years; from this word *term* doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time. These leases for years do some of them commence in *present* time, and some in *futuro* is called an *interesse ter-*

While estates for years were thus precarious, it is no wonder that they were usually very short, like the modern leases upon rack-rent; and, indeed, we are told, that by the ancient law no cases for more than forty years were allowable; because any longer possession (especially when given without any livery, declaring the nature and duration of the estate,) might tend to defeat the inheritance. *Mirr. c. 2. § 27; Co. Lit. 45, 46.* Yet this law, if ever it existed, was soon antiquated; for we may observe, in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period; and long terms for three hundred or one thousand years were certainly in use in the time of Edward III. and probably of Edward I. But certainly when by 21 *Hen. VIII. c. 5.* the termor (that is, he who is entitled to the term of years) was protected against the fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before, and were afterwards

extensively introduced, being found extremely convenient for family settlements and mortgages; continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord. 2 *Comm. c. 9.*

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years, and therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end. *Cp. Lit. 45.*

A demise having no certain commencement is void; for every contract sufficient to make a lease ought to have certainty in commencement, in the continuance, and in the end.—*Vaugh. 85; 6 Rep. 53.*

But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. 6 *Rep. 35.* If no day of commencement is named in the creation of this estate, it begins from the making or delivery of the lease. *Co. Lit. 46.* A lease for so many years as J. S. shall live is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. *Co. Lit. 45.* And the same doctrine holds if a parson make a lease of his glebe for so many years as he shall continue parson of Dale, for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good; for there is a certain period fixed beyond which it cannot last, though it may determine sooner on the death of J. S. or his ceasing to be parson there. *Co. Lit. 45.*

The law reckons an estate for years inferior in interest, as compared to an estate for life, or an inheritance; an estate for life, even if it be *pur auter vie*, is a freehold; but an estate for a thousand years is only a chattel, and reckoned part of the personal estate. *Co. Lit. 45.* Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As if one grants lands to another to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*, because it cannot be created at common law without livery or seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now,

but hereafter. 5 *Rep. 94.* And because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called, as has been already remarked, his interest in the term, or *interesse termini*; but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is possessed, not properly of the land, but of the term of years; the possession or seisin of the land remaining still in him who hath the freehold. *Co. Lit. 46.* Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the term may expire, during the continuance of the time, as by surrender, forfeiture, and the like. For which reason if one grant a lease to A. for the term of three years, and after the expiration of the said term, to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but if the remainder had been to B. from the after expiration of the said three years, or from or after the expiration of the said time, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term. *Co. Lit. 45.*

A freehold lease for three lives differs from a chattel lease only in this, viz. that the *habendum* is to the lease, his heirs and assigns, for and during the natural lives of him the said C. D., E. his wife, and T. D. his son, and during the natural life of every and either of them longest living. And in every covenant, the lessee covenants for himself, his heirs and assigns; and the covenants are the same as in a chattel lease, with the addition of a letter of attorney at the end, to deliver possession and seisin, as in a deed of feoffment, *Dict.*

Though a lease for life cannot be made to commence *in futuro*, by the common law, because livery cannot be made to a future estate, yet where a lease is made for life, *habendum* at a day to come, and after the day the lessor makes livery, there it shall be good; and a lease in reversion may be made for life, which commences at a day that is future. 5 *Rep. 94; Hob. 314; 1 Inst. 5.* A lease for years may begin from a day past, or to come, at Michaelmas last, Christmas next, three or four years after, or after the death of the lessor, &c. though a term cannot commence upon a contingency which depends on another contingency. 1 *Inst. 5; 1 Rep. 156.* If one make a lease for years, after the death of A. B. if he die within ten years, this is a good lease, in case he dies within that time, otherwise not.



*Plowd.* 70. And where a man has a lease of long as both parties please, if the tenant die lands for eighty years, and he grants it to an estate, his administrator has the same interest another to hold for thirty years, to begin at the death of the land which the intestate had. 3. *T.* his death, it will be good for the whole thirty *R.* 13.

years, provided there is so many of the eighty. A lessee hath a term for a year by parol, and to come at the time of the death of the lessor, so from year to year, so long as both parties *Bro. Grant.* 51; 1 *Rep.* 155. A lease made demise; if the lessee enters on a second year, from the lessor's death, until a certain year, he is bound for that year, and so on; and if (i. e. A. D. 1800), is good; and if a lease be made for a year, and so from during the minority of J. S. or until he shall year to year as long as both parties agree, it is come to the age of twenty-one years, the lease is binding but for one year; though if the are good leases; and if he dies before his term, the lessee enters upon the second year, he is for age, the lease is ended. *Hob.* 155. A person that year bound: if it is for a year, and so grants a rent of 20*l.* a year, till one hundred from year to year, so long as both parties pounds be paid, it is a lease of thirty years, and six years expire, this is a lease for years. *Co. Lit.* 12. If a man makes a lease for six years, but determinable every year at the of land to another, until he shall levy out of him of either party; but if it is for a year, the profits are landed, potatoes, or it is paid and so from year to year till six years deter- that sum, &c. this will be a lease for life, de- mine, this is a certain lease for six years.— terminable on the payment of the hundred *Mod. Ca.* 215. If A. make a lease of land pounds, if livery and seisin be made; but if to B. for ten years, and it is agreed between there is no livery, it will not be good for years, them that he shall pay fifty pounds at the end but void for uncertainty. 21 *Assis.* 18; of the said term, and if he do so, and pay fifty *Plowd.* 27; 6 *Rep.* 35. See *Livery of Seisin.* pounds at the end of every ten years, then the

A lease for years to such person as A. B. said B. shall have a perpetual demise and shall name, is not good; though it may be for grant of the lands, from ten years to ten years so many years as he shall name, not as shall continually following, *extra memoriam hom-* be named by his executors, &c. for it must be *inum*, &c. Though this be a good lease for in the lifetime of the parties. *Hob.* 173; *Moor*, the first ten years, as for all the rest it is incer- 911. tain and void; by covenant a further lease

If one makes a lease for a year, and so from may be made for the like term of years.— *Plowd.* 192; 2 *Shep. Abr.* 376.

A. and B. covenant in a lease for sixty-one year to year, it is a lease for two years; and afterwards it is but an estate at will. *Mod.* 4; 1 *Lutw.* 213. And if from three years years, "that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the pre- mises unto the lessee, for and during the fur- ther term of twenty years, to commence from

If a parson makes a lease of his glebe for three years, and so from three years to three and after the expiration of the said term of years, so long as he shall be parson, it is a sixty-one years, and so in like manner at the good lease for six years, if he continue parson end and expiration of every twenty years, during the said term of sixty-one years, for so long. 6 *Rep.* 35; 3 *Cro.* 511. the like consideration, and upon the like re- quest, would execute another lease for the fur- ther term of twenty years, to commence at

Lease for one year, and so for two or three years, or any further term of years, as lessor and lessee shall think fit and agree, after the expiration of the said term of one year; this is a good lease for two years; and after every subsequent year begun, is not determinable till that be ended. *Wils. part 1*, p. 262. But if the original contract were only for a year, or if it were at so much per annum rent, with- out mentioning any time certain, it would be a tenancy at will after the expiration of the year; unless there were some evidence by a regular payment of rent, annually or half yearly, that the intent of the parties was that he should be tenant for a year. *Bull. N. P.* 84 (3d ed.)

In case of a tenancy from year to year, as

A lease made to a man for seven years, if D. shall live so long, who is dead when the lease is made; by this the lessee hath an absolute lease for seven years. 9 *Rep.* 63.— Lease for life is granted, and says, that if the lessee within one year do not pay 20*s.* then he

shall have but a lease for two years; here, if he pays not the money, he shall have only the two years, although livery of seisin be had thereon. 1 *Inst.* 218. If a lease be made to A. B. during his own life and the lives of C. and D. it is one entire estate of freehold, and shall continue during the three lives, and the life of the survivor of them; and though the lessee can have it no longer than his own life, yet his assignee shall have the benefit of it so long as the other two are living. 5 *Rep.* 13; *Moor.* 32. Where one grants land by lease to A. B. and C. D., to hold to them during their lives, although the words "and the longest liver of them" be omitted, they shall hold it during the life of the longest liver. 5 *Rep.* 9. A lease is made to a person for sixty years, if A. B. and C. D. so long live; and afterwards A. B. dies, by his death the lease is determined. Though if the lease be made to one for the lives of A. B. and C. D. the freehold doth not determine by the death of one of them; and if in the other case of a term, the words or "either of them" be inserted in the lease, it will be good for both their lives. 13 *Rep.* 66.

A lease was made to a man for ninety-nine years, if he should so long live; and if he died within the term, the son to have it for the residue of the term; this was adjudged void as to the son, because there can be no limitation of the residue of a term which is determined. *Cro. Eliz.* 216. But if the words of the lease be, to hold during the residue of the ninety-nine years, and not during the rest of the term, in this case it may be good to the son also. 1 *Rep.* 153; *Dyer*, 253.

A lease was made for twenty-one years, if the lessee lived so long, and in the service of the lessor; the lessor died within the term, and yet it was held that the lease continued, for it was by the act of God that the lessee could serve no longer. *Cro. Eliz.* 643.

If a lease be to a man and to her whom he shall take to wife, it is void; because there ought to be such persons at the time of the commencement of the lease which might take. 4 *Leon.* 158. When a lease in reversion is granted as such after another lease, and that lease is void by rasure, &c. the revisionary lease, expectant upon the lease for years that is void, is void also. *Cro. Car.* 289. But where a man recites a lease, when in truth there is no lease, or a lease which is void, and misrecites the same in a point material, and grants a further lease, to commence after the determination thereof; in such case the new lease shall begin from the time of delivery. *Dyer*, 93; 6 *Rep.* 36; *Vaugh.* 73, 80, &c.

A man makes a lease for years to one, and afterwards makes a lease for years to another,

of the same land; the second lease is not void, but shall be good for so many years thereof as shall come after the first lease ended. *Noy's Max.* 67. And if one make a lease for years, and afterwards the lessor enters upon the lands let, before the term is expired, and makes a lease of these lands to another, this second lease is a good lease until the lessee doth re-enter: and then the first lease is revived, and he is in thereby. 2 *Lill. Abr.* 152. It hath been held that a lease may be void as to one, and stand good to another; and leases voidable or void for the present, may after become good again. 1 *Inst.* 46; 3 *Rep.* 51. If a lease be made to two, to hold to them and two others, it is voidable as to the two other persons; and when the two first die, the lease is at an end. 2 *Leon.* 1.

A lease which is only voidable, and not absolutely void, must be made void by the lessor by re-entry; but if a lease be void absolutely, there needs no re-entry; and as a voidable lease is made void by re-entry, and putting out the lessee, so it is affirmed by accepting and receiving the rent, which acknowledges the lessee to be tenant. 21 *Car. R. B.*; *Lil.* 149.

When a term for years in lease, and a fee simple, meet in one person, the lease is drowned in the inheritance; yet in some cases it may have continuance, to make good charges and payments, &c. *Poph.* 39; 2 *Nels. Abr.* 1100. If a lease for years is made to a man and his heirs, it shall go to his executors. 1 *Inst.* 46, 388. And a lease for years, notwithstanding it be a very long lease, cannot be intailed by deed; but may be assigned in trust to several uses. 2 *Lil. Abr.* 150. A lease is sealed by the lessor, and the lessee hath not sealed the counterpart, action of covenant may be brought upon the lease against the lessor; but where the lease is sealed by the lessee, and not the lessor, nothing operates. *Yelv.* 18; *Owen*, 100.

If lessee for years loses his lease, if it can be proved that there was such a term let to him by lease, and that is not determined, he shall not lose his term; so it is of any other estate in lands, if the deed that created it be lost, for the estate in the land is derived from the party that made it, and not from the deed, otherwise than instrumentally and declarative of the mind and intent of the party, &c. 2 *Lil. Abr.* 152.

A man out of possession cannot make a lease of lands, without entering and sealing the lease upon the land. *Dalis.* 81. The lessee is to enter on the premises let; and such lessee for years is not in possession, so as to bring trespass, &c. until actual entry; but he may grant over his term before entry. 1 *Inst.* 46; 2 *Lil.* 160. If a lessee of a future interest never enters by virtue of his term, but enters before,

and continues after the commencement of the term, and then the lessor ousts him, the lessee may assign over his term of the land. 1 *Lev.* 47. But a lease to begin at Michaelmas, if the lessee enters before Michaelmas, and continues the possession immediately, is a disseisin. *Ibid.* 46.

If a lease be made of a close of land, by a certain name, in the parish of A., in the county of B., whereas the close is in another county, the said parish extending into both counties, such a lease is good to pass such land; though where a house is leased without a name, and the parish is mistaken, it hath been held otherwise. *Dyer*, 276, 292.

Land and mines are leased to a tenant; this only extends to the open mines, and the lessee shall not have any others, if there are such; and if land and timber are demised, the lessee is not empowered to sell it. 2 *Lev.* 184; 2 *Mod.* 193. A man makes a lease of lands for life, or years, the lessee hath but a special interest in the timber trees, as annexed to the land, to have the mast and shadow for his cattle; and when they are severed from the lands, or blown down with wind, the lessor shall have them as parcel of his inheritance. 4 *Rep.* 62; 11 *Rep.* 81.

A demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard, which was then in the occupation of B., another tenant to the lessor; and the lessor in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised. Whether parcel or not of the thing demised is always matter of evidence. 1 *T. R.* 701.

Declarations by tenants are admissible evidence after their death, to show that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. 2 *T. R.* 53.

If the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years, &c. *Wood's Inst.* 266. But a lease in writing, though not under seal, cannot be given in evidence, unless it be stamped. 1 *T. R.* 735. Articles with covenant to let and make a lease of lands, for a certain term, at so much rent, have been adjudged a lease. *Cro. Eliz.* 486. In a covenant with the words "have, possess, and occupy lands, in consideration of a yearly rent," without the word demise, it was held a good lease; and a licence to occupy, take the profits, &c. which passeth an interest, amounts to a lease. 3 *Bulst.* 204; 3 *Salk.* 223. An agreement of the parties, that

the lessee shall enjoy the lands, will make a lease; but if the agreement hath a reference to the lease to be made, and implies an intent not to be perfected till then, it is not a perfect lease until made afterwards. *Bridg.* 13; 2 *Shep. Abr.* 374. If a man, on promise of a lease to be made to him, lays out money on the premises, he shall oblige the lessor afterwards to make the lease; the agreement being executed on the lessee's part, where no such expense hath been, a bare promise of the lease for a term of years, though the lessee have possession, shall not be good without some writing. *Preced. Chan.* 561. See *Agreement*.

A paper containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a lease itself. 1 *T. R.* 735. But an instrument containing words of present demise will operate as a lease, if such appears to be the intention of the parties, though it contain a clause for a future lease. *Poole v. Bentley*, 12 *East*, 168; 15 *East*, *R.* 244; 3 *Tunt.* 65.

An instrument on an agreement-stamp reciting that A. in case he should be entitled to certain copyhold premises on the death of B. would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. 2 *T. R.* 739.

Words in an agreement that A. shall hold and enjoy, &c. if not accompanied with restraining words, operate as words of present demise; otherwise, if they be followed by others, which show that the parties intended that there should be a lease in future. The whole must depend on the intention of the parties. 5 *T. R.* 163.

These words in an instrument, "Be it remembered, that I. B. hath let, and by these presents doth demise," &c. held to operate as a present demise, although the instrument contained a further covenant for a future lease. 5 *T. R.* 165.

The provision as to a future lease does not necessarily prevent the instrument from operating as a present demise, especially if the terms of the future lease are ascertained at the time of signing the instrument. 8 *Bing.* 182. It is to be collected from the whole instrument, whether it is intended to operate as a present demise or as a mere executory agreement. 7 *Bing.* 590; 8 *Bing.* 178. Though the words are "agree to let," it may be a present demise, if such appears the intention. 7 *Bing.* 594. If the words of the instrument are ambiguous, the court will call in aid the acts of the parties



done under it as a clue to their intention. 8 *Bing.* 181. "G. F. does this day agree to let to J. S. three cottages for ten years; he further agrees to build a store-house, and make a cellar, at the rent of 35*l.*; he agrees to pay the ground rent, and has this day received 4*l.* from J. S. in earnest:" Held, an actual demise, and not a mere agreement. 7 *Bing.* 590; and see 8 *Bing.* 178; 2 *N. & M.* 137.

A lease at will, is at the will of the lessor or lessee, or regularly at the will of both parties. 1 *Inst.* 55. According to the strict letter of the old law, such a tenancy, as it existed only by the mutual will of the lord and tenant, might have been put an end to at any time by either party. *Co. Lit.* 55 *a*; 2 *Comm.* 145. But in modern times estates at will have been looked upon with an unfavourable eye by the courts of law, and it is now clearly settled that where the relation of landlord and tenant is created without any limitation as to time, it is a tenancy from year to year, and not determinable at the will of either party, not even at the end of the current year, unless by a regular notice to quit. 3 *T. R.* 16; 6 *T. R.* 297; 7 *T. R.* 83; 8 *T. R.* 3; 8 *East*, 165. However a tenancy at will may still be created if two parties agree to let and take certain premises so long as both shall please, reserving a compensation accruing from day to day, without reference to any aliquot portion of a year; this will be strictly a tenancy at will. 4 *Taunt.* 128. And it would seem that a person who is permitted to live in a house rent-free, and without any limitation as to time, is still in the eye of law a tenant at will. *Russ. & R. C. C.* 498, 525. And see *post*, 4.

2. All persons seised or possessed of lands, may dispose of them according to the nature and quantity of their estates, provided they are under no legal disability. Where such disability exists, the demise may be either void or voidable.

He that is seised of an estate for life, may make a lease for his life according as he is seised; also he may make a lease for years of the estate, and it shall be good as long as the estate for life doth last; one possessed of lands for years may make a lease for all the years except one day, or any short part of the term; and if lessee for years make a lease for life, the lessee may enjoy it for the lessor's life, if the term of years last so long; but if he gives livery and seisin upon it, this is a forfeiture of the estate for years. *Wood's Inst.* 267.

If a person having an interest for three years make a lease for five years, it will be good for the three years, for though he exceed his authority, the lease is only void for the excess. *Bull. N. P.* 106.

If tenant in tail or for life make a lease ge-

nerally, it shall be construed for his own life. 1 *Inst.* 42.

No restraint is imposed on civil corporations, as mayor and commonalty, bailiffs, burgesses, and the like, by common law or by statute, and they may therefore, consistently with their by-laws, lease their lands for life or years, so as to bind their successors. 1 *Sid.* 161, 162.

With respect to statutable leases by ecclesiastical corporations, and tenants in tail, see *post*, II.

Joint-tenants, tenants in common, and coparceners, may make leases for life, years, or at will, of their own parts, which shall bind their companions; and in some cases, persons who are not seized of lands in fee, &c. may make leases for life or years, by special power enabling them to do it; when the authority must be exactly pursued. *Wood's Inst.* 267. But there is a difference, where there is a general power to make leases, and a particular power. See *ante*, and 8 *Rep.* 69.

If joint-tenants join a lease, this shall be but one lease, for they have but one freehold; but if tenants in common join in a lease, it shall be several leases for their several interests. 2 *Ro. Abr.* 64; *Com. Dig.* tit. *Estates*, (G. 6.); *Bac. Abr. Leases*, (I. 5.)

A lease by a feme covert is altogether void, for by marriage the free agency of the woman is suspended. *Co. Lit.* 46 *b*, 351 *b*; 2 *Com.* 293.

If an infant be seized of land in fee-simple, and he make a lease for years of it, rendering no rent, this lease is void; but if there be a rent reserved upon the lease, then the lease is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good. *Shep. Touchst.* c. 14. cites 9 *H. 7. c.* 24; 18 *E. 4. c.* 2; *Plowd.* 545. In 3 *Burr.* 1806, it is said to have been long settled, that an infant may make a lease without rent, to try his title; and that all leases by an infant, whether with or without rent, if made by deed, are voidable only. See *Infant*, and *Bac. Abr.* tit. *Leases* B.; and addenda, (ed. by *Guillim & Dodd*.)

By 1 *W. 4. c.* 65. § 12. infants and femes covert may by their guardians, &c. apply to the Courts of Chancery or Exchequer, or to the Courts of Equity of the counties palatine of Lancaster and Durham, as to land within their jurisdiction, by petition or motion in a summary way; and by the order of those Courts respectively may by deed surrender leases for lives or years, and take new leases for lives or years of the premises comprised therein.

By § 16. infants and femes covert may, under the direction of the Court of Chancery, accept of surrenders of leases, and grant renewals thereof; and by § 17. infants may

grant leases of their lands, under the direction of the Court, where it is for the benefit of their estates.

By § 18. if persons bound to renew are out of the jurisdiction of the Court, it may, on the petition of the parties entitled to such renewals, appoint persons to renew leases in the names of the individuals who ought to have renewed.

An idiot, or person *non compos mentis*, may make leases which will be *prima facie* binding; though after office found, the king, as guardian of insane persons, may avoid such leases. *Co. Lit.* 247 a; 4 *Rep.* 123; and so after his death, they may be avoided by his heir. *Ibid.*

For the provisions of the 1 *W. 4. c.* 65. with respect to leases to or by lunatics, see *Idiots*, IV. 2.

By various acts of parliament, and also by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain time; the object being that the estate may not be incumbered, by the act of the party, beyond a specific time. Yet persons who had this limited power of making in possession only, had frequently demised the premises to hold from the day of the date; and the Courts in several instances had determined that the words "from the day of the date," excluded the day of making the deed; and that in consequence these were leases in reversion and void; but this question having been brought again before the Court of B. R., it was determined that the words 'from the day' might either be inclusive or exclusive; and therefore that they ought to be construed so as to effectuate these important deeds, and not to destroy them. *Pugh v. Leeds*, (*Duke*), *Cowp.* 714; and see *Doug.* 53, 185, *in notis*.

The lease of a tenant for life, who has power of leasing under certain conditions, must strictly comply with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. 5 *T. R.* 567.

Under a settlement, with power to every tenant for life in possession to lease for any term of years not exceeding 21 years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives, be at any one time in being in any part of the premises; held that a lease made by tenant for life or ninety-nine years, determinable on lives, as it might exceed twenty-one years, was void at law, and not even good *pro tanto* for the twenty-one years. 10 *East*, 158.

Of all kinds of power the most frequent is that to make leases. In the making such leases, all the requisites particularly specified in the power must be strictly observed; and

such leases must contain all such beneficial clauses and reservations as ought to be for the benefit of the remainder-man; the principle being, that the estate must come to him in as beneficial a manner as the ancient holders held it. See 1 *Burr.* 120, and tit. *Power*.—If a man hath power to lease for ten years, and he leaseth for twenty, the lease shall be good in equity for ten years. 1 *Ch. Ca.* 23. See further *Shep. Touchst. c.* 14, *in n.*

Where lessor leased lands which he held in fee, with others, of which he was only tenant for life, at one entire rent, and the lease was not well executed according to the power, it was held, that the lease was good for the lands in fee, though bad for the other lands, for the rent might be apportioned. 2 *Mau. & Sel.* 276.

A lease executed by the tenant for life, in which the revisioner, who was then under age, is named, but who does not execute the lease, is void on the death of the tenant for life; and an execution by the reversioner only afterwards is no confirmation of it, so as to bind the lessee in an action of covenant. 1 *T. R.* 86.

Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had not been let before was held void. In these cases, the intention of the parties is to govern the Court in construing the power. 3 *T. R.* 665.

Where tenant for life has a power "to grant leases in possession, but not by way of reversion of future interest," a lease *per verba de presenti* is not contrary to the power; though the estate, at the time of making the lease, was held by tenants at will, or from year to year; if, at the time, they received directions from the grantor of the lease to pay their rent to the lessee. *Doug.* 565, *Goodtitle v. Funucan*.

Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on the 17th February, *habendum* from 25th March next ensuing, the date thereof, is good if not executed and delivered till after the 25th March, for it then takes effect as a lease in possession with reference back to the date actually expressed. 10 *E. R.* 127.

A lease purported on the face of it to have been made on the 25th of March, 1783, *habendum* to the lessee from the 25th of March now last past, for 35 years. There was evidence to show that the lease was not executed until after the 25th of March, 1783. Held, that it took effect from the delivery, and not from the date; and consequently that the term commenced on the 25th March, 1783, and not on the 25th of March, 1782. 4 *B. & C.* 272, and see *ibid.* 908.

Under a power "to lease all manors, messuages, lands, &c. so as there be reserved as much rent as is now paid for the same," such parts of the estates enumerated in the power as have never been demised may be let; but in a family settlement of an estate consisting of some ground always occupied with the family seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, "that the ancient rent must be reserved," excludes the mansion-house and lands about it never let. *Doug.* 565—9, 574.

Under a power to lease, reserving the best rent, a lease at £43 a year cannot be impeached by showing that two specific offers to give £50 and £60 for the premises were rejected by the lessor, for all other requisites of a good tenant may be regarded by him as well as the mere amount of the rent offered. 10 *East*, 278.

Where premises have been jointly let by one demise at one rent, and the power directs that the letting shall be at the accustomed rent, a part of such premises may be demised, reserving a rent bearing the same proportion to the old rent that the premises demised by the new lease bore to the whole premises formerly demised. 5 *B. & Adol.* 363.

Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, was held void, the jury finding that such covenant was unusual. 1 *T. R.* 705.

By the Bankrupt Act, 6 *G. 4. c. 16. § 77.* the powers vested in any bankrupt, which he might execute for his own benefit, may be executed by his assignees; and this clause, of course, extends to any power of leasing which he may possess.

By the insolvent Act, 7 *G. 4. c. 57.* and which has been continued by subsequent statutes, powers of leasing vested in insolvents may be exercised by their assignees.

3. If a house falls down by tempest, &c. the lessee hath an interest to take the timber to re-edify it for his habitation. 4 *Rep.* 63.

Tenants suffering houses to be uncovered or in decay; taking away wainscot, &c. fixed to the freehold, unless put up by the lessee and taken down before the term is expired; cutting down timber-trees to sell; permitting young trees to be destroyed by cattle, &c.; ploughing up ground that time out of mind hath not been ploughed; not keeping banks in repair, &c. are guilty of waste. 1 *Inst.* 52; *Dyer*, 37; 1 *Salk.* 368.

Lessees are bound to repair their tenements, Vol. II.

except it be mentioned in the lease to the contrary. Though a lessee for years is not obliged to repair the house let to him, which is burnt by accident, if there be not a special covenant in the lease that he shall leave the house in good repair at the end of the term; yet if the house be burnt by negligence, the lessee shall repair it, although there be no such covenant. *Pasch. 24 Char. B. R.* A lessee at will is not bound to sustain or repair, as tenant for years is. If the house of such tenant is burnt down by negligence, action lies not against the tenant; but action lies for voluntary waste, in pulling down houses or cutting woods, &c. 5 *Rep.* 13. See *Fire*.

In an action of covenant for non-repair, the question is, whether the covenant to repair has been substantially complied with.—Minute damage, as the non-repair of the broken glass of a sky-light, is not sufficient to constitute a breach; and where the verdict is for the defendant, the court will not grant a new trial to enable the plaintiff to recover nominal damages. 1 *M. & Rob.* 173.

A lessee who covenants to pay rent and repair, with an exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. 1 *T. R.* 310; *Anstr.* *Rep. Scac.* 678; or if there is no covenant under seal, the landlord may in such case recover for use and occupation; *Baker v. Holtzapffel*, 4 *Taunt.* 45; *sed vide Ry. & Moo.* 268, from which it appears the tenant cannot be liable in this action if he has no beneficial occupation; but see *Brown v. Quilter*, *Amb.* 619, where the tenant was relieved in equity, the landlord having renewed the value against the insurer: but in general equity will not relieve or grant an injunction in such a case; *Holtzapffel v. Baker*, 18 *Ves.* 115.

A covenant on the part of the lessor, at the end of eighteen years of the term, or before, on the request of the lessee, to grant a new lease of the premises for the like term, of twenty-one years, at the like rent, with all covenants as in that indenture contained, was held to be satisfied by a tender of such a new lease, containing all the former covenants, except the covenant for future renewal. 7 *East*, 237. See *Conop.* 819.

A lessee of land in the Bedford Level cannot, to an action by his landlord for a breach of covenant, object that the lease was void by the 15 *Car. 2. c. 17.* because not registered; that act not avoiding it between the parties themselves, but only postponing its priority with respect to subsequent incumbrances. 10 *East*, 350.

Covenant will lie against an original lessee, before he takes actual possession; and so be-  
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fore actual possession, against an assignee, under an absolute indefeasible assignment of the whole interest in the term; and against a mortgagee of the term, though he has never entered. *Williams v. Bosanquet*, 1 *Brod. & B.* 238, which over-rules the contrary decision of *Eaton v. Jaques*, *Dougl.* 455.

A covenant on the part of a lessor, his executors, &c. and assigns, not to hire persons to work on the premises, who were settled in other parishes, without a parish certificate, was held not to run with the land, or bind the assignee of the lessee. 10 *East*, 130.

But a covenant in a lease, that the lessee, his executors and administrators, shall constantly reside on the demised premises during the demise, is binding on the assignee of the lessee, though he be not named. 2 *H. Bla.* 133.

Whether a covenant by the lessee to insure is, in general, a covenant running with the land, is a question not decided; but if all the premises are situate within the London bills of mortality, it is decided to be so, since the Building Act, which extends to that district, compels the insurance office to have the money insured laid out in rebuilding the premises. *Vernon v. Smith*, 5 *B. & A.* 1.

If a lease contain a covenant that the lessee, his executors, &c. shall not *set, let, or assign over*, the whole or part of the premises, without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee cannot *under-let* without incurring a forfeiture, though for less time than the whole term: a parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso. 2 *T. R.* 425. And so even if part be let to be occupied exclusively by a partner, the original lessee still residing in part of the premises. 1 *M. & S.* 297.

Where the lessee covenanted not to allow any *trade or business* to be exercised upon the premises, held that the assignment of the lease to a schoolmaster who had sixty pupils was a breach of this covenant. 1 *M. & S.* 95.

An assignee of a bankrupt, a devisee, and a personal representative, are assignees in law to the purpose of being liable to actions on a covenant for rent in a lease to the bankrupt, devisor, or intestate. *Dougl.* 184. But whether the transfer to them was such an assignment as would occasion a forfeiture under a provision not to assign, was for some time a much litigated question. 3 *Wils.* 237. *Dougl.* 184, in note. 2 *Eq. Ca. Abr.* 100. It is, however, now settled, that the common covenant and proviso against assigning do not apply to assignments in law, and that the assignee under a commission of bankrupt may assign a lease without consent of the lessor, notwithstanding such proviso. 3 *M. & S.* 353.

And so a warrant of attorney to confess judgment, on which a lease is taken into execution, and sold, is no forfeiture of the lease under a covenant not to *let, set, assign, &c.* 8 *T. R.* 57. But it being afterwards proved that the tenant gave the warrant of attorney to the creditor for the express purpose of enabling the creditor to take lease in execution this was held a fraud on the covenant, and the landlord recovered the premises in ejectment. 8 *T. R.* 300.

However, a special provision guarding against the bankruptcy of the tenant, may be inserted; for instance, a proviso in a lease for twenty-one years, that the landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good. 2 *T. R.* 133.

And so where one leased for twenty-one years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and actually occupy the lands, &c. and not let, or assign over, or part with the lease: held that the tenant having become bankrupt, and the assignees having sold the lease, and the bankrupt being out of possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry. 8 *East*, 185.

The bankruptcy of the lessee was formerly no bar to an action of covenant (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 *T. R.* 94.—But now the bankrupt will be discharged from the rent and covenants if the assignees accept the lease; or in case they decline it, if the bankrupt, within fourteen days after notice of their declining, shall deliver up the lease to the lessor; 6 *Geo. 4. c. 16. § 75.* The former bankrupt act (49 *Geo. 3. c. 121. § 19.*) was held only to apply to cases between the lessor and lessee, and not to cases between the lessee and the assignee of the lessee. *Buck*, 189; 3 *B. & A.* 521. And the lessee who has assigned over, is not discharged by the circumstance of his assignee having become bankrupt, and having delivered up the lease to the lessor; for the statute of the 6 *Geo. 4. c. 16.* does not put an end to the lease, but merely discharges the bankrupt personally from the rents and covenants. 2 *B. Adol. & 211.*

Though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day, *e. g.* he may agree to pay half-a-year's rent in advance, where by the custom of the country half-a-year's becomes due on the day on which a tenant enters: and in this case the law gives the landlord a power of distraining on that day. 2 *T. R.* 600. See *Distress, Rent.*

If both lessee and lessor sign a lease, the lessee is estopped from pleading *non habuit in tenementis* to an action of debt for rent by the lessor. 6 T. R. 62.

Under a proviso that all assignments of a lease shall be void, if not enrolled, under-leases are not included, and an under-lease is no assignment to the effect of working a forfeiture under a proviso not to assign. *Doughl.* 56 to 58, 181. But what cannot be supported as an assignment, shall be good as an under-lease, against the party granting it. *Doughl.* 188, in note.

When the whole term is made over by the lessee, although in the deed by which it is done, the rent and a power of entry for non-payment is reserved to him, and not to the original lessor, this is an assignment and not an under-lease. *Palmer v. Edwards*, *Doughl.* 187, in note; and 8 Taunt. 593; but it has lately been held, that it is a lease and not an assignment, though it is clear that in such a case the lessor cannot distrain, since he has no reversion. *Præce v. Corrie*, 5 Bing. 24.—However, in *Curtis v. Wheeler, Moo. & Mal.* 493, it was held by Lord Tenterden, that a tenant from year to year, under-letting from year to year, had a reversion which entitled him to distrain. In that case the under-lease was of parts of the premises demised.

A landlord cannot maintain an action of covenant for rent, against an under-tenant who holds for a term less than the time granted in the original lease. *Hadford v. Hatch*, *Doughl.* 12.

A lessee for twenty-one years, at a pepper-corn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and covenant to pay the land-tax, and all other taxes, rates, assessments, and impositions, having his term for a small sum in gross, was held not to be liable to pay the expense of a par-wall, either by the provisions of 14 Geo. 3. c. 78. § 41. or by the covenant, but the charge must in such case be borne by the original landlord; for the statute intended to throw that burden on persons to whom long leases had been granted, with a view to an improvement of the estate, and who afterwards under-let at a considerable increase of rent. 3 T. R. 458.

A lessor, who has a right of re-entry for breach of a covenant not to under-let, does not, by waiving his re-entry on one under-letting, lose his right on a subsequent similar cause of forfeiture. 4 Taunt. 735.

And if a lessee exercise a trade contrary to the covenants of his lease, the landlord does not, by merely lying by and witnessing the

act for six years, waive the forfeiture, for there must be an express waiver. 3 Taunt. 78. So a right of re-entry, accruing by the tenant's omission to repair within three months after notice, is not waived by the acceptance of rent falling due during the three months. And such right is only suspended, not waived, by an agreement to allow the tenant farther time to repair. 1 N. & M. 1.

Where a tenant for years under a lease delivered up possession of the premises and the lease, in fraud of his landlord, to a person claiming under a hostile title, with the intention of enabling him to assert such hostile title, and not to hold under the lease, it was held a forfeiture of the term. 1 C. M. & R. 137.

By 32 Hen. 8. c. 34. grantees of reversion have the same remedy against lessees, their executors, &c. as their grantors had.—See *Covenant*, III.

4. Lands are leased at will, the lessee cannot determine his will before or after the day of payment of the rent, but it must be done on that very day; and the law will not allow the lessee to do it to the prejudice of the lessor, as to the rent; nor that the lessor shall determine his will to the prejudice of the lessee, after the land is sown with corn, &c. *Sid.* 339; *Lev.* 109. For where lessee at will sows the land, if he does not himself determine the will, he shall have the corn; and where tenant for life sows the corn, and dies, his executors shall have it; but it is not so of tenant for years, where the term ends before the corn is ripe, &c. 5 Rep. 116. The lessor and lessee, where the estate is at will, may determine the will when they please; but if the lessor doth it within a quarter, he shall lose that quarter's rent; and if the lessee doth it, he must pay a quarter's rent. 2 Salk. 413. By words spoken on the ground, by the lessor in the absence of the lessee, the will is not determined, but the lessee is to have notice. 1 Inst. 55. If a man makes a lease at will, and dies, the will is determined; and if the tenant continues in possession, he is tenant at sufferance. *Ibid.* 57. But where a lessor makes an estate at will to two or three persons, and one of them dies, it has been adjudged this doth not determine the estate at will. *Rep.* 10. Tenant at will grants over his estate to another, it determines his will.—1 Inst. 57.

As to the time when the landlord's right to make an entry or distress, or bring an action, to recover land in the possession of a tenant at will, is to be deemed to have accrued, see 3 & 4 W. 4. c. 27. § 7. under tit. *Limitation of Actions*.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which tenant for life is entitled to, that is so say, house-bote, fire-bote, plough-bote, and hay-bote. *Co. Lit.* 45. See *Bote, Estovers*.

With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life, that where the term of tenant for years depends upon a certainty, as if he holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, the end of his term the landlord shall have it, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. *Lit.* § 68. But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives, in all these cases an estate for years not being certainly to expire at a time fore-known, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. *Co. Lit.* 56. Not so if it determine by act of the party himself; as if tenant for years does any thing that amounts to forfeiture, in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default. *Co. Lit.* 55. See a recent case on emblements, 5 *Barn. & Adol.* 105. And see 2 *Comm.* 144, and tit. *Emblements*.

Persons for whose lives estates are held by lease, &c. remaining beyond sea, or being absent seven years, if no proof be made of their being alive, shall be accounted dead. 19 *Car. 2. c. 6.* See *Life Estate, Occupancy*.

A lease in 1785 for three, six, or nine years, determinable at the end of three or six years, by either of the parties, in 1788, 91, 94, is a lease for nine years, determinable on giving reasonable notice to quit. 3 *T. R.* 463.

A proviso in a lease, that either party, his executors or administrators, might upon notice to the other party, his heirs, executors, or administrators, determine it, extends to the devisee of the lessor, who was entitled to the rent and reversion. 12 *East*, 464.

Under a lease for fourteen or seven years, the lessee only has the option of determining it. 9 *East*, 15.

A surrender is either in fact, or by operation of law. *Co. Lit.* 338 a. Since the Statute of Frauds, a surrender of things ly-

ing in possession cannot be made by parol; but a note in writing is sufficient. A surrender of things lying in grant, must however be still made by deed; *Wils.* 26; as at common law, *Co. Lit.* 338 a.

Where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the goodwill already paid by such assignee," such agreement operates as a surrender of the whole term. 1 *T. R.* 441.

The mere cancelling a lease is not a surrender within the Statute of Frauds, nor is the recital in a second lease that it was granted in part consideration of the surrender of a former lease, it not purporting in the terms of it to be of itself a surrender. See 6 *East*, 86.

But where a lease of lands belonging to a bishopric was surrendered by deed-poll, and a new lease granted in consequence of such surrender, which was afterwards avoided by the succeeding bishop, it was held the first lease was not revived by such avoidance. 1 *Barn. & Adol.* 847.

A., the tenant of a house, three cottages, and a stable and yard, let to him for seven years at an entire rent, assigned all the premises to B. for the remainder of the term, the house and cottages being in the occupation of undertenants, the stable and yard in that of A. The landlord accepted a sum of money, as rent, up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages subsequently left them, and before the expiration of the term the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants; and before the term expired, he advertised the whole premises to be let or sold: held that there was a surrender, by operation of law, of all the premises. 1 *C. M. & R.* 31.

Where a tenant under-let part of the premises, and surrendered the remainder to his landlord, the latter is not entitled to recover against the sub-lessee, upon giving half-a-year's notice to quit, in his own name. *Pleasant v. Benson*, 14 *East*, 234.

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day, and quit at Candlemas; though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, and therefore the landlord can only put an end



to the tenancy at Candlemas. 5 *T. R.* 471. sold: held that the tenant was bound to quit after the expiration of six months from the service of the notice, whenever desired by his landlord, and that if he did not, he was a trespasser. 10 *East*, 13.

Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit, because the lease is of course at an end, unless the parties come to a fresh agreement. 1 *T. R.* 54, 159, 162, 165. But a demand of possession, and notice in writing, are necessary to entitle the landlord to double rent or value. 8 *East*, 358. In the case of a tenancy from year to year, there must be *half-a-year's* notice to quit, ending at the expiration of the year; *six calendar months'* notice is not sufficient. And there is no distinction between houses and lands as to the time of giving notice to quit. 1 *T. R.* 54, 159, 162, 163.

If a tenant hold under an agreement for a lease at a yearly rent, by which it stipulated that an agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon half a year's notice to quit, served after such a delay; but if the son had elected within a week or a fortnight, that would have been reasonable. 2 *T. R.* 436.

Under an agreement of demise, dated in January, of a dwelling-house, land, &c. to carry on a manufacture, to commence as to the land on 25th December last, and as to the rest of the premises from the 1st May: held that a notice to quit served on 28th September, to quit at the expiration of the current year of holding, was good. *Doe d. Bradford v. Watkins et al.*, 7 *East*, 551. See 11 *East*, 498.

A notice to quit the T. B. (the name of a farm) where the principal mansion was, must be intended to mean T. B. *cum sociis*. 14 *East*, 245.

Tenant from year to year before a mortgage or grant of the reversion, is entitled to six months' notice to quit, before the end of the year, from the mortgagee or grantee. 1 *T. R.* 380, 382. But ejectment will lie by a mortgagee against a tenant under a lease from a mortgagor, made subsequent to the mortgage, without notice to quit. *Ketch v. Hall, Dougl.* 21. And see *Ejectment*, V.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice to quit as the original lessor must have given. 3 *T. R.* 159.

Where a landlord, about to sell his premises, gave his tenant a regular notice to quit, but promised not to turn him out unless they were

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit, to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice, and ought to be left to the jury. 4 *T. R.* 464.

If notice to quit at Midsummer be given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time it was served. 4 *T. R.* 361.

Since the new stile, a demise of land to hold from the Feast of St. Michael, means from *new* Michaelmas, and cannot be shown by extrinsic evidence to refer to *old* Michaelmas; and a notice to quit at *old* Michaelmas, though given half a year before *new* Michaelmas, is bad. 11 *East*, 312. But in this case the demise was by deed; where, however, the tenant held under a written agreement, not under seal, from Lady-day, a notice to quit on the 6th April was held good, it being proved by parol evidence, which was admissible, that the parties meant *old* Lady-day. *Doe v. Benson*, 4 *B. & A.* 588.

It seems that a receiver appointed by the Court of Chancery, with authority to let lands from year to year, may also determine such tenancies by a regular notice to quit. 12 *East*, 57.

Under a proviso that either the landlord or the tenant, or their respective executors or administrators might determine a lease at the end of fourteen years, by six months' notice in writing under his or their hands; a notice signed by two only of these executors, on behalf of themselves and the third executor, was held not to be good, although the third executor joined in the ejectment. 5 *East*, 491.

II. The enabling statute, 32 *Hen. 8. c.* 28. empowers three manner of persons to make leases, to endure for three lives or one-and-twenty years, which could not do so before; as, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion: secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease may bind her and her heirs thereby: lastly all persons seised of an estate in fee-simple in right of their churches, which extends not to parsons and vicars may (without the concurrence of any other person) bind their successors. But then many requisites must be observed, which the statute specifies, otherwise such leases

are not binding. *Co. Lit.* 44. 1st, the lease must be by indenture, and not by deed-poll or parol: 2d, it must begin from the making, or day of the making, and not at any greater distance of time: 3d, if there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring: 4th, it must be either for twenty-one years or three years, and not for both: 5th, it must not exceed the term of three lives, or twenty-one years, but may be for a shorter time: 6th, under this statute, 32 *Hen.* 8. it must have been of corporeal hereditaments, and not of such things as lie merely in grants; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain; but now by the statute 5 *Geo.* 3. c. 17. a lease of tithes or other incorporeal hereditaments alone may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law: 7th, it must be of lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court-roll, it is sufficient: 8th, the most usual and customary form of rent for twenty years past, must be reserved yearly on such lease: 9th, such lease must not be made without impeachment of waste. These are the guards imposed by the statute (which was avowedly made for the security of farmers, and the consequent improvement of tillage,) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

Next follows, in order of time, the disabling or restraining statute, 1 *Eliz.* c. 19. (made entirely for the benefit of the successor) which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter, the which, however long and unreasonable, were good at common law), other than for the term of twenty-one years, or three lives, from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid, provided they do not exceed, together with the lease in being, the term permitted by the act. *Co. Lit.* 45. But by a saving expressly made, this statute of 1 *Eliz.* did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her

own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself: to prevent which for the future, the 1 *Jac.* 1. c. 3. extends the prohibitions to grants and leases made to the king, as well as to any of his subjects. 11 *Rep.* 71.

Then came 13 *Eliz.* c. 10. explained and enforced by 14 *Eliz.* c. 11, 14; 18 *Eliz.* c. 11; 43 *Eliz.* c. 29., which extend the restrictions laid by the 1 *Eliz.* c. 19. on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together, we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1st, they must not exceed twenty-one years or three lives, from the making: 2d, the accustomed rent, or more, must be yearly reserved thereon (and they must be of lands, &c. which have been before demised, 1 *Bing.* 28): 3d, houses in corporations or market towns may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair; and they may also be aliened in fee-simple for lands of equal value in recompence: 4th, where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years: 5th, no lease, by the equity of the statute, shall be made without impeachment of waste; *Co. Lit.* 45: 6th, all bonds and covenants tending to frustrate the provisions of the 13 & 18 *Eliz.* shall be void.

Concerning these restrictive statutes two general observations are to be made. First, That they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even with the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, without obtaining such consent. *Co. Lit.* 44. Secondly, That though leases contrary to these statutes are declared void, yet they are good against the lessor, during his life, if he be a sole corporation; and are also good against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest. For the statute was intended for the benefit of the successor only; and no man shall take an advantage of his own wrong. *Co. Lit.* 45; 2 *Comm.* c. 20.

The power of leasing lands belonging to

hospitals and houses for the poor, is further restrained by the 39 *Eliz. c. 5. § 2.* whereby all leases, grants, conveyances, or estates made by any corporation so to be founded, exceeding twenty-one years, and that in possession, and whereupon the accustomed yearly rent, or more by the greater part of twenty years' rent before the making of such lease, shall not be reserved and yearly payable, shall be void.

Where a new thing is demised with lands accustomedly let, though there be great increase of rent, the lease is void: but more rent than the accustomed rent may be reserved. 5 *Rep. 5; 6 Rep. 37.*

By the 39 & 40 *Geo. 3. c. 41.* where any part of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any ecclesiastical living, shall be demised by several leases which were formerly demised by one lease under one rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the 32 *Hen. 8. c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11.*

A guardian during the minority of an infant tenant in tail, who was but one year old, made a lease for twenty years, and it was adjudged not good by the 32 *Hen. 8. c. 28.* to bind the issue in tail; and it is the same in the case of tenant in dower, tenant by the curtesy, or husband seised in right of his wife, because they have no inheritance. *Dyer, 271.*

If a lease of the wife's land is not warranted by the statute, it is a good lease against the husband, though not against the wife: the husband and wife cannot bind him in reversion or remainder. 1 *Inst. 362.*

A lease by the husband of a feme covert's estate, though not within 32 *Hen. 8. c. 28.* is only voidable. But mortgage of a feme covert's estate, though in form of a lease, is void. *Dougl. 53, 54, in n.*

If a bishop have two chapters, as there may be two or more to one bishopric, both chapters must confirm leases made by the bishop. 1 *Inst. 131.* A lease by a bishop made to begin presently for twenty-one years, when there is an old lease in being, is good, notwithstanding the statute of 1 *Eliz. c. 19; Moor Cas. 241.* But if such a lease is to commence at a day to come it will be void. 1 *Leon. 14.* Lease for three lives by a bishop on titles, is void against the successor, although the usual rent be duly reserved. *Moor Cas. 1078.*

Leases of a dean and chapter are good, without confirmation of the bishop. *Dyer, 273; 2 Nels. Abr. 1096.* Where there is a chapter and no dean, they may make grants, &c. and are within the statute. 1 *Mod. 204.* A prebendary is seised in right of the church within the equity of the statute 32 *Hen. 8. c. 28; 4 Leon. 51.* A prebendary's lease confirmed by the archbishop, who is his patron, is good, without confirmation of a dean and chapter. 3 *Bulstr. 290.* But where a prebendary made a lease for years of a part of his prebend, and this was confirmed by the dean and chapter, because it was not confirmed likewise by the bishop, who was patron and ordinary of the prebend, the lease was adjudged void. *Dyer, 60.* If a prebend hath rectories in two several dioceses belonging to his prebend, and his lease of them is confirmed by the bishop, dean, and chapter of the diocese of which he is prebendary, it is good, though not confirmed by the other. *Sid. 75.*

A chancellor of a cathedral church may make a lease, and it is said it will be good against the successor, though not confirmed, &c. *Sid. 158.* If a parson or vicar makes a lease for life or years, of lands usually letten reserving the customary rent, &c. it must be confirmed by the patron and ordinary, for they are out of the statute 32 *Hen. 8. c. 28.* And if the parson and ordinary make a lease for years of the glebe to the patron, and afterwards the patron assigns this lease to another, such assignment is good, and is a confirmation of that lease to the assignee. 5 *Rep. 15.* Ancient covenants in former leases may be good to bind the successor, so as to discharge the lessee from payment of pensions, tenths, &c. but of any new matter they shall not. 1 *Vent. 223.*

A lease for years of a spiritual person will be void by his death, if it is not according to the statutes; and a lease for life is voidable by entry, &c. of the successor; and so in like cases leases not warranted by statute are void on the death of their makers. acceptance of rent on a void lease shall not bind the successor. 2 *Cro. 173.*

If a bishop be not bishop *de jure*, leases made by him to charge the bishoprick are void, though all *ad hoc* acts by him are good. 2 *Cro. 353.* And where a bishop makes a lease, which may tend to the diminution of the revenues of the bishoprick, &c. which should maintain the successor; there the deprivation or translation of the bishop is all one with his death. 1 *Inst. 329.*

A manor belonging to a bishop's see had been leased out for lives at a certain rent—the bishop grants a lease excepting the demesnes, but reserving the whole of the former rent,



and received only part of it in payment according to the proportion, deducting for the demesnes excepted. The successor was held to be entitled to the full rent reserved under the lease. *Dyke v. Bath and Wells (Bishop), Parl. Cases, tit. Rent, Case 1.*

There is yet another restriction with regard to college by 18 *Eliz. c. 6.* which directs that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d. or a quarter of malt for every 5s.; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This is said to have been an invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal secretary of state; who observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, which effects were likely to increase to a greater degree, devised this method for upholding the revenues of colleges. Their foresight and penetration have, in this respect, been very apparent: for though the rent so reserved in corn was at first one-third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted, and the money arising from corn-rent is, *communibus annis*, almost double to the rents reserved in money. 2 *Comm. c. 20.*

It has been observed that the price of a quarter of wheat brings at present near 50s. and the colleges receiving one third of their rent in corn, i. e. a quarter of wheat, or its value, for every 13s. 4d. which they are paid in money, it follows, that the corn-rent will be in proportion to the money-rent, nearly as four to one. But these rents united are very far from the present value. Colleges, therefore, in order to obtain the difference, generally take a fine upon the renewal of their leases. It was a great object in colleges to restrain those in possession from making long leases, and impoverishing their successors, by receiving the whole value of the lease by a fine at the commencement of the term. The corn-rent has made the old rent approach in some degree nearer to its present value: otherwise it should seem the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn. *Christian's Note to 2 Comm. c. 20. p. 322.*

The leases of beneficed clergymen are further restrained in case of their non-residence, by 13 *Eliz. c. 20*; 14 *Eliz. c. 11*; 18 *Eliz. c. 11*; 43 *Eliz. c. 9*; which direct, that if any beneficed clergyman be absent from his cure

above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but that all leases made by him of the profits of such benefice, and all covenants and agreements of a like nature, shall cease and be void; except in the case of licensed pluralists, who are allowed to demise the living on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in one year. On these statutes it has been determined, that where an incumbent has leased his rectory, and had been afterwards absent for more than eighty days in a year, his tenant could not maintain an ejectment against a stranger who had got into possession without any right or title whatever. 2 *Term Rep. 749.* If the curate leases over, the lease will become void by his absence; but not by the absence of the incumbent. *Gibbs. 740.*

But now by the 67 *Geo. 3. c. 99.* these statutes are repealed as far as relates to spiritual persons holding farms, and to leases of benefices and livings, and to buying and selling, and to the residence of spiritual persons on their benefices.

By 13 *Eliz. c. 20.* it is enacted that all chargings of benefices with cure with any person, or with any profit out of the same, to be yielded or taken, other than rents to be reserved upon leases thereafter to be made according to the meaning of the act, should be utterly void. By the 43 *Geo. 3. c. 84. § 10.* this act, and the statutes explaining and continuing it, were wholly repealed; but by the 57 *Geo. 3. c. 99. § 1.* (taking effect 10th July, 1817,) the 43 *Geo. 3. c. 84.* was in its turn repealed. The effect, therefore, of the 57 *Geo. 3. c. 99. § 1.* is to revive the clause of the 13 *Eliz. c. 20.* as to chargings of benefices, and consequently a demise by a parson of his benefice subsequent to the 57 *Geo. 3. c. 99.* for securing an annuity, is void, it being in substance a charging of the benefice. 10 *Barn. & C. 241.* And so also a warrant of attorney for securing an annuity charged on a benefice, and executed to the intent that the grantee might obtain a sequestration. 1 *Barn. & Adol. 673.* But a demise of a rectory for securing an annuity made between the passing of the 13 *Geo. 3. c. 84.* (7th July, 1803,) and of the 57 *Geo. 3. c. 99.* is valued. 6 *Barn. & C. 126.* And so also in an assignment made, after the passing of the last acts, of a term granted between the passing of the two acts for securing an annuity out of a benefice for the term when created, was legal, and the assignment is only a continuance of the same security. 9 *Barn. & C. 344.*

III. 1. If a bishop, before the statute 1 Eliz. c. 19. § 5. leased part of his bishoprick for term of years, reserving rent, and then died, and after another was made bishop, who accepted and received the rent when due; by this acceptance the lease was made good, which otherwise the new bishop might have avoided. It is the same if baron and feme, seised of lands in right of the feme, join and make a lease or feoffment, reserving rent, and the baron dies, after whose death the feme receives or accepts the rent; by this the lease or feoffment is confirmed, and shall bar her from bringing a *cui in vita*. *Co. Lit.* 211. Tenant in tail made a lease for years, rendering 20s. rent, and afterwards released 19s. and died; the issue in tail accepted the 12d. rent; the better opinion was, that by the acceptance of the shilling for rent he had affirmed the lease, and could not distrain for the 19s. rent. *Dyer*, 304. Tenant for life, remainder in tail; a stranger levies a fine to him in remainder, who leased the lands to the conusor, rendering rent, the tenant for life died, and the issue in tail accepted the rent; adjudged, that by the fine and acceptance of the rent, the lease was affirmed. *Dyer*, 299. See *Smuth v. Stapleton*, *Plowd.* 426. 434.

Lord and tenant; the rent is behind many years, the tenant made a feoffment in fee, and the lord accepted the rent of the feoffee which became due in his time; adjudged, that by such acceptance he shall lose all the arrearages, and cannot avow for the same. 3 *Rep.* 65; *Pennant's case*. Lease for years, rendering rent, with a clause of re-entry; the lessee paid the rent, which the lessor accepted and put into a bag, but afterwards finding brass money amongst it, he refused to carry it away, and entered for the condition broken; but adjudged unlawful, because after he has accepted the rent he is barred. 5 *Rep.* 113; *Wade's case*.

Acceptance of the next rent due, at a day afterwards, will bar one to enter for a condition broken before by reason of non-payment of the rent: because the lessor thereby affirmeth the lease to have continuance. *Co. Lit.* 211. And taking a distress affirmeth the continuance of the rent; but if rent was due at a day before, and thereby the condition was broken, one may receive the rent, and yet re-enter; and if he accept a part of the rent, he may enter for a condition broken, and retain the lands until he has the whole rent. 3 *Rep.* 64; *Co. Lit.* 203.

If an infant accepts of rent at his full age, it makes the lease good, and shall bind him. *Plow.* 418.

If a lessor accepts of rent from an assignee knowing of the assignment, it bars him from

action of debt against the lessee, for the privity of contract is extinguished: but after such acceptance, the lessor or his assigns may maintain an action against the first lessee upon his covenant for payment of the rent. 1 *Saund.* 241: 3 *Rep.* 24. But acceptance of rent from the assignee has been adjudged a sufficient notice of the assignment, so that the lessor could not resort to the first lessee. 2 *Bulst.* 151.

Lessee for years assigned his term, and died intestate; the lessor brought debt against his administrator, who pleaded the assignment, and that the plaintiff had notice, and had accepted the rent of the assignee; adjudged, that by the death of the lessee, the privity of contract was determined, and the action would not lie against the administrator. *Cro. Eliz.* 715: cited in *Walker's case*. 3 *Rep.* 24.

Tenant for life makes a lease for years to commence on a certain day, and dies before the expiration of the lease, in the middle of a year. The remainder-man receives rent from the lessee, who continues in possession (but not under a fresh lease,) for two years together, on the days of payment mentioned in the lease. This is evidence from which an agreement will be presumed between the remainder-man and the lessee, that the lessee should continue to hold from the day and according to the terms of the original demise; and notice to quit on that day is proper. 1 *H. Black.* 97.

2. If a parson, &c. makes a lease for years not warranted by the 32 *Hen. 8* c. 34., but it is void by his death; acceptance of rent by a new parson or successor will not make it good. 1 *Saund.* 241. And if a tenant for life makes a lease for years, there no acceptance will make the lease good, because the lease is void by his death. *Dyer*, 46, 239.

Tenant in tail made a lease for years, rendering rent to him and his heirs, and died; his son and heir accepted the rent, and was afterwards executed for treason, leaving issue a son; the king accepted the rent, but that did not make the lease good, the lands being in his hands by the attainder, and not in the reverter. *Dyer*, 115. Lease for years, with condition that the lessee shall not alien or assign without the assent of the lessor, and if he did, that then the lessor should re-enter, he assigned part of the land without assent, &c. and then the lessor, before notice of the assignment, accepts the rent, and afterwards entered for the condition broken: and adjudged lawful; for the condition being collateral, he might assign the land so secretly, that it may be impossible for the lessor to know it. 3 *Rep.* 65; *Pennant's case*; *Cro. Eliz.* 553. *S. C.*

Lease for twenty-one years, rendering rent on condition, that if the lessee did let any part of it above three years, then the lease may be

void, and that the lessor might enter; he let it out for three years, and so from three years to three years, during the term of twenty-one years, if he so long lived; the lessor accepted the rent, of the assignee and afterwards entered: this was a breach of the condition, and the acceptance of it afterwards did not dispense with it, because the original lease was void and determined. *Cro. Car.* 368. If tenant in tail make a lease for years to commence after his death, rendering rent, in such case acceptance of rent by the issue will not make the lease good to bar him, because the lease did not take effect in the life of his ancestor. *Plowd.* 418.

Where one in remainder, after the expiration of an estate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; such acceptance being only evidence of a holding from year to year is rebutted by the previous notice to quit, and therefore the notice remains good. See *1 T. R.* 161.

The lessor's receiving rent after a forfeiture is no waiver, unless the forfeiture were known to him at the time. *2 T. R.* 425; *6 T. R.* 220; *3 Taunt.* 78.

A lease void in its creation as against a remainder-man, does not become valid in law by his accepting rent, and suffering the lessee to make improvements after his remainder vests in possession; though it seems that in such case equity would afford relief. See *Doe v. Butcher*, *Dougl.* 50—54, in n.

Where a lease is *ipso facto* void by the condition or limitation, no acceptance of rent afterwards can make it have continuance as between the grantor and grantee; but it is otherwise of a lease voidable only. See *Dougl.* 578, in n. See further on this subject, *Covenant, Disclaimer, Distress, Ejectment, Forfeiture, Injunction, Rent, Replevin*, &c.

**LEASES OF THE KING.** Leases made by the king, of part of the duchy of Cornwall, are to be for three lives, or thirty-one years, and not be made punishable of waste, whereon the ancient rent is to be reserved; and covenants in reversion, with those in possession, are not to exceed three lives, &c. See *13 Car. 2. c. 4.*

All leases and grants made by letters-patent, or indentures under the great seal of England, or seal of the Court of Exchequer, or by copy of court-roll, according to the custom of the manors of the duchy of Cornwall, not exceeding one, two, or three lives, or some term determinable thereon, &c. are confirmed; and covenants, conditions, &c. in leases for lives or years, shall be good in law, as if the king were seised in fee simple. *1 Jac. 2. c. 9.* See *5 & 6 W. & M. c. 18*; *12 Ann. c. 22.* Leases from the crown of lands in

England and Wales, and under the seals of the duchy of Lancaster, &c. for one, two, or three lives, or terms not exceeding fifty years, allowed time for enrolment, &c. by *10 Ann. c. 18.* Leases made by the Prince of Wales of lands, &c. in the duchy of Cornwall, for three lives or thirty-one years, on which is reserved the most usual rent paid for the greatest part of twenty years before, shall be good against the king, the prince, and their heirs, &c. and the conditions of such leases be as effectual as if the prince had been seised of an absolute estate in fee simple in the lands. *10 Geo. 2. c. 29.* See *Cornwall, King.*

**LEASE AND RELEASE.** A conveyance of the fee-simple, right, or interest in lands or tenements under the Statute of Uses, *27 Hen. 8. c. 10.* givin first the possession, and afterwards the interest, in the estate conveyed. Though the deed of feoffment was the usual conveyance at common law, yet, since the Statute of Uses, *27 Hen. 8. c. 10.* the conveyance by lease and release has taken place of it, and is become a very common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, &c. and supplying the place of livery and seisin, required in that deed: in the making it, a lease or bargain and sale for a year, or such like term, is first prepared and executed, "to the intent," as is expressed in the deed, "that by virtue thereof the lessee may be in actual possession of the land intended to be conveyed by the release; and thereby, and by force of the statute *27 Hen. 8. c. 10.* for transferring of uses into possession, be enabled to take and accept a grant of the reversion and inheritance of the said lands, &c. to the use of himself and his heirs for ever." Upon which the release is accordingly made, reciting the lease, and declaring the uses: and in these cases a pepper-corn rent in the lease for a year is a sufficient reservation to raise an use, to make the lessee capable of a release. *2 Vent.* 35; *2 Mod.* 262.

Blackstone says, this species of conveyance was first invented by Serjeant Moore, soon after the Statute of Uses, and is now the most common of any, and therefore not to be shaken; though very great lawyers, as particularly Mr. Noy, attorney-general to King Charles I., formerly doubted its validity. *2 Mod.* 252. It is thus contrived: a lease, or rather bargain and sale upon some pecuniary consideration for one year, is made by the tenant of the freehold, to the lessee or bargainee. Now this without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the possession. He therefore being thus



in possession is capable of receiving a release of the freehold and reversion, which must be made to a tenant in possession, and accordingly the next day a release is granted him. This is held to supply the place of livery of seisin, and, thus a conveyance by lease and release is said to amount to a feoffment. *Co. Lit.* 270; *Cro. Jac.* 604.

The form of this conveyance is originally derived to us from the common law; and it is necessary to distinguish in what respect it operates as a common law conveyance, and in what manner it operates under the Statute of *Uses*. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him, which release, operating by way of enlargement, would give the releasee (or releasee as he is sometimes termed) a fee. In all these cases, the particular estate was only an estate for years; for at the common law the ceremony of livery of seisin is as necessary to create even an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for without actual possession the lessee is not capable of a release operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession, was superseded or made unnecessary by the Statute of *Uses*, [27 *Hen.* 8. c. 10. above alluded to]; for by that statute the possession was immediately transferred to the *cestui que use*; so that a bargainee under that statute is as much in possession, and as capable of a release before or without entry, as a lessee is at the common law after entry. All, therefore, that remained to be done to avoid on the one hand, the necessity of livery of seisin from the grantor, and to avoid, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years,) should be so framed as to be a bargain and sale within the statute.—Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute; but as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert, among the operative words, the words *bargain and sell*; (in fact, it is more accurate to insert no other operative words; and to express that the bargain and sale, or lease, is made to the extent and purpose that thereby, and by the statute for transferring uses into possession, the lessee may be capable of a release. The bargain and sale therefore, or lease for a year, as it is generally called, operates and the bargainee is in the possession by the statute. The release operates by enlarging the estate or possession of a bargainee to a fee. This is at the common law; but if the use be declared to the releasee in fee-simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the release to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee under the lease is not so properly merged in, as enlarged by, the release; but at all events it does not, after the release, exist distinct from the estate passed by the release. 1 *Inst.* 271. *b. in n.* See *Release I.*

As the operation of a lease and release depends upon the lease or bargain and sale, if the grantor is a *body corporate*, the lease will not operate under the Statute of *Uses*; for a body corporate cannot be seised to an use, and therefore the lease of possession, considered as a bargain and sale under the statute, is void; and the release then must be of no effect for want of a previous possession in the releasee. In cases of this nature, therefore, it is improper to make the conveyance by feoffment, or by a lease and release with an actual entry by the lessee previous to the release; after which the release will pass the reversion. It may also be observed, that in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. But if the exchange is made by lease and release, this inconvenience is prevented, as the statute executes the possession without entry; and all accidents annexed to an exchange at common law will be preserved. 1 *Inst.* 271. *b. in n.*

When an estate is conveyed by lease and release, in the lease for a year there must be the words *bargain and sell* for money; and

five shillings or any other sum, though never paid is a good consideration, whereupon the bargainee for a year is immediately in possession on the executing of the deed, without actual entry: if only the words *demise, grant, and to farm let*, are used, in that case the lessee cannot expect of a release of the inheritance, until he hath actually entered, and is in possession. 2 *Lit. Abr.* 435. But where *Littleton* says, that if a lease is made for years, and the lessor releases to the lessee before entry, such release is void; because the lessee had only a right, and not the possession; and such release shall not enure to enlarge the estate, without the possession though this is true at common law it is not so now upon the Statute of Uses. 2 *Mod.* 250, 251. And if a man make a lease for li'e, remainder for life, and the first lessee dieth, on which the lessor releases to him in remainder, before entry, this is a good release to enlarge the estate, he having an estate in law capable of enlargement by release, before entry had. 1 *Inst.* 270.

No person can make a bargain and sale, who hath not possession of the lands but it is not necessary to reserve a rent therein; because the consideration of money raises the use. If a lease be without any such consideration the lessee hath not any estate till entry, nor hath the lessor any reversion; and therefore a release will not operate, &c. 1 *Inst.* 270, 278; *Cro. Car.* 169 1 *Mod.* 263.—On lease at will, a release shall be good by reason of the privity between the parties; but if a man be only tenant at sufferance, the release will not enure to him; and as to the person who hath the reversion it is void, for such tenant hath not possession, there being no estate in him. *Lit.* § 461, 462; *Cro. Eliz.* 21; *Dyer*, 251.

A lease and release make but one conveyance, being in the nature of one deed. 1 *Mod.* 252.

A lease dated *two* days before the release is good to support the latter, which refers to a lease as of the day *next before* the date of the release. 2 *Mun. & Sel. Rep.* 434.

For further information as to the principle in which this form of conveyance originates, and under which it operates, see *Conveyance, Deed, Feoffment, Trusts, Uses, &c.*

LEASING or LESING. See *Gleaning*.

LEASING-MAKING, Slandrous and untrue speeches to the disdain, reproach, and contempt of the king, his council and proceedings, or to the dishonour, hurt or prejudice of the king or his ancestors. *Scotch Acts*, 1584, 1585. By these acts this offence was made capital, but being declared a grievance by the petition of right, the punishment of the offenders is, by the act 1703, c. 4. declared arbitrary,

LEATHER. By the 11 *Geo. 4. c. 16.* all the duties and restrictions on the manufacture of leather were repealed: and § 2. enacts, that nothing therein contained shall be construed to continue so much of the 48 *Geo. 3. c. 60.* as prohibits tanners from carrying on the business of shoemakers, curriers, leather-cutters, &c.

LECCATOR. A debauched person, *lecher*, or whore-master.

LECHERWITE. See *Lairwite*.

LECTISTERNIUM. A bed; sometimes all that belongs to a bed. *Flor. Worc.* p 631.

LECTRINUM. A pulpit. *Mon. Angl. tom. 3. p. 243.*

LECTURER. [*Pralector.*] A reader of lectures. In London, and other cities, there are lecturers who are assistants to the rectors of churches, in preaching, &c. These lecturers are chosen by the vestry, or chief inhabitants of the parish, and are usually the afternoon preachers: the law requires that they should have the consent of those by whom they are employed, and likewise the approbation and admission of the ordinary: and they are, at the time of their admission, to subscribe to the thirty-nine articles of religion, &c. required by the 13 & 14 *Car. 2. c. 4.* They are to be licenced by the bishop, as other ministers, and a man cannot be a lecturer without a licence from a bishop or archbishop; but the power of a bishop &c. is only as to the qualifications and fitness of the person, and not as to the right of the lectureship; for if a bishop determine in favour of a lecturer, a prohibition may be granted to try the right.—*Mch. 12 W. 3. B. R.* If lecturers preach in the week-days, they must read the common prayer for the day when they first preach, and declare their assent to that book; they are likewise to do the same the first lecture-day in every month, so long as they continue lecturers, or they shall be disabled to preach till they conform to the same: and if they preach before such conformity, they may be committed to prison for three months, by warrant of two justices of the peace, granted on the certificate of the ordinary. 13 & 14 *Car. 2. c. 4.*

Where lectures are to be preached or read in any cathedral or collegiate church, if the lecturer openly, at the time aforesaid, declare his assent to all things in the book of Common Prayer, it shall be sufficient, and university sermons or lectures are expected out of the act concerning lecturers. They are lectures founded by the donations of pious persons, the lecturers whereof are appointed by the founders, without any interposition or consent of rectors of churches, &c. though petition of right, the punishment of the offenders with the leave and approbation of the bishop; such as that of Lady *Moier* at St. Paul's, &c.

But such is not entitled to the pulpit without the consent of the rector, or vicar, in whom the freehold of the church is. *Cases, B. R.* 420, 433.

The court of *B. R.* will not grant a *mandamus* to a bishop to licence a lecturer without the consent of the rector, where the lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shown. *R. v. London, (Bp.) 1 T. R.* 331. Nor will that court grant a *mandamus* to the rector, to certify to the bishop the election of a lecturer chosen by the inhabitants, where no such custom is shown, though the lecturer has been paid out of the poor rates. But such *immemorial custom*, if in fact it exists, is binding on the rector. *4 T. R.* 125.

LECTURES on Divinity, Law, Physic, &c. in the universities of Oxford and Cambridge; see *Regius Professor*.

LECTURNUM, [lectorium.] The desk or reading place in churches. *Stat. Eccl. Paul. Lond. MS.* 44.

LEDGRAVE, or LEDGREVE. See *Lathreve*.

LEDO, [ledona.] The rising water or increase of the sea.

LEET, or COURT-LEET. See *Court-Lect*.

LEETS, or LEITS. Meetings appointed for the nomination or election of officers: often mentioned in Archbishop Spotwood's *History of the Church of Scotland*.

LEGA, or LAUTA. Anciently the allay of money was so called. *Spelm.*

LEGABILIS, signifies what is not entailed as hereditary; but may be bequeathed by legacy, in a last will and testament. *Articula proposita in parlamento coram Rege; anno* 1234.

## LEGACY.

[LEGATUM.] A bequest, or gift of goods and chattels by will or testament: the person to whom it is given is styled the legatee: and if the gift is of the residue of an estate after payment of debts and legacies, he is then styled the residuary legatee.

This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor; for if one has a general or pecuniary legacy of 100*l.*, or a specific one of a piece of plate, he cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient sum left to pay the debts of the testator. See *Co. Lit.* 111; *Aleyn.* 39; *Bract. l. 2 c.* 26. But if there is a fund to pay the debts, and the executor then

refuses his assent to a legacy, he may be compelled to give it, either by the spiritual court, or by a court of equity. *March, Rep.* 19.

In case of a deficiency of assets, all the general legacies must abate proportionably, in order to pay the debts; but a specific legacy (of a piece of plate, a horse, or the like,) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. *2 Vern.* 111. Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a rateable part in case debts come in more than sufficient to exhaust the residue after the legacies paid. *2 Vern.* 205.

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the residue. And if a contingent legacy be left to any one, as when he attains, or if he attains the age of twenty-one, and he dies before that time, it is a lapsed legacy. *Dy.* 59; *1 Eq. Ab.* 295. But a legacy to one to be paid when he attains the age of twenty-one years, is a vested legacy; an interest which commences *in presenti*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable in case the legator had lived. This distinction is borrowed from the civil law; and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the Ecclesiastical Courts. For since the Chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in these determinations; and that the subject should have the same measure of justice in whatever court he sued. *1 Eq. Ab.* 295. But if such (contingent) legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for with regard to the devises affecting lands, the Ecclesiastical Court hath no concurrent jurisdiction. *2 P. Wms.* 601, 610. And in case of a vested legacy due immediately, and charged on land, or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator. *2 P. Wms.* 26, 27.

Besides the formal legacies contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a *donatio causâ mortis*; a gift in prospect of death. And that is, when a person in his last sickness, apprehending his



dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, (under which have been included bonds and bills drawn by the deceased upon his banker,) to keep in case of his decease.—This gift, if the donor dies, needs not the assent of his executors; yet it shall not prevail against creditors; and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death; *mortis causa*. *Pre. Ch.* 269; 1 *P. Wms.* 406, 441; 3 *P. Wms.* 357. See 2 *Ves.* 431.

As this donation may be avoided by creditors, so may it by the wife or children of a free-man, if it break in on their customary shares. 2 *Vern.* 612. The delivery of receipts for South-Sea annuities does not amount to a gift of annuities themselves. *Ward v. Turner*, 2 *Ves.* 442. There may be a *donatio causa mortis* of bonds, bank notes, and bills payable to bearer, but not of other promissory notes or bills of exchange, those being choses in action which do not pass by delivery. See 2 *Ves.* 431, *Ward v. Turner*; which case collects all the laws on the subject of donations *causa mortis*, and particularly considers what shall be a sufficient delivery of different kinds of property to give effect to such donations.

One cannot sue in the spiritual court for a *donatio causa mortis*. 2 *Stra.* 777. See further *Donatio causa mortis*.

Having said thus much on the subject of legacies in general, we may proceed more particularly to inquire,

1. Who may be legatees; of legacies lapsed, vested or contingent, or conditional.
2. Of the payment of legacies; and herein of specific legacies.
3. Of interest on legacies.
4. Of suits to recover legacies.
5. Of devises to creditors, &c. in satisfaction of demands due from the testator.

Some persons are incapable of taking by legacy, under several statutes, as in 13 *Wm.* 3. c. 6. officers, counsellors, lawyers, &c. not taking the oaths, and persons twice denying the Christian religion to be true, or the divine authority of the Scriptures. (9 & 10 *Wm.* 3. c. 32.)

The name of a legatee being very falsely spelled, it was referred to a master in chancery, to examine who was the person intended. 1 *P. Wms.* 425.

The general rule is, that if a legatee die before the testator, or before the condition upon which the legacy is given be performed, or before it be vested in interest, the legacy is

extinguished. *Treat. Eq. lib.* 4, pt. 1. c. 2. § 3. Even where a legacy is given to a man and his executors, &c., or to a man and his representatives, if the legatee dies before the testator, though the executors are named, yet the legacy is lost; for the words "executors," &c. are deemed surplusage, inasmuch as those persons would have taken the legacy in succession, and not by way of representation, whether expressly named by the testator or not. 1 *P. Wms.* 83; 4 *Ves.* 435; 3 *Bro. C. C.* 128, 142, 143. But a bequest may be so specially framed as to prevent the death of the legatee operating as a lapse of the legacy. See 3 *Atk.* 572, 580. Neither will the rule extend to a legacy to two or more; for though, by the civil law, there is no survivorship amongst legatees, yet it is settled that a legacy to two or more jointly, is not extinguished by the death of one, but will vest in the survivor.—*Gilb. Rep.* 137; 2 *Atk.* 220. But where the legacy is to two or more severally, or to be divided share and share alike, and one dies, his share will lapse. See 1 *P. Wms.* 700; 2 *P. Wms.* 489; 2 *Stra.* 820, and the notes there. Where, however, a legacy is given to a class of persons in general terms as tenants in common, as to the children of A., the death of one of them before the testator will not occasion a lapse of any part of the fund, but those of the described class who survive the testator will take the whole. 2 *Cox.* 190; *S. C.* 2 *Bro. C. C.* 658. A further exception, as to the doctrine of lapse in cases of legacies given to tenants in common, occurs in instances where the will contains a limitation over of the legacy to the survivors. 9 *Ves.* 566.—Nor will the rule extend to those cases where the legacy is given over after the death of the first legatee; for in such cases the legatee in remainder shall have it immediately. 1 *And.* 33. pl. 82; 2 *Vern.* 207; 1 *P. Wms.* 274; 3 *P. Wms.* 113; *Pre. Ch.* 37; *Mosel.* 319; 2 *Vern.* 378. Nor will a legacy lapse by the death of a legatee in the testator's life-time, if he be to take as a trustee. See 1 *Ves.* 140; 1 *Cox.* 1; and 2 *Vern.* 468, in which latter case the point is doubted.

A man devised 200*l.* a piece to the two children of A. B. at the end of ten years after the death of the testator; afterwards the children died within the ten years, and it was held a lapsed legacy; for there is a difference where a devise is to take effect at a future time, and where the payment is to be made at a future time; and whenever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time happens, it is a lapsed legacy. 2 *Salk.* 415. A bequest of money to one at the age of twenty-one, or day of marriage, without saying to be paid at that time,

and the legatee dies before the term, this is a lapsed legacy: and so it is if the devise had been to her when she shall marry, or when a son shall come of age, and they die before. *Godb.* 182; 2 *Vent.* 342.

But a devise of a sum of money, to be paid at the day of marriage, or age of twenty-one years, if the legatee dies before either of these happen, the legatee's administrator shall have it, because the legatee had a present interest, though the time of payment was not yet come; and it is a charge on the personal estate which was in being at the testator's death; and if it were discharged by this accident, then it would be for the benefit of the executor, which was never intended by the testator. 2 *Vent.* 366; 2 *Let.* 207. And if the legatee be a child, when he should be of the age of twenty-one years, and if he die before that time, then his daughter should have them; afterwards the father died, and then the son died before he was of age; adjudged, that the daughter shall have the goods given in legacy immediately, and not stay till her brother would have been of age, if he had lived. 1 *Atk.* 33. And where a legacy was devised to an infant, to be paid when he should come of age, and he died before that time; it was ruled that his administrator should have it presently, and not stay until the infant should have been of age, if he had lived. 1 *Leon.* 278. In a case of this nature, it has been decreed in equity, that although the administrator should have the legacy, yet he must wait for it till such time as the child would have come to twenty-one. 2 *Vern.* 199.

If the legacy be to the legatee payable to him at a certain age, and the legatee die before he attain such age, this is a vested and transmissible interest in the legatee. See 2 *Vent.* 342; 2 *Ch. Ca.* 155; 1 *Vern.* 462; 3 *P. Wms.* 138; 2 *Vern.* 199. Otherwise, if the legacy be to the legatee generally, at or when he attains such age. 2 *Vent.* 342; 2 *Sulk.* 415; 1 *Eq. Ab.* 295, 6; and see 1 *Bro. C. R.* 119. If the legacy be made to carry interest, though the words to be paid, or payable, are omitted, it is a vested and transmissible interest. 2 *Vent.* 342; 2 *Ch. Ca.* 155; 2 *Vern.* 673; 2 *Ves.* 263; 3 *Atk.* 645. So if the bequest be to A. for life, and after the death of A. to B., the bequest to B. is vested upon the death of the testator, and will not lapse by the death of B. in the life-time of A. 2 *Vent.* 347; 1 *P. Wms.* 566; 2 *Vern.* 378; *Ambl.* 167; 1 *Bro. C. R.* 119; and the notes there. 1 *Bro. C. R.* 181.

Where a legacy is to arise out of the real estate, it shall not go to the representative of the legatee, but sink in the inheritance. And yet where 1000*l.* was given by a person out

of lands, to his daughter, and interest to be computed from his death, &c. here, though the legatee died before the time appointed for paying the same, it was held, the legacy should be raised notwithstanding; and the lord chancellor said, that this legacy was a vested one. 2 *Vern. Rep.* 617; *Barnardist.* 328, 330. A person by will, &c. gives a portion or legacy to a child, payable at twenty-one years of age, out of a real and personal estate, and the child dies before the legacy becomes payable; in that case so much thereof as the personal estate will pay, shall go to the child's executors and administrators; but so far as the legacy is charged upon the land, it is said shall be given to one to be paid out of such a fund, and the same fails, it has been resolved that it ought to be paid out of the personal estate, and the failing of the manner appointed for payment shall not defeat the legacy. 1 *P. Wms.* 779.

A testatrix gave a legacy to the sole and separate use of a married daughter for life, with a power of appointment, and in default thereof to her next of kin, as if she were sole. The daughter died in the testator's lifetime, but the legacy did not lapse, but that the next of kin took it as purchasers. *Hardwick v. Thurston*, 4 *Russ.* 380.

A conditional legacy is a bequest depending upon the happening or not happening of some uncertain event, by which it is either to take place, or to be defeated.

By the civil law, which has been adopted in our courts of equity, (1 *Eden*, 116,) and which differs from the common law as regards devises of real estates,—when a condition precedent to the vesting of a legacy is impossible, the bequest is discharged of the condition, and the legatee will be entitled as if the legacy were unconditional. *Swinb. pt. 4. c. 6. pt. 2.* 3; *Com. Rep.* 738.

Where the performance of a condition subsequent is illegal, then as well at the common law as by the civil law adopted in the courts of equity, the condition is void, and the bequest freed from it. *Co. Lit.* 206 *a. b.*; 6 *Mad.* 32.

A condition that a legatee shall not dispute the will, is generally considered merely in *terrorem*, and will not operate as a forfeiture, by reason of the legatee having disputed the validity (2 *Vern.* 90; 3 *P. Wms.* 344,) or effect (1 *Atk.* 414,) of the will. But it is otherwise if the legacy or breach of such a condition is given over to another person. 2 *P. Wms.* 528.

It is now settled that conditions which do not import an absolute injunction to celibacy are valid. 2 *Dick.* 721. Thus, conditions re-

straining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, &c., (*Bro. C. C.* 303: 3 *Ves.* 18; 4 *Russ.* 325,) or requiring or prohibiting marriage with particular persons, (2 *Dick.* 721; 9 *East.* 170,) and the like, are valid.

Where a father makes a provision for a child by his will, and afterwards gives to such child, being a daughter, a portion in marriage, or, being a son, a sum of money to establish him in life, (such portion or sum being in amount equal to, or greater than, the legacy,) it is an implied ademption of the legacy; for the law will not intend that the father designed two portions to one child. 1 *P. Wms.* 680; 2 *Ch. Rep.* 85; 2 *Vern.* 115, 257; 2 *Atk.* 216; *Ambl.* 325; 2 *Bro. C. R.* 307. But this implication will not arise, if the provision by the will be by bequest of the residue. 2 *Atk.* 216; or if the provision in the father's life-time be subject to a contingency, 2 *Atk.* 491,—or be not *ejusdem generis* with the legacy, 1 *Bro. C. R.* 425,—or if the testator be a stranger, 2 *Atk.* 516; 2 *Bro. C. R.* 499. And such implication is always liable to be refuted by evidence. 2 *Atk.* 516; 2 *Bro. C. R.* 165, 519.

2. If a legacy be given generally, without specifying the time of payment, it is due on the day of the death of the testator, (*Swinb. pt. 7. s. 23. pt. 1.*) though not payable till the end of a year next after.

If a legacy, when due, be paid to the father of an infant, it is no good payment; and the executor may be obliged in equity to pay it over again; and where any legacy is bequeathed to a feme covert, paying it to her alone is not sufficient, without her husband. 1 *Vern.* 261.

An executor, however, may discharge himself from all responsibility with respect to the payment of legacies due to infants, by paying such legacies into the Bank of England, with the privity of the accountant-general, under the provisions of the 36 *Geo. 3. c. 52. § 32.*

Executors are not bound to pay a legacy, without security to refund. *Chan. Rep.* 149, 257. And if sentence be given for a legacy in the Ecclesiastical Court, a prohibition lies, unless they take security to refund. 2 *Vend.* 358. If an executor pays legacies, and seven years after covenant is broken, for which action is brought against the executor, the court inclined that it was a devastavit, and that the executor ought to have taken security for his indemnity upon payment of the legacies. *Allen*, 38. Though it has been adjudged that a covenant is no duty till broken; and therefore since it is uncertain whether it will be broken or not, it shall be presumed it will not; and the legacies being a present duty, it shall be paid by the executor notwithstanding any covenant not actually broken. *Sty.* 37; 1 *Nels.*

*Abr.* 786. If one binds himself and his executors in an obligation, &c. to perform a certain thing, and in his will gives divers legacies, and dies, leaving goods only sufficient to pay the obligation when forfeited, this obligation shall be no bar to the legacies, because it is uncertain whether the same may ever be forfeited; though the executor may therefore make a delivery upon condition, viz. to return the legacies if the obligation becomes forfeited, and the penalty be recovered. 1 *Roll. Abr.* 928; 2 *Vent.* 358.

The old practice of the Court of Chancery was, that the legatee should in all cases give the executor security to refund, if debts should afterwards appear. 1 *Chan. Cas.* 257. But the court has ceased to require such security, and therefore creditors have in modern times been allowed to follow assets in the hands of legatees, as well as of the executor. By Lord *Hardwicke*, in *Harg. MSS.*; *Amb.* 804.

The executor is to pay the legacies after the debts; but executors cannot, in equity, pay their own legacies first, where there is not enough to pay all of them, but shall have an equal proportion with the rest of the legatees. *Chan. R.* 354. An executor has election, where any chattel is given to him, to have and take it in one right or the other, viz. as executor or legatee, which is to be made by a special taking or declaration, &c. 10 *Rep.* 47; *Plowd.* 519; *Dyer* 277.

If there be a specific legacy given of any thing, as a horse, silver cup, &c. it must be delivered before any other legacy, provided there be assets. *Off. Ex.* 317. And if there be enough to pay all the legacies after the debts are satisfied, the legacies shall all be paid; but if there is not sufficient to pay debts or more, the legatees must lose their legacies, or a proportionable part of them. *Plowd.* 526. *Ses* 1. *Lib. Ab.* 579.

A specific legacy is, where, by the assent of the executor, the property of the legacy will vest; as there is a benefit one way to a specific legatee, that he shall not contribute (in case of a deficiency to pay all the legacies,) so there is a hazard the other way; for instance, if such specific legacy, being a *lease*, be evicted; or, being *goods*, be lost or burnt; or, being a *debt*, be lost by the insolvency of the debtor; in all those cases such specific legatee shall have no contribution from the other legatees, and therefore shall pay none toward them. *Hinton v. Pinke*, 1 *P. Wms.* 539.

These consequences attending a specific legacy have raised, in the several cases to be met with in the books, the question whether a legacy was *specific* or *general*. A specific legacy (strictly speaking) is said by Lord *Hardwicke*, in *Purse v. Snaplin*, 1 *Atk.* 417, to



be a bequest of a particular chattel, specifically described and distinguished from all other things of the same kind, or, in other words, an individual legacy. Money, therefore, if sufficiently distinguished, may be the subject of a specific bequest, as money in a certain chest, &c. *Lawson v. Stith*, 1 *Ath.* 508. Or a particular debt, as to the ademption of which latter by payment in the testator's life-time, see *Thomond (Earl) v. Suffolk (Earl)*, 1 *P. Wms.* 461. So of stock, in *Ashton v. Ashton*, *Talb.* 152; *Avelyn v. Ward*, 1 *Ves.* 121; *Drinkwater v. Falconer*, 2 *Ves.* 623. So a bequest of a part of a specific chattel may be equally a specific legacy. 3 *Ath.* 103.

But the legatees of specific parts, though not liable to abatement with general legatees, yet must abate, proportionably among themselves, upon deficiency of the specific thing bequeathed. *Sleech v. Thorington*, 2 *Ves.* 563; or on deficiency of the general assets for payment of debts. *Long v. Short*, 1 *P. Wms.* 403. So specific legacies of distinct chattels shall abate proportionably on a deficiency of general assets. *Devon (Duke) v. Atkins*, 2 *P. Wms.* 382.

On the other hand, a mere bequest of quantity, whether of money or any other chattel, is a general legacy; as of a quantity of stock; *Purse v. Snaplin*, 1 *Atk.* 414; *Sleech v. Thorington*, 2 *Ves.* 562. And where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee. *Partridge v. Partridge*, *Talb.* 227. So the purpose to which a general legacy is to be applied will not alter its nature; as in the case of *Hinton v. Pinke*, 1 *Wms.* 539. Personal annuities given by will, are general legacies. *Hume v. Edwards*, 3 *Atk.* 693; *Lewin v. Lewin*, 2 *Ves.* 417. How far a legacy of money, to be paid out of a certain fund, shall be adeemed by the failure of the fund, see *Savile v. Blackett*, 1 *P. Wms.* 778; 2 *P. Wms.* 330; *Mr. Cox's note* (1); and see *Treat. Eq. Lib.* 4 pt. 1. c. 2 § 5. in note.

The general rule is, that to complete the title to a specific legacy, the thing bequeathed must remain *in specie*, as described in the will, otherwise the legacy is considered as revoked by ademption: thus if a debt specifically bequeathed be received by the testator, the legacy is adeemed, because the subject is extinguished, and nothing remains to which the words of the will can apply. 3 *Bro. C. C.* 131.

A sum bequeathed out of a debt must be paid, though the debt is recovered by the testator; otherwise of a bequest of the debt itself. 5 *Stra.* 824.

As an executor is not obliged to pay a legacy without security given him by the legatee to refund, if there are debts, because, the leg-

acy is not due till the debts are paid, and a man must be just before he is charitable; so in some cases the executor may be compelled to give security to the legatee for the payment of his legacy; as where a testator bequeathed 1000*l.* to a person, to be paid at the age of twenty-one, and made an executor, and died; afterwards the legatee exhibited a bill inequity against the executor, setting forth that he had wasted the estate, and praying that he might give security to pay the legacy when it should become due; and it was ordered accordingly. 1 *Cham. Rep.* 136, 257. See *post*, 4.

By the Stamp Act, duties *ad valorem* are imposed on receipts given for payment of legacies; and these extend now as well to legacies secured on real as on personal property. For the amount of these stamps the executor is made liable, and it is his duty not to pay a legacy without a receipt duly stamped. The stamp is from 1*l.* up to 10*l.* per cent. (in Great Britain, and from 10*s.* to 5*l.* per cent. in Ireland,) according to the propinquity or distance of relationship between the deviser and legatee.

For the amount of the stamp duties in Great Britain, see the act 55 *Geo.* 3. c. 184. For the regulation by which executors are made liable for the payment of the duty, see 36 *Geo.* 3. c. 52; 42 *Geo.* 3. c. 99. And as to Ireland, see 47 *Geo.* 3. st. 1. c. 50, &c. See further tit. *Executor*.

3. If a legacy is devised, and no certain time of payment, the legatee shall have interest for the legacy from the expiration of one year after the testator's death; for so long the executor shall have, that he may see whether there are any debts. Interest is therefore payable from that time, unless some other period is fixed by the will. 13 *Ves.* 333, 334. Nor will interest be payable at an earlier date, although the will directs the legacy to be paid "as soon as possible." 8 *Ves.* 410, 413; 6 *Mad.* 15.

But after the expiration of a year from the testator's death, the legacy will carry interest, although payment be, from the condition of the estate, impracticable. 13 *Ves.* 334. And although the assets have been unproductive. See 1 *Sch. & Lef.* 10.

With respect to interest in general legacies, where the time of payment is fixed by the testator, the general rule is, that they will not carry interest before the arrival of the appointed period; as for instance, when the legatee shall attain twenty-one. 3 *Atk.* 101. 4 *Ves.* 1. Nor does it make any difference that the legacy is vested. 3 *Atk.* 102; 3 *Ves.* 10.

This rule is, however, subject to an exception where the testator is the parent, (or *in loco parentis*.) 1 *P. W.* 783; 1 *Ves. sen.* 308; 3 *Ves. & B.* 183, of the legatee. For in that

case, whether the legacy be vested or contingent, if the legatee be not an adult (1 *Swan*. 553,) interest in the legacy will be allowed as a maintenance, from the death of the testator provided there is no other provision for that purpose.

Where the payment of a legacy is postponed until the legatee attains twenty-one, and the will directs that payment shall then be made with interest, the legacy will only bear interest from the end of a year after the testator's death. 2 *Sim. & Stu.* 492.

Where a person gives a legacy charged upon land, which yields rents and profits, and there is no day of payment mentioned, the legacy shall carry interest from the testator's death, because the land yields profit from that time; though were it charged on the personal estate, and the will mentions no time for paying it, there the legacy bears interest only from the end of a year after the death of the testator, which is said to be the settled difference. 2 *P. Wms.* 26.

4. Legacies being gratuities, and no duties, action will not lie at common law for the recovery of a legacy, but remedy is to be had in the Chancery or Spiritual Court. *Allen*, 38.

Sometimes the common law takes notice of a legacy, not directly, but in a collateral way; as where the executor promised to pay the money, if the legatee would forbear to sue for the legacy, this was adjudged a good consideration to ground an action, but that it would not lie for a legacy in specie; which would be to divest the Spiritual Court of what properly belonged to their jurisdiction, by turning suits which might be brought there, into actions on the case. *Raym.* 23.

So if security be given by bond to pay a legacy, in such case an action at law is the proper remedy; by giving the bond, the legacy is, as it were, extinct, and becomes a debt at common law, and the legatee can never afterwards sue for it in the Spiritual Court. *Yelv.* 39.

It is now positively determined that no action at law lies for a legacy; the Court of Chancery being the proper jurisdiction for that purpose. *Deeks v. Strutt*, 5 *T. R.* 690. The reason given in this case seems to contradict the principle of two other cases in *Comp.* 284, 289, in which it was held, that if an executor, in consideration of assets in his possession, promises to pay a legacy, an action of assumpsit lies against him in his own right. In the first mentioned of these cases, however, no express promise was proved. But *Deeks v. Strutt* is considered as an unqualified decision that no action at law will lie for a legacy, whether there is an express promise or not.—See *per Littledale*, J. 7 *B. & C.* 544. And it

has lately been held, that an action at law will not lie against an administrator for a distributive share of an intestate's property. *Jones v. Tanner*, 7 *B. & C.* 542.

But the law is different with respect to specific legacies, for an action at law will lie against an executor to recover a specific chattel bequeathed, after his assent to the bequest. 3 *East*, 120; 3 *Atk.* 223.

And where executors have ceased to hold the money bequeathed in their representative character, an action at law may be maintained against them. 1 *Moore & P.* 209. So where, on demurrer to a declaration which was for a legacy that had been retained by the executor for several years, under an agreement by him to pay interest thereon to the legatee, the court was clearly of opinion that the action would lie. *Wasney v. Earnshaw*, *Excheq. T. R.* 1834, MS.

Suits for legacies are rarely instituted in the Ecclesiastical Courts, on account of their not possessing adequate jurisdiction to afford complete relief in many cases. 5 *Madd.* 357.—Though recent instances of such proceedings may be found. 2 *Phill. R.* 335; 1 *Hagg. Ecc. R.* 535. And cases of bequests to married women and infants, which involve the execution of any trust, are subject to the exclusive cognizance of the Court of Chancery. 2 *Roper on Leg.* 693; and see 9 *B. & C.* 489, *post*

The Spiritual Court administers redress in the case of subtraction or the withholding or detaining of legacies, as a consequential part of their testamentary jurisdiction; but in this case the Courts of Equity exercise a concurrent jurisdiction, as incident to some other species of relief required; and as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination. See 3 *Com.* 98. c. 7.

It is without question that the suit for a personal legacy may be brought in Chancery; and if the matter has proceeded to a sentence in the Ecclesiastical Court, it is proper to go into Chancery for the executor's indemnity, where the legatees are to give security to refund, and that court will see money put out for children. On like principles a bill for the distribution of an intestate's personal estate is proper in Chancery, for the Spiritual Court in that case has but an ineffectual jurisdiction.—*Fomb. Treat. Eq. lib.* 4. pt. 1. c. 1. § 2.

An executor being in equity considered as a trustee for the legatee, with respect to his legacy, and as trustee in certain cases for the next of kin as to the undisposed surplus, is the true ground of equitable jurisdiction in enforcing the payment of a legacy, or distribu-

tion of personal estate. See 1 *P. Wms.* 544, six years after becoming due, or a similar acknowledgment thereof in writing to that mentioned in the above section. See further *Limitation of Actions*.

That the jurisdiction of our Courts of Equity is in such cases, more effective and protective of the interest of creditors and legatees, is evident in several instances, particularly in compelling executors to give security for a legacy payable at a future day, the executor appearing to have wasted the estate. 1 *Ch. Ca.* 121. Or to bring the fund into court.—3 *Bro. C. C.* 365. And there are cases in which a Court of Equity will restrain proceedings in the Ecclesiastical Court for a legacy; as where a husband is suing for a legacy in right of his wife. See 2 *Atk.* 420; *Toth.* 114; *Pre. Ch.* 548.

A testator devised lands to executors, in trust to sell, directing that the money thereby raised should be part of and subject to the dispositions concerning his personal estate; he then directed his personal estate should be sold, and bequeathed several legacies: held that these legacies could not be sued for in the Ecclesiastical Court, the money being equitable assets; and a prohibition issued accordingly. *Barker v. May*, 9 *B. & C.* 489.

It was held in an early decision, that the Statute of Limitations could not be pleaded in bar to a suit for a legacy, although it had been due twenty years. *Anon. Freem. C. C.* 22. But though the statute could not be pleaded, it was frequently adopted in cases where there was no fraud, and the parties had permitted the assets to be distributed, without claiming the legacy for thirty-five or forty years. 2 *Ves. jun.* 572, 582. And it would seem that a lapse of twenty years from the testator's death, without any demand, would have been sufficient to afford a presumption of the legacy being paid. 1 *Roper on Leg.* 1792; and see 1 *Russ. & Mylne*, 453.

Now, by the recent Statute of Limitations (3 & 4 *Wm.* 4. c. 27. § 40.) no action or suit or other proceeding shall be brought to recover any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person to whom the same shall be payable, or his agent, to the person entitled, or his agent; and in such case no such action, &c. shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one.

And by § 42. no arrears of interest in respect of any legacy are recoverable but within

5. Where a testator gives his debtor a legacy greater than his debt, it shall be taken in satisfaction for it; though where the legacy is less, it shall not be deemed as any part thereof; but as a legacy is a gift, sometimes the legatee has been decreed both. 1 *Salk.* 155; 2 *Salk.* 508. If a greater legacy is given by a codicil to the same person that was legatee in the will, it shall not be a satisfaction unless so expressed. 1 *P. Wms.* 424.

Although a legacy is to be taken as a gift, yet a man shall be intended to be just before he is kind; so that a bequest of the same sum by the debtor to the creditor shall be applied in satisfaction of the debt. *Pre. Ch.* 394; 2 *P. Wms.* 130; 3 *P. Wms.* 354; 1 *Ves.* 123; *Mosel.* 7. See 2 *P. Wms.* 616.—Yet where there are assets, and the testator intended both, it may be as good equity to construe him both just and kind; and the construction of making a gift a satisfaction, has, in many cases, been carried too far. See 1 *Salk.* 155; 1 *P. Wms.* 410; 2 *P. Wms.* 616.

If a legacy be less than the debt, it was never held to go in satisfaction. 2 *Salk.* 508; *Pre. Ch.* 394; 2 *P. Wms.* 616; 2 *Vern.* 478; *Mosel.* 295.—So if the legacy were upon condition, or upon a contingency; for the will is intended for the legatee's benefit; and therefore it could not be supposed that the testator would give him an uncertain recompense in satisfaction of a certain demand. *Pre. Ch.* 394; *Salk.* 508; 2 *Atk.* 300, 491; 2 *P. Wms.* 555; 2 *Ves.* 519.—So where the legacy is not equally beneficial with the debt in some one particular, although it may be more so in another, as in time of payment. *Pre. Ch.* 236; 2 *Vern.* 478; 2 *Atk.* 300; 3 *Atk.* 96; 1 *Bro. C. R.* 129, 295.—So if the thing were of a different nature, as land, it should not go in satisfaction of money, unless there was a defect of assets. 2 *P. Wms.* 616; *Salk.* 508; 3 *P. Wms.* 245.—And a legacy of a specific chattel, however great its value, will not be a satisfaction of a debt, unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction. 1 *Cox*, 49.—So if the debt was contracted after the legacy given; as the testator could not have had it in contemplation to satisfy a debt not then in being. 2 *Salk.* 508; 2 *P. Wms.* 342; 1 *P. Wms.* 409; 3 *P. Wms.* 353.—So if the debt was upon an open or running account, so that it might not be known to the testator whether he owed any money to the legatee or not. 1 *P. Wms.* 299.

Cases of this nature heretofore depend upon



circumstances; and where a legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption that the testator did so intend it; for a Court of Equity ought not to hinder a man from disposing of his own as he pleases; and therefore the intention of the party is to be the rule; for where he says he gives a legacy, the Court cannot contradict him, and say he pays a debt. See *Treat. Eq. lib. 4. pt. 1. c. 1. § 5*; and the notes there.

It is to be observed, that if the testator expressly bequeaths the debt to his debtor, this being no more than a release by will, operates only as a legacy; and is assets, therefore, subject to the payment of the testator's debts. 2 *P. Wms.* 331, 332; *Toller*, 338. See further on this subject, titles *Executor, Will*.

**LIXALIS HOMO.** He who stands *rectus in curia*, not outlawed, excommunicated, or infamous; and in this sense are the words *probi & legales homines*; hence also legality is taken for the condition of such a man. *Leg. Ed. Conf. c. 18*.

**LEGALIS MONETA ANGLIÆ.** Lawful money of England, is gold or silver money coined here by the King's authority, &c. 1 *Inst.* 207. See *Coin*.

**LEGAL REVERSION.** In the Scotch law, the period, (seven years) within which a proprietor is at liberty to redeem land adjudged from him for debt. *Scotch. Dict.*

**LEGAMANNUS.** See *Lageman*.

**LEGATARY** [*Legatarius*.] He or she to whom any thing is bequeathed; a *legatee*. See 27 *Eliz. c. 16*. *Spelman* says, it is sometimes used *pro legato vel nuncio*.

**LEGATE** [*Legatus*.] An ambassador or Pope's nuncio. There are three sorts of *Legates*,—*Legatus à latere*, *Legatus natus*, and *Legatus datus*. *Legatus à latere* was usually one of the Pope's family vested with the greatest authority in all ecclesiastical affairs over the whole kingdom where he was sent; and during the time of his legation he might determine even those appeals which had been made from thence to Rome. *Legatus natus* had a more limited jurisdiction, but was exempted from the authority of the *Legatus à latere*, and he could exercise his jurisdiction in his own province.

*Legati dati*, legates given; were such as had authority from the Pope by special commission. *God.* 18, 19, 20, 21.

The Popes of Rome had formerly in England the Archbishops of Canterbury their *Legati nati*; and upon extraordinary occasions sent over *Legati à latere*.

**LEGATEE.** The person to whom a legacy is bequeathed by a last will.

**LEGATUM.** In the ecclesiastic sense,

was a legacy given to the church, or accustomed mortuary. *Cowell*.

**LEGEM FACERE.** To make law, on oath; *legem habere*, to be capable of giving evidence upon oath; *minor non habet legem*. *Seldens Notes on Heng.* 133. See *Wager of Law*.

**LEGEND** [*Legenda*.] Is that book which contained the lessons, whether out of the Scriptures or out of other books, which were to be read throughout the year. *Lind.* 251.

**LEGERGILD** [*Legergildam*.] See *Lair-wite*.

**LEGIOSUS.** Litigious, and so subjected to a course of law. *Cowell*.

**LEGITIM.** In Scotch law; the claim of children out of the free moveable estate of their father, amounting to one half, or one third, (according to circumstances,) of his moveables after paying his debts. *Scotch Dict.*

**LEGITIMACY.** See *Bastard, Descent*.

**LEGITIMATION.** The act whereby children born bastards are rendered lawful children; this (in Scotland) may be by the subsequent marriage of the parents. There is also a species of legitimation by letters of legitimation given by the sovereign; these, however, affect only the rights of the crown in regard to the succession to the bastard, but do not give him a legitimation which may enable him to claim as one lawfully born.

**LEIPA.** A departure from service.—*Si quis à Domino suo sine licentia discedat, ut leipa emendetur & redire cogatur.* *Leg. Hen. 1. c. 43. Blount*.—Rather, an *Eloper*, the person who escapes or departs. See *Spelm. in v*.

**LEIRWIT** [*Multa adulteriorum. Flea, lib. 1. c. 7*.] Is used for a liberty, whereby a lord challengeth the penalty of one that lieth unlawfully with his bond-woman. *Cowell*.

**LENT** [From the Germ. *Lentz*, i. e. *Ver*. The Spring Fast.] A time of fasting for forty days, next before Easter; mentioned in 2 & 3 *Edw. 6. c. 19*. First commanded to be observed in England by *Ercombert*, seventh king of Kent, before the year 800. *Baker's Chron.* 7. No meat was formerly to be eaten in Lent, or on Wednesdays or other fish days, but by licence, under certain penalties. And butchers were not to kill flesh in the Lent, unless for victualling ships, &c.

**LEP AND LACE** [*Leppe & Lasse*.] A custom in the manor of Writtle, in Essex, that every cart which goes over Greenbury, within that manor, (except it be the cart of a nobleman,) shall pay 4*d.* to the lord. This Greenbury is conceived to have been accidentally a market-place, on which account this privilege was granted. *Blount*.

**LEPA.** A measure which contained the third part of two bushels; whence we derive a *seed-leap*. *Du Cange*.

**LEPORARIUS.** A greyhound for the hare. *Mon. Ang. tom. 2. fol. 283.*

**LEPORIUM.** A place where hares are kept together. *Mon. Ang. tom. 2. fol. 1035.*

**LEPROSO AMOVENDO.** An ancient writ that lay to remove a Leper or Lazar, who thrust himself into the company of his neighbours in any parish, either in the church, or at other public meetings, to their annoyance. *Reg. Orig. 237.* The writ lay against those lepers that appear outwardly to be such, by sores on their bodies, smell, &c. and not against others; and if a man were a leper, and keep within his house, so as not to converse with his neighbours, he shall not be removed. *New Nat. Br. 521.*

**LE ROY LE VEUT.** See *Royal Assent, Parliament.*

**LE ROY S'AVISERA.** By these words to a bill, presented to the King by his houses of parliament, are understood his denial of that bill. By this means the indelicacy of a positive refusal to give the Royal Assent to a bill passed by the Lords and Commons is avoided. See title *Parliament.*

**LESCHEWES.** Trees fallen by chance, or windfalls. *Broke's Abr. 341.*

**LESIA.** A leash of greyhounds, now restrained to the number of three, but formerly more. *Spehn.*

**LESPEGEND,** [*Sax. Le spegen Baro minor.*] *Sint sub quolibet horum quatuor ex mediocribus hominibus quos Angli Lespegend nuncupant, Dani vero young-men vocant, locati, qui curam et onus tum viridis tum veneris suscipiant.*—Hence it appears that this was an inferior officer in forests, to take care of the vert and venison therein, &c.—*Constitut. Canut. de Foresta. Art. 2.* See *Forest, Regarder.*

**LESSA.** A legacy; from this word also lease is derived. *Mon. Ang. tom. 1. pag. 562.*

**LESSOR AND LESSEE.** The parties to a lease. The former he who makes the lease, the latter to whom it is made.

**LESTAGEFRY.** Lestage-free, or exempt from the duty of paying ballast money. *Cowell.*

**LESWES, or LELVES.** Is a word used in *Domesday*, to signify pastures, and is still used in many places of England, and often inserted in deeds and conveyances. *Cowell.* Hence the modern term *Leaseowes.*

**LETARE JERUSALEM.** See *Quadragesimalia.*

**LEATHERWITE.** See *Leirwit.*

**LETTER MISSIVE FOR ELECTING OF A BISHOP.** A letter from the King to the Dean and Chapter, containing the name of the person whom he would have them elect. See *Bishop.*

**LETTER MISSIVE IN CHANCERY.** To a peer. See *Chancery.*

**LETTERS OF ABSOLUTION** [*Litera absolutoriae.*] Absolvatory letters, were such in former times, when an abbot released any of his brethren *ab omni subjectione & obedientia*, &c. and made them capable of entering into some other order of religion. *Mon. Favershamensi, p. 7.*

Ancient deeds were in the form of letters; and in Scotland, the charter and judicial writs, under the King's signet, bear still the form of letters.

**LETTER OF ATTORNEY** [*Litera Attor-noti.*] A writing, authorising another person, who, in such case, is called the attorney of the party appointing him, to do any lawful act in the stead of another; as to give seisin of lands, receive rents, or sue a third person, &c. A *letter of attorney* is either general or special. The nature of this instrument is to give the attorney the full power and authority of the maker, to accomplish the act intended to be performed; and sometimes these writings are revocable, and sometimes not so; but when they are revocable, it is usually a bare authority only; they are irrevocable when debts, &c. are assigned to another, in which case the word irrevocably is inserted; and the intention of them then is to enable the assignee to receive the debt, &c. to his own use.

In *Walsh v. Whitcomb*, 2 *Esp.* 565, it was held that where a power of attorney is given as part of a security, it is not revocable.

In cases of letters of attorney it was anciently held that the authority must be strictly pursued: if it be to deliver livery and seisin of lands between certain hours, and the attorney doth it before or after; or in a capital mesuage, and he does it in another part of the land, &c. the act of the attorney to execute the estate shall be void. *Plowd.* 475. But notwithstanding the ancient opinions for pursuing authorities with great strictness and exactness, yet in case of livery and seisin they have been always favourably expounded of later times, unless where it hath appeared that the authority was not pursued at all; as if a letter of attorney be made to three, two cannot execute it, because they are not the parties delegated, and they do not agree with the authority. 2 *Mod. Rep.* 79. Where the attorney does less than the authority mentions, it is void; it is said if he doth more it may be good for so much as he has power to do, and void for the rest; yet both these rules have divers exceptions and limitations. See 1 *Inst.* 258. Where two attorneys were made jointly and severally to deliver seisin of lands, &c. and one of them delivered seisin of part of the land, and after another attorney, being tenant thereof for years, gave livery of the other part of the land; this was held good, though made at several

times. 1 *And.* 247. And if a man make a deed of feoffment of lands in divers counties, with such a letter of attorney, that livery must be at several times, otherwise it cannot be made. *Ibid.* See 1 *Leon.* 192, 260.

If a mayor and commonalty make a feoffment of lands, and execute a letter of attorney to deliver seisin, the livery and seisin, after the death of the mayor, will be good, by reason the corporation dieth not. 1 *Inst.* 52. In other cases, by the death of the party giving it, the power given by letter of attorney generally determines. See further as to letters of attorney, *Com. Dig.* tit. *Attorney* (C.) And as to *Forgery* thereof, this Dictionary, under the latter title.

A Letter of Attorney to receive Rents, Debts, and Dividends, and to demise Premises.

KNOW all men by these presents, That I, A. B. of the parish of Christ Church, in the county of Middlesex, spinster, for divers good causes and considerations me hereunto moving, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, C. D. of the parish of Christ Church aforesaid, weaver, my true and lawful attorney for me, and in my name, place, and stead, and for my use, to ask, demand, and receive, all and every rent and rents, sum and sums of money now due, or which hereafter shall or may grow due to me from any person and persons whomsoever, who have been, now are, or hereafter shall or may be, tenant or tenants of any messuages or tenements, lands, hereditaments, and premises, or of any part or parts, share or shares, of any messuages or tenements, lands, hereditaments, and premises, in Great Britain, the island of Jamaica, or elsewhere, belonging to me; and of and from all and every other person and persons liable to or empowered to pay the same; and upon receipt thereof, or of any part thereof, acquittances or other sufficient discharges for me, and in my name, or in his own name, to make and give for what he shall so receive, and for non-payment of such rent or rents, or any part thereof, to enter into and upon all or any of the messuages or tenements, lands and premises, liable to the payment thereof, and distrain for the same, and the distress and distresses then and there found to take away, sell, and dispose of according to law, and also for me and in my name, and for my use, to ask, demand, and receive, of and from all and every corporations and companies, all and every sum and sums of money now due, or which hereafter shall or may grow due to me for dividends, interest or profits of any sum or sums of money, parts or shares, now belonging, or which shall belong to me therein respectively;

and likewise to ask, demand, sue for, recover, and receive all and every debt and debts, sum and sums of money due, or to grow due and payable to me, from any other person or persons, for any other matter, cause, or thing whatsoever, and upon receipt thereof, or of any part thereof in my name, or in his own name, to make and give proper receipts and discharges for the same; and in case any tenant or tenants of any messuages or tenements, lands and premises, wherein I have any right or interest, shall quit or leave the premises by them respectively holden, then and in that case I do hereby give and grant to my said attorney full power and authority to demise, let, and set the same respectively, or any part thereof, to such person or persons, and for such rent and rents, and for such term and time, and under such covenants and agreements, as my said attorney shall think fit and to expend and apply such part of the rents and profits of the said premises as shall come to his hands, in repairing and improving the same, as my said attorney shall judge proper, and one or more attorney or attorneys under him, for all or any the purposes aforesaid, to make and at pleasure to revoke; Giving and hereby granting to my said attorney full power and authority in the performance of all and singular the premises aforesaid, as fully and amply in every respect as I myself might or could do if personally present; hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do or cause to be done, in and about the said premises, by virtue hereof. In witness whereof I the said A. B. have hereunto set and subscribed my hand and seal, this — day of — in the year of our Lord —.

Sealed and delivered (being first duly stamped) in the presence of }

LETTERS CLAUSE [*Liters Clause.*] Close letters, opposed to letters-patent; being commonly sealed up with the king's signet or privy seal; whereas the letters-patent are left open and sealed with the broad seal.

LETTER OF CREDIT. Is where a merchant or correspondent writes a letter to another requesting him to credit the bearer with a certain sum of money. *Merch. Dict.* See *Bill of Exchange*.

LETTERS OF EXCHANGE [*Liters Cambii.*] *Reg. Orig.* 194. See *Bill of Exchange*.

LETTER OF LICENCE. An instrument or writing made by creditors to a man that hath failed in his trade, allowing him longer time for the payment of his debts, and protecting him from arrests in going about his affairs. These letters of licence give leave to the party to whom granted to resort freely to his creditors, or any others, and to compound debts, &c. And the creditors severally cove-



ment, that if the debtor shall receive any satisfaction or hindrance from any of them, he shall be acquitted and discharged of his debt against such creditor, &c.

**LETTERS OF MARQUE.** Commissions for extraordinary reprisals for reparation to merchants taken and despoiled by strangers at sea, grantable by the secretaries of state, with the approbation of the king and council; and usually in time of war, &c. *Lex Mercat.* 173.

The words *marque* and *reprisal* are used as synonymous; and signify, the latter a taking in return, the former the passing the frontiers in order to such taking. *Dufresne*, title *Marca*.

As the delay of making war by the sovereign power of the nation may sometimes be detrimental to individuals who have suffered by depredation from foreign states, the laws of England have, in some respect, armed the subject with powers to impel the prerogative of the crown in this particular, by directing his ministers to issue letters of marque and reprisal upon due demand; the prerogative of granting which is nearly related to, and plainly derived from, that of making war, (see tit. *King*;) this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations, wherever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case, letters of marque and reprisal may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found; and in fact this custom of reprisal seems dictated by nature. The necessity however, is obvious of calling in the sovereign power to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle it is declared by 4 *Hen. 5. c. 7.* that if any subjects of the realm are oppressed, in the time of truce, by any foreigners, the King will grant *marque* in due form, to all that feel themselves grieved; which form is thus directed to be observed: the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy seal; and if after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of *marque* under the great seal; and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being

condemned as a robber and a pirate. See 1 *Comm. c. 7. p. 258, 59.*

It is observable that the above statute of Henry V. is confined to the time of a truce, wherein there is no express mention that all *marques* and reprisals shall cease. It seems that the manner of granting letters of *marque* under this statute has been long disused, as it could only be granted to persons actually grieved. But if, during a war, a subject without any commission from the king should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral. *Carth.* 399. Therefore, to encourage merchants and others to fit out privateers, or armed ships, in time of war, the lord high admiral or the commissioners of the admiralty are, from time to time, empowered by various acts of parliament to grant commissions to the owners of such ships; and the prizes captured are divided between the owners and the captain and crew of the privateer. But the owners, before the commission is granted, give security to the admiralty, to make compensation for any violation of treaties between those powers with whom the nation is at peace; and that such armed ship shall not be employed in smuggling. These commissions are now upon all occasions, as well as in the statutes, called letters of *marque*; see 29 *Geo. 2. c. 34*; 19 *Geo. 3. c. 67*; 33 *Geo. 3. c. 34, 66*; 43 *Geo. 3. c. 160*; 45 *Geo. 3. c. 72*, &c. (temporary prize acts passed during war.) Sometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the case in December, 1780, to empower them to grant letters of *marque* to seize the ships of the Dutch. See *Christian's Note on 1 Comm. c. 7, ubi sup.*

If a letter of *marque* wilfully and knowingly take a ship and goods belonging to another nation, not of that state against whom the commission is awarded, but of some other in amity this amounts to a downright piracy. *Rol. Abr.* 430. See further tit. *Reprisal*.

**LETTERS-PATENT** [*Litteræ patentēs*,] sometimes called letters overt. Are writings of the King sealed, with the great seal of England, whereby a person is enabled to do or enjoy that which otherwise he could not; and so called because they are open with the seal affixed, and ready to be shown for confirmation of the authority thereby given. And we read of letters-patent to make denizens, &c. Letters-patent may be granted by common persons, but in such case they are not properly called patentees; yet, for distinction, the king's letters-patent have been called letters-

patent royal. See 2 *H. 6. c. 10*; also *tits. Grants of the King, Patents*.

LETTERS OF SAFE CONDUCT. See *Safe Conduct*.

LEVANT AND COUCHANT. Is a law term for cattle that have been so long in the ground of another that they have lain down and are risen again to feed; in ancient records *levantes et cubantes*. When the cattle of a stranger are come into another man's ground, and have been there a good space of time, (supposed to be a day and a night,) they are said to be levant and couchant. *Terms de Ley*; 2 *Lil. Abr.* 167. Beasts of a stranger on the lord's ground may be distrained for rent, though they have not been levant and couchant but it is otherwise if the tenant of the land is in fault in not keeping up his mounds, by reason whereof the beasts escape upon the land. *Wood's Inst.* 190. See *tit. Distress, I. 2*.

LEVANT COMPANY. See *Turkey Company*.

LEVANUM [Lat. *Levare*, to make lighter.] Leavened bread.

LEVARE FENUM. To make hay, or properly to cast it into wind-rows, in order to cock it up. *Paroch. Antiq.* 320. Hence *una levatio feni* was one day's hay-making, a service paid the lord by inferior tenants. *Paroch. Antiq.* 402.

LEVARI FACIAS. A writ of execution directed to the sheriff for levying a sum of money upon a man's land and tenements, goods and chattels, who has forfeited his recognizance. *Reg. Orig.* 298. This writ was given by the common law, before the statute *West. 2. c. 18*. gave to writ of *elegit*; and it commands the debt to be levied *de exitibus et proventus terra*, &c. Except in the case of outlawry, it is now superseded in practice by the writ of *elegit*.

There is a *levari facias damna disseisitoribus* for the levying of damages, wherein the disseisor has formerly been condemned to the disseisee. *Rep. Orig.* 214. Also *levari facias residuum debiti*, to levy the remainder of a debt upon lands and tenements, or chattels of the debtor, where part has been satisfied before. *Reg. Orig.* 299. And a *levari facias quando vicecomis retinuit quod non habuit emptores*, commanding the sheriff to sell the goods of the debtor which he has taken, and returned that he could not sell. *Reg. Orig.* 300. There is also a *levari facias* for executing the judgment of a county court, but this latter writ ought to be *de hominibus et catallis* only, and not *de tenementis et catallis*. 2 *Lutw.* 1413. And the goods cannot be sold without a special custom. *Ibid.* See title *Execution*.

LEUCA. A measure of land, consisting of 1500 paces. *Ingulphus* says, it is 2000 paces, *p. 910*. In the *Monastic*, 1 *tom. p. 313*, it is 480 perches.

LEUCATA. A space of ground, as much as a mile contains. *Monastic*, 1 *tom. p. 768*. And so it seems to be used in a charter of William the Conqueror to Battle Abbey. *Cowell*.

LEVELLUS. A level, even or upon the level. *Cowell*.

LEVITICAL DEGREES. The farthest between uncle and niece. See 1 *Comm.* 435. *Gilb. Rep.* 158.

LEVY [*Levare*.] Is used in the law for to collect or exact, as to levy money, &c. Sometimes it signifies to erect or cast up, as to levy a ditch, &c. To levy a fine of land is the usual term for the completing that conveyance; in ancient time, the word *levare* a fine was made use of. 17 *Hen. 6.* See *Fine*.

LEVYING MONEY WITHOUT CONSENT OF PARLIAMENT. No subject of England can be constrained to pay any aids or taxes even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. See 25 *Edw. 1. cc. 5, 6*; 34 *Edw. 1. st. 4. c. 1*; 14 *Edw. 3. st. 2. c. 1*; the petition of right, 3 *Car. 1. c. 1*; 1 *W. & M. st. 2. c. 2*; and *tits. Liberties, Taxes*.

LEVYING WAR AGAINST THE KING. See *tit. Treason*.

LEWDNESS. Open and notorious lewdness is an offence against religion and morality, either by frequenting houses of ill fame, which is an indictable offence, *Poph.* 208; or by some grossly scandalous and public indecency, for which the punishment is fine and imprisonment: and in *M. T. 15 Car. 2.* a person was indicted for open lewdness in showing himself naked on a balcony, and other misdemeanors, and was fined 2000 marks, imprisoned for a week, and bound to his good behaviour for three years. 1 *Sid.* 168. In times past, when any man granted a lease of his house, it was usual to insert an express covenant, that the tenant should not entertain any lewd woman, &c.

Many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court, and are appropriated to it. But except those appropriated cases, the Court of King's Bench is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*. 3 *Burr.* 1438. An information has been granted in that Court against a number of persons concerned in assigning a young girl as an ap-

prentice to a gentleman under a pretence of learning music, but for the purposes of prostitution. 3 *Burr.* 1438, &c. There is also an instance of an information for a conspiracy, granted against a peer and several others, for enticing away a young lady from her father's house, and procuring her seduction by the peer. 3 *St. Tr.* 519. And all such acts of indecency and immorality are also punishable by indictment in any criminal court, as public misdemeanors. See 4 *Comm. c.* 4. p. 64.; and *Bawdy-house, Fornication, Indecency.*

**LEX.** A law for the government of mankind in society. *Lit. Dict.* It is often taken for *judicium Dei* or *ordeal*. See *Lada, Law.*

**LEX AMISSA**, or *legem amittere*, viz. One who is an infamous, perjured, or outlawed person. See *Bracton, lib.* 4. c. 19. par. 2.

**LEX APOSTATA**, or *LEGEM APOSTATARE*. Is to do a thing contrary to law. See *Leg. II.* 1. c. 12. *Qui legem apostatabit verè suæ sit reus prima vice.*

**LEX BREHONIA.** The Brehon or Irish law, overthrown by King John.

**LEX BRETOISE.** Was the law of the Ancient Britons, or Marches of Wales. *Lex Marchiarum.*

**LEX DERAISNIA.** The proof of a thing which one denies be done by him, where another affirms it; defeating the assertion of his adversary, and showing it to be against reason or probability; this was used among the old Romans as well as the Normans. *Grand Castumur, c.* 126.

**LEX JUDICIALIS.** Ordeal. *Leg. H.* 1. See *Lada.*

**LEX SACRAMENTALIS.** *Leg. H.* 1. c. 9. Purgation by oath. See *Wager of Law.*

**LEX TALIONIS.** Is *juris positivi*; and the *taliones* among the Jews were converted into pecuniary estimates, so that the price of an eye, &c. lost, was allowed to the person injured. 1 *Hale's P. C.* 12.

It does not appear that this is a principle applicable to laws of a civilized state; when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by 37 *Edw.* 3. c. 18. that such as preferred any suggestions to the king's great council, should put in sureties of taliation; that is, to incur the same pain that the other should have had in case the suggestions were found untrue. But after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead. 38 *Edw.* 3. c. 9. See 4 *Comm. c.* 1. p. 12, 14.

**LEX TERRÆ.** The law and custom of the land, distinguished by this name from the

civil law. See *Selden in Dissertations ad Flammam, c.* 9. par. 3.

**LEX WALLENSICA.** The British law, or law of Wales. *Statut. Wall.*

**LEY, LEYS.** Fr. Law, laws.

**LEY, LEE, LAY.** Whether in the beginning or end of names of places, signifying an open field, or large pastures. From the Saxon, *leag, compus, pascuum*, as *Blechingley*, &c. *Cowell.* Leys in *Domesday* is used for pasture.

**LEY-GAGER.** *Wager of Law.* See that title.

## LIBEL.

[**LIBELLUS FAMOSUS.**] A contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person. *Com. Dig. tit. Libel (A.)*

It is termed *libellus famosus seu infamatoria scripta*, and from its pernicious tendency has been held a public offence at the common law; for men not being able to bear the having their errors exposed to public view, were found by experience to revenge themselves on those who made sport with their reputation, from whence arose duels and breaches of the peace; and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. *Lamb. Sax. Law,* 64; *Bract. lib.* 3. c. 36; 3 *Inst.* 174; 5 *Co.* 125; cited *Bac. Abr. tit. Libel ad init.*

It is also defined to be a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c. tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. 1 *Hawk. P. C. c.* 73. § 1; *Bac. Abr. tit. Libel*; 5 *Mod.* 165; 5 *Co.* 121, 25.

Libels, says *Blackstone*, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency. Considered particularly as offences against the public peace, they are malicious declarations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt or ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. 4 *Comm. c.* 11. p. 150; 3 *Comm. c.* 8. p. 125.

From the different modes in which a libel may be conveyed, a distinction has been made between a libel *in scriptis*, and one *sine scriptis*; i. e. in writing, or without writing. 3 *Inst.* 174.



- I. *What shall be considered as a libel.*
- II. *What is a publication.*
- III. *When the truth of a libel may be pleaded in justification; and of evidence in mitigation of damages.*
- IV. *Of the trial, punishment, &c. on a criminal prosecution.*

I. A libel is the greatest degree of scandal, and does not die like words which may be forgotten, an action for which is confined to the person; but the cause of action for scandal in a libel survives. 5 Rep. 125.

This species of defamation is usually termed *written scandal*; and thereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation; and to continue longer and propagate wider and farther than any other scandal. 5 Rep. 125; *Bac. Abr.* tit. *Libel*. (A).

According to *Holt, C. J.* scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, &c. And if a man speaks scandalous words, unless they are put in writing, he is not guilty of a libel; for the nature of a libel consists in putting the infamous matter into writing. 2 *Salk.* 417; 3 *Salk.* 226.

The important distinction between libels and words spoken was fully established in the case of *Villers v. Mousley*, 2 *Vils.* 403. *viz.* That whatever renders a man ridiculous, or lowers him in the esteem and opinion of the world, amounts to a libel; though the same expressions, if spoken, would not have been defamatory; as to call a person in writing *an itchy old toad*, was held in that case to be a libel; although as words spoken they would not have been actionable. 4 *Taunt.* 355. And on this ground a young lady of quality, in the year 1793, recovered £4000 damages for reflections upon her chastity, published in a newspaper, although she could have brought no action for the grossest verbal aspersions that could have been uttered against her honour. An action for a libel also differs from an action for words in this particular; that the former may be brought at any time within six years, and any damages will entitle the plaintiff to full costs. *Christian's note* on 1 *Comm.* p. 125, 126.

All libels are made against private men or magistrates, and public persons; and those against magistrates deserve the greatest punishment: if a libel be made against a private man, it may excite the person libelled, or his friends, to revenge or break the peace; and if against a magistrate, it is not only a breach of the peace, but a scandal to government, and stirs up sedition. 5 Rep. 121.

Upon the whole it may be collected, that

any writings, pictures or signs, which derogate from the character of an individual, by imputing to him either bad actions, or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage; in short, that an action lies for any false, malicious, and personal imputation, effected by such means, and tending to alter the party's situation in society for the worse. 1 *Starkie on Libel*, 171.

Where a writing inveighs against mankind in general, or against a particular order of men, this is no libel; it must descend to particulars and individuals to make it a libel. *Trin.* 11 *W. 3. B. R.* But a general reflection on the government is a libel, though no particular person is reflected on: and the writing against a known law is held to be criminal. 4 *Stat. Tr.* 672. 903.

So a publication stating that "unarmed and unresisting men had been inhumanly cut down by the dragoons," is a libel on the king's troops, although no particular dragoons or troops were defined by it. 4 *B. & A.* 314. And a criminal information was granted against the editor of a newspaper for a libel reflecting on the clergy of a particular diocese, and generally upon the Church of England, though no individual prosecutor was named, and though the libellous matter was not negatived by affidavit. *Rez v. Williams*, 5 *B. & A.* 595.

A defamatory writing, expressing only one or two letters of a man's name, if it be in such a manner that from what goes before and follows after it must be understood, by the natural construction of the whole, to signify and point at such a particular person, is as properly a libel as if the whole name was expressed at large. 1 *Hawk. P. C.* c. 73. § 5. For, adds *Hawkins* it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. On application for an information for this offence, some friend of the party complaining should in such case state by affidavit the having read the libel, and that he understands and believes it to mean the party. 3 *Bac. Abr.* in *n.* And in the case of actions for libels by signs or pictures, it seems necessary always to shew, by proper innuendoes and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed, otherwise it cannot appear that such libel by picture was understood to be levelled at the plain-

tiff, or that it was attended with any actionable consequences. 3 *Comm. c. 8. p. 126.*

So printing or writing may be libellous, though the scandal is not directly charged, but obliquely and ironically; and where a writing pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally famous for, pitches on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his learning, who is known to be a good soldier, but an illiterate man, &c. this will amount to a libel. 1 *Hawk. P. C. c. 73. § 4.*

Though a private person or magistrage be dead at the time of making the libel, yet it is punishable, as it tends to a breach of the peace. *Hob. 215; 5 Co. 125; Hawk. P. C. c. 73. § 1; 4 T. R. 126; 129, in n.* But an indictment for publishing libellous matter reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the king's subjects against them, and to excite his relations to a breach of the peace, cannot be supported; and judgment was in this case accordingly arrested. *R. v. Topham, 4 Term Rep. 126.* See 4 *T. R. 129 in n.*

A private libel for a private matter, as a letter scandalizing a person courting a woman, is indictable and punishable by fine. *Sid. 270.* No writing is esteemed a libel, unless it reflect upon some particular person; and a writing full of obscene ribaldry is not punishable by any prosecution at common law; but the author may be bound to the good behaviour, as a person of evil fame. 1 *Hawk. P. C. c. 73. § 9.* It was so agreed in *Read's case*, 1 *Mod. 142*; but in the case of the *K. v. Curl, Mich. 1 Geo. 2.* for publishing an obscene book, the court were unanimous that it is a temporal offence, and that *Read's case* was not law. *Str. 788, 834.* See also 4 *Burr. 2527.*

To print of any person that he is a swindler, is a libel, and actionable. 1 *T. R. 748.*

Accusing a bishop of the established church with offering money and preferment to a catholic priest, on condition of his becoming a protestant, was held to be a libel. 5 *Bing. 23.*

The petition of the seven bishops in the reign of King James II. against the king's declaration, setting forth, that it was founded on a dispensing power, which had been declared illegal in parliament, &c. was called a seditious libel against the king, and they were committed to the Tower; but after being tried at bar, they were acquitted, 3 *Mod. 312.* See *State Trials.* The printing of a petition to a committee of parliament, (which would be a libel

against the party complained of, were it made for any other purpose,) and delivering copies thereof to the members of the committee, is not the publication of a libel, being justified by the order and course of proceedings in parliament. 1 *Hark. P. C. c. 73. § 8.*

Scandalous matter in legal proceedings by bill, petition, &c. in a court of justice, amounts not to a libel, if the court hath jurisdiction of the cause. *Dyer, 258; 4 Rep. 14.* But he who delivers a paper full of reflections on any person, in nature of a petition to a committee to any other persons, except the members of parliament who have to do with it, may be punished as the publisher of a libel. 1 *Hawk. c. 73. § 8.* And by the better opinion, a person cannot justify the printing any papers which import a crime to another to instruct counsel, &c. but it will be a libel. *Sid. 414.*

An order made by a corporation and entered in their books, stating, that A. B. (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed in C. B.) was actuated by motives of public justice in preferring the indictment, is a libel reflecting on the administration of public justice, for which the Court of K. B. will grant an information against the members making the order. 2 *T. R. 199.* But it is no libel to assign on the books of a Quakers' meeting their reasons for expelling a member. 1 *Black. R. 386.*

It has been determined that it is neither the subject of a criminal prosecution, nor of an action, to publish a true account of the proceedings in parliament, or the courts of justice. See *R. v. Wright, 8. T. R. 293; Curry v. Wells, 1 Bos & Pul. 525.* But a member of the House of Commons was convicted in the Court of King's Bench upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, containing libellous matter; although the publication was proved to be a correct report of such speech, and to be made in consequence of an incorrect publication having appeared in that and other newspapers. *R. v. Creevey 1 Man. & Sel. 273.*

As the privilege of publishing judicial proceedings with impunity, notwithstanding the inconvenience and mischief which such publications may occasion to individuals, is founded upon grounds of public policy and convenience; the condition necessarily annexed to immunity is, that the proceeding shall be fairly, impartially, and correctly reported. 1 *Sturkie on Libel, 269.*

Therefore it is a libel to publish a highly-coloured account of proceedings in a court of record, mixed with the party's own observa-

tions and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury. 7 *East*, 493.

So a report of a trial, containing the *ex parte* statement of the plaintiff's counsel, and those parts of the judge's address to the jury which were unfavourable to the defendant, and omitting all but a few sentences of the defence, was held not to be a privileged report. *Saunders v. Mills*, 6 *Bingh.* 213.

So the publishing a counsel's speech in a judicial proceeding, coupled with a general assertion, that this statement was proved by a witness called upon that trial, cannot be justified. 4 *B. & A.* 605. And where in a recent case, the defendant published a report of the proceedings under a commission of lunacy, which the plaintiff had attended as a witness, and stated "that the object was to set aside a will; that the plaintiff's testimony, being unsupported by that of any other person, failed to have any effect on the jury; and that Mr. J. (the counsel against the commission) commented with cutting severity on the testimony of Mr. D. (the plaintiff,)" it was held, that the whole, taken together, was a libel; and that a plea, justifying only the words "Mr. J. commented, &c." was bad. 10 *Bing.* 519.

Neither is a reporter privileged in publishing a speech of a counsel containing reflections on the character of an individual, annexed to a short summary of the trial, without stating the evidence. 4 *B. & C.* 473.

But the publication of *ex parte* proceedings, &c. is not privileged. 5 *Esp.* 123; 2 *Camp.* 563.

So in the case of *Duncan v. Thwaites*, 3 *B. & C.* it was decided, that the publication of a charge, imputing to the plaintiff indecent conduct to a female child, could not be justified on the ground that the alleged libel was no more than a correct account of the proceeding which had taken place at a public police office.

Where the writing is a confidential communication, which is reasonably called for by the occasion, it is not considered libellous.—Thus a servant cannot maintain an action against his former master for words spoken, or a letter written, by him in giving the character of a servant, unless the latter prove the malice (or unless from the circumstances of the case malice may be inferred by a jury,) as well as the falsehood of the charge; even though the master make specific charges of fraud. See 1 *T. R.* 110; 3 *Bos. & Pul.* 587; 1 *B. & A.* 240; and *tit. Servants*.

II. No one is punishable for writing a libel unless he actually publishes it to the world. 5 *Mod.* 165, 167.

The communication of a libel to any one

person is a publication in the eye of the law; *Moor*, 813; and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed; for it equally tends to a breach of the peace; 2 *Brownl.* 151, 157; 12 *Rep.* 35; *Hob.* 215; *Poph.* 139; 1 *Hawk. P. C. c.* 73. § 11; 4 *Comm. c.* 11, p. 150; *Bac. Abr. tit. Libel* (B 2); in which latter book it is stated that this was a matter of doubt; but a case is mentioned where an information was granted under such circumstances; and at all events it is an offence against the king's peace, punishable by indictment; and if copies of it are afterwards dispersed, it aggravates the crime, or rather makes it a new crime, for which the party may have an action. *Poph.* 46; *Hob.* 62. Writing a letter to a man, and abusing him for his public charities, &c. is a libellous act, punishable by indictment. *Hob.* 215. In the case of the seven bishops, the delivery by them to King James II. of a petition, which was termed a libel, was held a publication. See *Phillips's State Trials*, 300, 301.

In the making of libels, if one man dictates, and another writes a libel, both are guilty; for the writing after another shows his approbation of what is contained in the libel; and the first reducing a libel into writing may be said to be the making it, but not the composing; if one repeats, another writes, and a third approves what is written, they are all makers of the libel; because all persons who concur to an unlawful act, are guilty. 5 *Mod.* 167. The making the libel is the genus; and composing and contriving is one species; writing a second species; and procuring to be written, a third: and one may be found guilty of writing only, &c. 2 *Salk.* 419, &c. But observe, a mere writing, without a publication, was not in question in *Salkeld*. It is conceived that for a mere writing of a libel, not published, no action can be maintained, nor prosecution legally supported.

If one writes a copy of a libel, and does not deliver it to others, the writing is no publication: but it has been adjudged, that the copying a libel, without authority, is writing a libel; and he that thus writes it, is a contriver; and that he who hath written a copy of a known libel, if it is found upon him, this shall be evidence of the publication: but if such libel be not publicly known, then the mere having a copy is not a publication. 2 *Salk.* 417; 2 *Nels. Abr.* 1122. When a libel appears under a man's own hand-writing, and no author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. *Ibid.* If one reads a libel, or hears it read, and laughs at it,



it is not a publishing; for before he reads or hears it read, he cannot know it to be a libel: though if he afterwards reads or repeats it, or any part thereof, in the hearing of others, it is a publication of it: yet if part of it be repeated in mirth without any malicious purpose of defamation, it is said be no offence. 9 *Rep.* 59; *Moor.* 862. Every one convicted of publishing a libel ought to be esteemed the contriver or procurer; the procurer and writer of a libel have been held to be both contrivers; also he who procures another to publish it, and the publisher, are both publishers. *Moor.* 627; 5 *Rep.* 125; 3 *Inst.* 174; 3 *Cro.* 17. See 1 *Hawk. P. C. c.* 73.

When any man finds a libel, if it be against a private person, he ought to burn it, or deliver it to a magistrate; and where it concerns a magistrate, he should deliver it presently to a magistrate. 5 *Rep.* 125. If a libel be found in a house, the master cannot be punished for framing, printing, and publishing it; but it is said he may be indicted for having it, and not delivering it to a magistrate. 2 *Vent.* 31.

The sale of a libel by a servant in a shop is *prima facie* evidence of a publication, in a prosecution against the master; and is sufficient for conviction, unless contradicted by contrary evidence showing that he was not privy, nor in any way assenting to it. 4 *T. R.* 126; 5 *Burr.* 2686, 2687; 1 *Hawk. P. C. c.* 73 § 10 in n.

So the proprietor of a newspaper is liable for whatever libel appears in it, but he may, under special circumstances, rebut such liability. *M. & M.* 433.

Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, under 29 *Geo.* 3. c. 50. § 10., and had occasionally applied at the stamp-office respecting the duties, is strong evidence to prove that he is the publisher. 4 *T. R.* 126.

A delivery of a newspaper, according to the provisions of 38 *Geo.* 3. c. 78., to the officer of a stamp office, is a sufficient publication, though it is directed by the statute, for the officer has an opportunity of reading it. 4 *B. & C.* 35.

For the regulations respecting the publication of newspapers, pamphlets, &c. see tit. *Newspapers.*

III. It is immaterial, on a criminal prosecution, with respect to the essence of a libel, whether the matter of it be true or false; because it equally tends to a breach of the peace; and the provocation, not the falsity, is the thing to be punished criminally; though doubtless the falsehood of it may aggravate its guilt and enhance its punishment. See 7 *T. R.* 4, that

it is not necessary to *allege* the falsity of the libellous matter. In a civil action a libel must appear to be false as well as scandalous; for if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace; and therefore upon a civil action the truth of the accusation may be pleaded in bar of the suit. But in a criminal prosecution the tendency which all libels have to create animosities and to disturb the public peace is the whole that the law considers. And therefore in such prosecutions, the only points to be inquired into are, first, the making or publishing of a book or writing; and, secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete. 4 *Comm. c.* 11. p. 150, 151. See *post*, IV., and tit. *Jury*, III. 2. as to the *intent* of the party publishing.

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is: for as *Lord Coke* observes, in a settled state of government the party grieved ought to complain for every injury done him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise. *Bac. Abr.* tit. *Libel* (A. 5.) cites 5 *Co.* 125; *Hob.* 253; *Moor.* 627; 1 *Hawk. P. C. c.* 73.

But although it has been held, at least for these two centuries, that the truth of a libel is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, viz. that it will not grant an *information* for a libel, unless the prosecutor who applies for it makes an affidavit, asserting directly and pointedly that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled resides abroad; or if the imputations of a libel are general and indefinite; or if it is a charge against the prosecutor for language which he has held in parliament. *Dougl.* 271 (284), 372 (388); 5 *B. & A.* 595.

Where on application for an *information* the truth of the libel is not denied, the court (except in the particular instances above mentioned) will leave the injury to be remedied in the ordinary course of justice by action or indictment. *Stra.* 493. See *post*, IV. But the court will not grant this extraordinary remedy by *information*, nor shall a grand jury find an

indictment, unless the offence be of such signal enormity, that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. In such a case the public are justly placed in the character of an offended prosecutor, to vindicate the common right of all, though violated only in the person of an individual; for the malicious publication of even truth itself cannot in policy be suffered to interrupt the tranquility of any well ordered society. This is a principal so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the star-chamber; the adoption of it by the worst of courts can never weaken its authority; and without it all the comforts of society might with impunity be hourly endangered or destroyed. See *Law of libels*; 1 *Hawk. P. C.* c. 73. § 6. *in n.*

The court of K. B. is now in the practice of granting an information for any description of libel. See *Information*.

With regard to libels in general, there are, as in many other cases, two remedies; one by indictment or information, and the other by action. The former for the public offence; for, as has been repeatedly remarked, every libel has a tendency to the breach of the peace, by provoking the person libelled to break it; which offence, we have seen, is the same in point of law, whether the matter contained be true or false, and therefore it is that the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all. The chief excellence, therefore, of a civil action for a libel consists in this, that it not only affords a reparation for the injury sustained, but is a full vindication of the innocence of the person traduced. See *Comm. c. 8.* p. 125, 126, and *n.*

It is not competent to a defendant charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons who have never been prosecuted for it. 5 *T. R.* 436.

Neither is it a defence to an action for the publication of a libel, that the libellous matter was communicated to the defendant by a third person, and that such defendant's name was published at the same time with the libel; and the court intimated that in *oral slander*, (see *Holt*, 513,) though a man at the time of speaking the words, names the person who told him what he relates, cannot plead that

circumstance to an action against him. *Cresspigny v. Wellesley*, 5 *Bing.* 392.

It would seem that a defendant may, under the general issue, give general evidence of the plaintiff's character, but not of particular facts tending to show that he has been guilty of the act imputed to him, in mitigation of damages. See 2 *Camp.* 251; 1 *M. & S.* 251; and 2 *Starkie on Libel*, 87—97.

A libel in a newspaper purported to be a report of proceedings before one of the corporation commissioners. Under the general issue the defendant was allowed to give the accuracy of the report in evidence in mitigation of damages only; and the plaintiff was then allowed to give evidence in reply of the inaccuracy of the report. 6 *C. & P.* 385.

IV. In information and law proceedings there are two ways of describing a libel; by the sense and by the words: the first is *cujus tenor sequitur*, and the second *quæ sequitur in hæc Anglicana verba*, &c. in which the description is by particular words, and whereof every word is a mark; so that if there is any variance, it is fatal; in the other description by the sense, it is not material to be very exact in the words, because the matter is not described by the sense of them. 2 *Salk.* 660.—See *Indictment, Information, Pleading*.

The declaration for a libel must lay it to be "of and concerning the plaintiff," otherwise there can be no judgment. 2 *Strange*, 934.

It hath been held, that writing a seditious libel is not an actual breach of the peace; and that a member of parliament writing such a libel is entitled to his privilege from being arrested for the same. *Wilkes's case*, 2 *Wils.* 159, 251; but see title *Parliament*, IV. 2. *ad fin.*

The arguments in the case of *Wilkes* (as also in that of the Seven Bishops, *State Trials*, 4 *Jac.* 2.) seem to have assumed that a common person not having privilege of parliament might be legally apprehended on the charge of writing and publishing a seditious libel: and it is now settled that such person may be apprehended by a justice of the peace, and committed for want of bail for writing or publishing a seditious libel against the government, or a libel against a minister of state, or against a judge. The same principle seems also to apply to the case of writing or publishing a malicious libel against any person. See *Butt's case*, 1 *Brod. & Bing.* 548.

Previous to the 32 *Geo. 3.* c. 60. it was held, that on the trial of an indictment for a libel, the only questions for the consideration of the jury are the fact of publishing, and the truth of the innuendoes; that is, the truth of the meaning and sense of the passages of the

libel, as stated and averred in the record; (whether the matter be or be not a libel is a question of law for the consideration of the court. 3 T. R. 428. See further *post*.)

The following extract from a modern historian, (*Hallam's History of England* from Henry VII. to Geo. II. c. 15,) affords a summary, applicable, as well to this offence itself, as to the province of the jury upon the trial of offenders.

For the vigilant superintendence, (of the proceedings of the government by public opinion,) and, indeed, for all that keeps up in us permanently and effectually the spirit of regard to liberty and the public good, we must look to the unshackled and independent energies of the press. In the reign of William III., and through the influence of the popular principles in our constitution, this finally became free. The licensing act, suffered to expire in 1679, was renewed in 1685 for seven years. In 1692 it was continued to the end of the session, which took place in 1693.—Several attempts were afterwards made to renew its operation, which the less courtly Whigs combined with the Tories and Jacobites to defeat. Both parties, indeed, employed the press with great diligence in that reign; but, while one degenerated into malignant calumny and misrepresentation, the signal victory of liberal principles is manifestly due to the boldness and eloquence with which they were promulgated. Even during the existence of a censorship, a host of unlicensed publications, by the connivance of the officers employed to seize them, bore witness to the inefficacy of its restrictions. The bitterest invectives of Jacobitism were circulated in the first four years after the Revolution.

The *Liberty of the Press* consists, in a strict sense, merely in an exemption from the superintendence of a licenser; but it cannot be said to exist in any security, or sufficiently for its principal ends, when discussions of a political or religious nature, whether general or particular, are restrained by two narrow or severe limitations. The *law of libel* has always been *indefinite*, an evil probably beyond any complete remedy, but which evidently renders the liberty of free discussion somewhat precarious in its exercise, perhaps more so than might be wished. It appears to have been the received doctrine in Westminster Hall before the Revolution, that no man might publish a writing *reflecting on the government*, nor upon the character or even capacity and fitness of any one employed in it. Nothing having passed to change the law, the law remained as before. Hence, in the case of *Tutchin*, it was laid down, that to possess the people with an ill opinion of the government (that is, the

ministry,) was a libel. And the attorney-general, in his speech for the prosecution, urged that there could be no reflection upon those in office under the sovereign, but it must cast some reflection on the sovereign who employed them. Yet in that case the censure upon the administration in the passages selected for prosecution was merely general and without reference to any person; upon which the counsel for Tutchin relied. *State Trials*, (Howell's edit.) xiv. 1103, 1128.

It is manifest, that such a doctrine was irreconcilable with the interests of any party *out of power*; whose best hope to regain it is commonly by possessing the nation with a bad opinion of their adversaries. Nor would it have been possible for any ministry to stop the torrent of a free press, under the secret guidance of a powerful faction, by a few indictments for libel. They found it generally more expedient, and more agreeable to borrow weapons from the same armoury, and retaliate with unsparing invective and calumny. This was practised with the avowed countenance of government, for the first time by Swift, in the *Examiner*, and some others of his writings. Both parties soon went such lengths in this warfare, that it became tacitly understood, that the *public characters* of statesmen and the measures of administration are the fair topics of pretty severe attack. Less than this, indeed, would not have contented the political temper of the nation, gradually and without intermission becoming more democratical, and more capable as well as more accustomed to judge of its general interests and of those to whom they were intrusted. The just limit between *political* and *private* censure has been far better drawn in these later times, (licentious as we may still justly deem the press,) than in an age when courts of justice had not deigned to acknowledge, as they do at present, its theoretical liberty. No writer, except of the most broken reputation, could venture at this day on the malignant calumnies of the great ministerial writer of that time.

Meanwhile the judges of the courts of law naturally adhered to their established doctrine, and in prosecutions for political libels were very little inclined to favour what they deemed the presumption, if not the licentiousness, of the press. They advanced a little farther than their predecessors, and, contrary to the practice both before and after the Revolution, laid it down as an absolute principle, that *falsehood*, though always alleged in the indictment, was *not essential to the guilt of the libel*; refusing to admit its truth to be pleaded or given in evidence, or even urged by way of mitigation of punishment. (See *State Trials*, xiv. 534; xvii. 659.) But as defendants could only be con-



victed by verdicts of juries and jurors, both partook of the general sentiment in favour of free discussion, and might, in certain cases, have acquired some prepossessions as to the real truth of the supposed libel, which the court's refusal to enter upon it could not remove, they were often reluctant to find a verdict of *guilty*. And hence arose by degrees a sort of contention, which sometimes showed itself upon trials, and divided both the profession of the law and the general public. The judges and the lawyers, for the most part, maintained, that the province of the jury was only to determine the fact of publication, and also whether the *inuendoes* on the record were correct, that is, whether the libel actually meant that which it was alleged in the indictment that it did mean, not whether such meaning were criminal or innocent—a question of law which the court were exclusively competent to decide. That the jury might acquit at their pleasure was undeniable; but it was asserted, that they would do so in violation of their oaths and duty if they should reject the opinion of the judge, by whom they were to be guided as to the general law. Others of great name in our jurisprudence and the majority of the public at large, conceiving that this would throw the liberty of the press altogether into the hands of the judges, maintained, that the jury had a strict right to take the whole matter into their consideration, and determine the defendants' criminality or innocence, according to the nature and circumstances of the publication. This controversy was put an end to by the act 32 Geo. 3. c. 60. (extended to Ireland by the Irish act 33 Geo. 3. c. 43.) which enacted, that on trials of indictment for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter in issue; and though, perhaps, the act is not drawn in the most intelligible and consistent manner, it was certainly designed or hoped that it would make the defendant's intention as it might be innocent or even laudable, or, on the other hand, seditious or malignant, a matter of fact for the inquiry and discussion of the jury. See more fully on this part of the subject. *Jury*, III. 2.

The punishment of libellers for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment, as imprisonment, pillory, &c. (now abolished,) as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender. 1 *Hawk. P. C. c.* 73. § *ult.*

If a printer print a libel against a private person, he may be indicted and punished for it; and so may he who prints a libel against a magistrate, and much more one who does it against the king and state; nor can a person in such a case excuse himself by saying they

were dying speeches, or the words of dying men; for a man may at his death justify his villainy; and he who publishes it is punishable; and it is no excuse for the printing or publishing a libel, to say that he did it in the way of trade, or to maintain his family. 1 *St. Tr.* 982, 986. •

Also if booksellers publish or sell libels, though they know not the contents of them, they are punishable. It has been resolved, that where persons write, print, or sell, any pamphlets, scandalizing the public, or any private persons, such libellous books may be seized, and the persons punished by law; and all persons exposing any books to sale, reflecting on the government, may be punished: also writers of news (though not scandalous, seditious, or reflecting on the government, if they write false news,) are indictable. 2 *St. Tr.* 477. See *False News, Scandalum Magnatum*.

One was indicted for a libel in scandalizing the King's witnesses, and reflecting on the justice of the nation, and had judgment of the pillory and fine. 3 *St. Tr.* 50. A person for libelling the Lord Chancellor Bacon, affirming that he had done injustice, and other scandalous matter, was sentenced to pay 1000*l.* fine; to ride on a horse with his face to the tail from the Fleet to Westminster, with his fault written on his head; to acknowledge his offence in all the courts at Westminster, stand in the pillory; and that one of his ears should be cut off at Westminster, and the other in Cheapside, and to suffer imprisonment during life. *Poph.* 135. One who exhibited a libel against a Lord Chief Justice, directed to the King, calling the Chief Justice traitor, perjured judge, &c. had judgment to stand in the pillory, was fined 1000 marks, and bound to good behaviour during life. *Cro. Car.* 125.

When a person is brought before the court to receive judgment for a libel, his conduct subsequent to his conviction may be taken into consideration, either by way of aggravation or mitigation of his punishment. 3 *T. R.* 432.

The stat. 60 Geo. 3. c. 8. "for the more effectual prosecution and punishment of blasphemous and seditious libels," enables the court before whom any offender is convicted, or wherein there is judgment by default, to make an order for seizing the copies of the libel. By § 4. persons on a second conviction might have been banished from the united kingdom and all other parts of the king's dominions; but this punishment of banishment (which at the passing of the act was much opposed,) was repealed by the 11 Geo. 4. and 1 Will. 4. c. 73. § 1. See tit. *Newspapers*.

In all the instances where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels, are punished by the English

law, some with a greater, others with a less degree of severity, the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publications; and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish as the law does at present, any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundation of civil liberty. Thus, the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon the freedom of thought or inquiry; liberty of private sentiment is still left. The disseminating or making public of bad sentiments, destructive to the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used in the restraining of the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force when it is shown (by a reasonable exertion of the laws,) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it can never be used to any good one, when under the control of an inspector. So true it will be found, that to censure the *licentiousness* is to maintain the *liberty*, of the press. 4 *Comm. c. 11. ad fin.*

The above observations deserve the serious attention of every jurymen who wishes well to the constitution and happiness of his country; to them we shall add the remark of another celebrated writer on this subject:—"The danger of such unbounded liberty (of uncensored printing,) and the danger of bounding it, have produced a problem in the science of government, which human understanding seems hitherto unable to solve. If nothing

may be published but what civil authority shall have previously approved, power must always be the standard of truth: if every dreamer of innovations may propagate his projects, there can be no settlement; if every murmur at government may diffuse discontent, there can be no peace; and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is to *punish the author*; for it is yet allowed that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious. But this punishment, though it may crush the author, promotes the book; and it seems not more reasonable to leave the right of printing unrestrained, because writers may afterwards be censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief." *Johnson, in vita Milton.*

The law of libel has of late been much discussed, and a committee of the House of Commons was appointed in the last session (1833) for the purpose of investigating it, previous to the consideration of the important changes which have been proposed by Mr. O'Connell and other members of parliament.

For further matter connected with libels, see *False News, Scandalum Magnatum, Treason, Words.*

**LIBEL**, in the Spiritual Court, from *libellus*, a little book: the original declaration of any action in the civil law. See 2 *Edw. 6. c. 13.*

By the 2 *Hen. 5. c. 3.* a libel of that which is surmised against any party cited to appear in the Spiritual Court, is to be granted and delivered without any difficulty.

If upon a libel for any ecclesiastical matter, the defendant make a surmise in B. R. to have a prohibition, and such surmise be insufficient, the other party may show it to the court, and the judges will discharge it. 1 *Leon. 10, 128.* The libel used in ecclesiastical proceedings, consists of three parts. 1. The major proposition, which shows a just cause of the petition. 2. The narration, or minor proposition. 3. The conclusion, or conclusive petition, which conjoins both propositions, &c. 3 *Comm. 100.*

In the Scotch law, the term libel is used to express the source of complaint, or ground of the charge, on which either a civil action or criminal prosecution takes place.

**LIBER NIGER.** See *Black Book.*

**LIBERA.** A livery or delivery of so much grass or corn to a customary tenant, who cut down or prepared the said grass or corn, and received some part or small portion of it as a reward or gratuity. *Cowell.*

**LIBERA BATELLA.** A free boat. Right of fishing. *Plac. in itin. ap. Cestr. 14 H. 7.*

**LIBERA CHASEA HABENDA.** A judicial writ granted to a person for a free chase

belonging to his manor; after proof made by inquiry of a jury, that the same of right belong to him. *Reg. Orig.* 36.

**LIBERAM LEGEM**, *amittere liberam legem*. Is to become infamous, and not to be accounted *liber et legalis homo*. See *Battle*, *Champion*.

**LIBERA PISCARIA**. A free fishery, which being granted to one, he hath a property in the fish, &c. 2 *Salk.* 637. See *Fish*, *Fisheries*, and *Fishing*.

**LIBER TAURUS**. A free bull. *Norf.* 16 *Edw.* 1.

**LIBERA WARA**. See *Wara*.

**LIBERATIL**. A writ that lies for the payment of a yearly pension or other sum of money granted under the great seal, and directed to the treasurer and chamberlains of the Exchequer, &c. for that purpose. In another sense it is a writ to the sheriff of a county for the delivery of possession of lands and goods extended, or taken upon the forfeiture of a recognizance. Also a writ issuing out of the Chancery, directed to a gaoler, for delivery of a prisoner that hath put in bail for his appearance. *F. N. B.* 132; 4 *Inst.* 116. This writ is most commonly used for delivery of goods, &c. on an extent; and by the extent the conscience of a recognizance hath not any absolute interest in the goods, until the liberate. 2 *Lil.* 169. It has been adjudged, that where an extent is upon a statute-merchant, there needs no liberate, for the sheriff may deliver all in execution without it; but where an extent is upon a statute-staple, or a recognizance, there must be a return made of such an extent, and then a liberate before there can be a delivery in execution. 3 *Salk.* 159. See *Extent*, *Execution*.

**LIBERATIO**. Money, meat, drink, clothes, &c. yearly given and delivered by the lord to his domestic servants. *Blount*.

**LIBERTAS ECCLESIASTICA**. This is a frequent phrase in our old writers, to signify church liberty, or ecclesiastical immunities; the right of investiture, extorted from our kings by force of papal power, was at first the only thing challenged by the clergy, as their *libertas ecclesiastica*: but by degrees, under weak princes and prevailing factions, under the title of 'church liberty,' they contended for a freedom of their persons and possessions from all secular power and jurisdiction, as appears by the canons and decrees of the council held by Boniface, Archbishop of Canterbury, at Merton, A. D. 1258, and at London, A. D. 1260, &c. *Cowell*.—See *Lord Littleton's Hist. of Hen. H.* and *Robertson's Hist. of Emp. C. V.*

**LIBERTATE PROBANDA**. An ancient writ which lay for such as, being demanded for villeins, offered to prove themselves free; directed to the sheriff, that he should take se-

curity of them for the proving of their freedom before the justices of assize, and that in the meantime they should be unmolested. *F. N. B.* 77. See *Tenures*, *Villein*.

**LIBERTATIBUS ALLOCANDIS**. A writ lying for a citizen or burgess, impleaded contrary to his liberty, to have his privilege allowed. *Reg. Orig.* 262. And if you claim a special liberty to be impleaded within a city or borough, and not elsewhere, there may be a special writ *de libertatibus allocandis*, to permit the burgesses to use their liberties, &c.—These writs are of several forms, and may be used by a corporation, or by any single person, as the case shall happen. *New Nat. Br.* 509, 510. The barons of the cinque ports, &c. may sue for such writs, if they are delayed to have their liberties allowed them. *Ibid.*

**LIBERTATIBUS EXIGENDIS IN ITINERE**. An ancient writ whereby the king commands the justices in eyre to admit of an attorney for the defence of another man's liberty. *Reg. Orig.* 19.

**LIBERTIES or FRANCHISES**. These are synonymous terms, and their definition is, a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. The kinds of them are various, and almost infinite. See *Franchise*.

**A LIBERTY**. A privilege held by grant or prescription, by which men enjoy some benefit beyond the ordinary subject. *Bract*.

## LIBERTY,

In its most general signification, is said to be a power to do as one thinks fit, unless restrained by the law of the land; and it is well observed, that human nature is ever an advocate for this liberty, it being the gift of God to man in his creation; therefore every thing is desirous of it, as a sort of restitution to its primitive state. *Fortesc.* 96. It is upon that account the laws of England in all cases favour liberty, and which is accounted very precious, not only in respect of the profit which every one obtains by his liberty, but also in respect of the public. 2 *Lil. Abr.* 169.

According to *Montesquieu*, liberty consists principally in not being compelled to do any thing which the law does not require; because we are governed by civil laws, and therefore we are free, living under those laws. *Spirit of Laws*, lib. 26. c. 20.

The absolute *Rights of Man*, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be the most desirable, are usually summed up in one general appellation, and denominated *The natural Liberty of Mankind*. This na-



tural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will.

1 *Comm. c. 1.*

But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. This species of civil obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man who considers a moment, would wish to retain the absolute and uncontroll'd power of doing whatever he pleases, the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. See *Ment. Spirit of Laws, lib. 11. c. 3.*

Political or civil liberty, therefore, which is that of a member of society, is no other than natural liberty, so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public. 1 *Comm. c. 1. p. 125.*

Hence we may collect, that the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference without any good end in view, or regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance, but supporting that state of society which alone can secure our independence. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for where there is no law there is no freedom. *Locke on Gov. part 2. § 57.* But then, on the other hand, that constitution or form of government, that system of laws is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct except in those points where in the public good requires some direction or restraint. 1 *Comm. 125, 6.*

The above definition of the learned commentator is adopted by most commentators to be correct, distinct, and perfectly satisfactory as respects to civil liberty; on the question of which, however, he adds, it is not to be understood, or rather expressed, that the restraints introduced by the law should be equal to all; or as much as the nature of things will admit. 1 *Comm. 126, n.*

Political liberty is distinguished by Mr. Christian from civil liberty; and he defines it to be the security with which, from the constitution, firm, and nature, of the established government, the subjects enjoy civil liberty. No laws, customs, &c. are more certain and stable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name. The learned Dr. *Beaumont* uses political and civil liberty not interchangeably, but would perhaps be conceived unnecessarily to use the same terms in the respective senses here suggested, or to have some fixed specific denominations of them which, in their nature, are so widely different. The last species of liberty has, probably more than the rest, engaged the attention of mankind, and particularly of the people of England. Civil liberty, which is nothing more than the compact administration of equal and expedient laws, they have long enjoyed, nearly to as great an extent as can be expected under any human establishment; and under a king who has the power to do wrong, yet all the prerogatives to do good, with the two houses of parliament, the people of England have a firm reliance that this civil liberty is secure, and that they shall retain and transmit its blessings, and those of political liberty also, to the latest posterity.—See 1 *Comm. 126, n.*

There is another common notion of liberty, which is nothing more than the freedom from confinement. This is a part of civil liberty; but it being the most important part, as a man in a gaol can have but the exercise and enjoyment of few rights, it is *κατ' ἐξοχὴν* called liberty.

The different definitions of the term liberty, here given and commented upon, should not be thought tautologous or uninteresting, since it is a word which it is of the utmost importance to mankind that they should clearly comprehend; for though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falso libertatis vocabulum obtendi ab iis, qui, privatim de generis, in publicum extiosi, nihil spei nisi per discordias habeant. Tac. Ann. 11. c. 17.*

The idea and practice of this political or

civil liberty flourish in their highest vigour in these kingdoms; where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owners; the legislature, and of course the laws of England, being particularly adapted to the preservation of this inestimable blessing, even in the meanest subject. 1 *Comm.* 126, 7.

The absolute rights of every Englishman, (which taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government, though subject at times to fluctuate and change; their establishment, excellent as it is, being still human. At some times we have seen them depressed by overbearing and tyrannical princes: at others, so luxuriant as even to tend to anarchy, a worse state than tyranny itself; as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments; and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been, from time to time, asserted in parliament as often as they were thought to be in danger.

*First*, By the great charter of liberties, which was obtained, sword in hand, from King John; and afterwards, with some alterations, confirmed in parliament by King Henry III., his son; which charter contained very few new grants; but as Sir *Edward Coke* observes (2 *Inst. proēm.*) was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *Confirmatio Cartarum*, 25 *Edw.* 1, whereby the great charter is directed to be allowed as the common law, all judgments contrary to it are declared void; copies of it are ordered to be sent to all the cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those who by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes from Edward I. to Henry IV.; of which the following are the most forcible.

25 *Edw.* 3. *st.* 5. *c.* 4. None shall be taken by petition or suggestion made to the king or his council, unless it be by indictment of lawful people of the neighbourhood, or by process made by writ original at the common law. And none shall be put out of his franchise or freehold, unless he be duly brought to answer, and forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.

42 *Edw.* 3. *c.* 3. No man shall be put to answer without presentment before justices, or matter of record of due process, or writ original, according to the ancient law of the land. And if any thing be done to the contrary, it shall be void, in law, and held for error.

After a long interval these liberties were still further confirmed by the Petition of Right; which was a parliamentary declaration of the liberties of the people, assented to by King Charles I. in the beginning of his reign; and is classed among our statutes as 3 *Car.* 1. *c.* 1. By this it was provided that no one should be compelled to make, or yield any gift, loan, benevolence, tax, or such like charge, without consent by act of parliament; (as to which liberty or privilege, see 25 *Edw.* 1. *cc.* 5, 6; 34 *Edw.* 1. *st.* 4. *c.* 1.; & 14 *Edw.* 3. *st.* 2. *c.* 1.) This petition of right was closely followed by the still more ample concessions made by that unhappy prince to his parliament (particularly the dissolution of the Star-chamber, by 16 *Car.* 1. *c.* 10,) before the fatal rupture between them; and by the many salutary laws, particularly the Habeas Corpus Act, passed under King Charles II.

To these succeeded the Bill of Rights, or Declaration delivered by the Lords and Commons to the Prince and Princess of Orange, February 13, 1688; and afterwards enacted in Parliament, when they became King and Queen; which is as follows:—

Stat. 1 *W. & M.* *st.* 2. *c.* 2. § 1. Whereas the Lords Spiritual and Temporal, and Commons assembled at Westminster, representing all the estates of the people of this realm, did upon the 13th of February, 1688, present unto their majesties, then Prince and Princess of Orange, a declaration, containing that,

The said Lords Spiritual and Temporal, and Commons being assembled in a full and free representative of this nation, for vindicating their ancient rights and liberties, DECLARE,

That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal:

That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal:

That the commission for erecting the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious:

That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal:

That it is the right of the subjects to peti-

tion the king; and all commitments and prosecutions for such petitioning are illegal:

That the raising or keeping a standing army within the kingdom in the time of peace, unless it be with consent of parliament, is against law:

That the subjects which are protestants may have arms for their defence suitable to their conditions, and as allowed by law:

That elections of members of parliament ought to be free:

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament:

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted:

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason, ought to be freeholders:

That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void:

And for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently:

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties: and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

§ 6. All and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, and taken to be: and all the particulars aforesaid shall be firmly holden as they are expressed in the said declaration; and all officers shall serve their majesties according to the same in all times to come.

§ 12. No dispensation by *non obstante* of any statute shall be allowed, except a dispensation be allowed of in such statute; and except in such cases as shall be specially provided for during this session of parliament.

§ 13. No charter granted before the 23d of October, 1689, shall be invalidated by this act, but shall remain of the same force as if this act had never been made.

Lastly. These liberties were again asserted at the commencement of the last century, in the Act of Settlement, 12 & 13 W. 3. c. 2. whereby the Crown was limited to his present majesty's illustrious house; and some new provisions were added at the same fortunate era,

for better securing our religion, laws, and liberties, which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.

Thus much for the declaration of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but in most other countries of the world, being now more or less debased or destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England.

These rights may be reduced to three principal or primary articles;—

The right of personal security.

The right of personal liberty.

The right of private property.

As there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense. 1 *Comm.* 129.

The right of personal security consists in a person's uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. The enjoyment of this right is secured to every subject by the various laws made for the punishment of those injuries by which it is any way violated; for a particular detail of which, see titles *Assault, Homicide, Maihem, Libel, Nunsance, &c.*

Life, however, may, by the Divine permission, be frequently forfeited for the breach of those laws of society which are enforced by the sanction of capital punishments. On this subject it is sufficient at present to observe, that whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law



of England does therefore very seldom, and the common law does never, inflict punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. The words of the Great Charter, c. 29, are "*Nullus liber homo capiatur, imprisonetur, vel aliquo modo destruat, nisi per legale iudicium parium suorum aut per legem terræ*." No freeman shall be taken, imprisoned or any way destroyed, unless by the lawful judgment of his peers, or by the law of the land." Which words, *aliquo modo destruat*, according to Coke, include a prohibition not only of killing or maiming, but also of torturing, (to which our laws are strangers,) and of every oppression by colour of an illegal authority. And it is enacted by 5 *Edw. 3. c. 9.* that no man shall be attached by any accusation, nor forejudged of life or limb, nor shall his lands or goods be seized into the king's hands contrary to the Great Charter, and the law of the land. And again by 28 *Edw. 3. c. 3.* that no man shall be put to death without being brought to answer by due process of law. 1 *Comm.* 133.

The right of personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's inclination may direct; without imprisonment or restraint, unless by due course of law. On this right there is at present no occasion to enlarge. For the provisions made by the laws of England to secure it, see titles *Arrest, Bail, False Imprisonment, Habeas Corpus*, &c. &c.

The absolute right of property, inherent in every Englishman, consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only the laws of the land. The origin of private property is probably founded in nature; but certainly the modification under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages in exchange for which every individual has resigned a part of his natural liberty. The laws of England are, therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter, c. 29, has declared that no freeman shall be disseised or divested of his freehold, or of his liberties or free customs, (or be outlawed, banished, or otherwise destroyed, nor shall the king pass or send upon him,) but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none. See 5 *Edw. 3. c. 9*; 25 *Edw. 3. st. 5. c. 4*; ante, 28 *Edw. 3. c. 3*.

So great, moreover, is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. In instances where the property of an individual is necessary to be obtained for the accommodation of the public, as in the case of enlarging or turning highways, all that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power indulged with caution, and which none but the legislature, or those acting under their immediate direction, can perform. See 13 *Geo. 3. c. 78*; and title *Way*.

Another effect of this right of private property is, that no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm, or the support of the government, but such as are imposed by his own consent, or that of his representative in parliament. By 25 *Edw. 1. c. 5, 6.* it is provided that the king shall not take any aids or tasks, but by the common assent of the realm. And what the common assent is, is more fully explained by the instrument usually called the statute *de Tallagio non concedendo*, usually classed as statute 34 *Edw. 1. st. 4. c. 1*; which enacts that no talliage or aid shall be taken, without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freeman of the land; and again, by 14 *Edw. 3. st. 2. c. 1.* the prelates, earls, barons, and commons, citizens, burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded, under many preceding princes, by compulsive loans and benevolences, extorted without a real and voluntary consent, it was made an article in the Petition of Right, 3 *Car. 1.* that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And lastly, by the Bill of Rights, 1 *W & M. st. 2. c. 2.* it is declared, that levying money for or to the use of the crown by pretence of prerogative, without grant of parliament, or for longer time, or in other manner than the same is or shall be granted, is illegal. 1 *Comm.* 140.

The above is a short view of the principal

absolute rights which appertain to every Englishman, and the constitution has provided for the security of their actual enjoyment, excluding certain duties and duties, subjects, rights, which serve principally as barriers to protect and maintain those principal rights involved. Therefore,

The constitution, powers, and privileges of parliament.

The final plea of the king's prerogative.

The right of applying to courts of justice for redress of injuries.

The right of petitioning the king or parliament.

The right of having arms for defence.

This last auxiliary right of the subjects of having arms for their defence, suitable to their condition and degree, and such as are allowed by law, is declared by the Bill of Rights; and it is, indeed, a public allowance, under one restriction, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression. See title *Arms*.

As to the first and second of the subordinate rights above mentioned, see titles *King*, *Parliament*. With respect to the third and fourth, some short information is here subjoined.

Since the law is, in England, the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Charta*, c. 29, spoken in the person of the king, who, in judgment of law, says *Sci* of any subjects of this kingdom, but that the *Edw. C. 29*, is ever present, and repeating themselves are ought to be tried and determined in the in all his courts, are these: "*Nullo iudicemus, aut iudicemur rectum rei iustitiam*." See *Chancery, Courts, Judges, &c.*

"To none will we sell, to none will we deny, or delay, right or justice." And therefore every subject, for injury to him in his lands, goods, or his person, by any other of subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and specially without delay. 2 *Inst.* 55.

It were endless to enumerate all the affirmative acts of parliament wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know if he please; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. A few negative statutes may however be mentioned, whereby abuses, perversions, or delays of justice, especially by the prerogative, are

restrained. It is ordained by *Magna Charta*, c. 29, that no freeman shall be outlawed, that is, out of the protection and benefit of the law, but according to the laws of the land.—By 2 *Edw.* 3. c. 8; 11 *Ric.* 2. c. 10, it is enacted, "that no commands or letters shall be sent under the great seal, or the little seal, the great or privy seal, in disturbance of the law; or to disturb or delay common right; and though such commandments should come, the judges shall not cease to do right." This is made a part of their oath, by 15 *Edw.* 3. c. 4. And by the Bill of Rights it is declared, that the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

Not only the substantial part, or judicial decisions of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law; for which reason it is declared in the 16 *Car.* 1. c. 10, upon the dissolution of the Court of Star Chamber, that neither his majesty nor his privy council have any jurisdiction, power, or authority, by English bill, petition, articles, or bills (which were the course of proceedings in the Star Chamber, borrowed from the civil law, or by any other arbitrary way whatsoever, to examine or draw into question, or dispose of, the lands or goods of any subjects of this kingdom, but that the ordinary courts of justice, and by course of the right of petitioning the king, or either house of parliament, for the redress of grievances, appertains to every individual in cases of any uncommon injury or infringement of the rights already particularized, which the ordinary course of law is too defective to reach. The restrictions, for some there are, which are laid upon the right of petitioning in England, while they promote the spirit of peace, are no check upon that of liberty; care only must be taken, lest, under the pretence of petitioning, any riot or tumult, as was used in the opening of the memorable parliament in 1610; and to prevent this, it is provided by 13 *Car.* 2. st. 1. c. 5, that no petition to the king or either house of parliament, for any alteration in church and state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury in the county, and in London by the lord mayor,

aldermen, and common council; nor shall any petition be presented by more than ten persons at a time; but under these regulations it is declared by the Bill of Rights, that the subject hath a right to petition, and that all commitments and prosecutions for such petitioning are illegal. The sanction of the grand jury may be given either at the assizes or quarter sessions: the punishment for offending against the 13 Car. 2. not to exceed a fine of 100*l.* and three months imprisonment. Upon the trial of Lord George Gordon, the Court of King's Bench declared that they were clearly of opinion that this statute was not in any degree affected by the Bill of Rights. *Dougl.* 571.

In the several articles above enumerated, consist the *Rights*, or, as they are more frequently termed, the *Liberties of Englishmen*—liberties more generally talked of than thoroughly understood, and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded, should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other; and all these rights and liberties it is our birth-right to enjoy entire, unless where the laws of the country have laid them under necessary restraints—restraints in themselves so gentle, and so moderate, as will appear on minute inquiry that no man of sense or probity would wish to see them slackened; for all of us have it in our choice to do every thing that a good man would desire to do, and are restrained from nothing but what would be pernicious either to ourselves or our fellow-citizens; so that this review of our situation may fully justify the observation, that the *English is the only nation in the world where political or civil liberty is the direct end of its constitution.* *Montesq. Sp. L.* xi. 5. See 1 *Comm. c.* 1. *ad. fin.*

**LIBERTY TO HOLD PLEAS.** Signifies to have a court of one's own, and to hold it before a mayor, bailiff, &c. See *Franchise*.

**LIBLACUM.** The manner of bewitching any person; also a barbarous sacrifice. *Leg. Athelstan*, 6.

**LIBRÆ, ARSÆ, and PENSATÆ, and AD NUMERUM.** A phrase which often occurs in the *Domesday Register* and some other memorials of that and the next age, as "Ailesbury, in Buckinghamshire, the king's manor. *In totis valentis reddit lvi. libr. arsas et pensatas, & de thelono x libr. ad numerum, i. e.* in the whole value it pays fifty-six pounds burnt and weighed, and for toll ten pounds by tale." For they sometimes took their money *ad numerum*, by tale in the current coin upon consent; but sometimes they rejected the common coin by tale, and money coin-

ed elsewhere than at the king's mint, by cities, bishops, and noblemen, who had mints, as of too great alloy, and would therefore melt it down to take it by weight when purified from the dross: for which purpose they had in those times always a fire ready in the Exchequer to burn the money and then weigh it. *Cowell.* See further, Sir *H. Ellis's General Introduction to Domesday Book*, vol. 1. 161.

**LIBRA PENZA.** A pound of money in weight. See the preceding article.

**LIBRARY.** Where a library is erected in any parish, it shall be preserved for the uses directed by the founders; and incumbents and ministers of parishes, &c. are to give security therefore, and make catalogues of the books, &c. None of the books shall be alienable without consent of the bishop, and then only where there is a duplicate of such books; if any book shall be taken away and detained, a justice's warrant may be issued to search for and restore the same; also action of trover may be brought in the name of the proper ordinary, &c. And bishops have power to make rules and orders concerning libraries, appoint persons to view their condition, and inquire of the state of them in their visitation. 7 *Ann. c.* 14.

Cotton Library settled in the family for the use of the public, 12 & 13 *Wm. 3. c.* 5; vested in the crown, 5 *Ann. c.* 30; transferred to the British Museum, 26 *Geo. 2. c.* 22; 27 *Geo. 2. c.* 16. § 3.

**LIBRATA TERRÆ.** Four oxgangs of land, every oxgang containing thirteen acres. *Skene, verb. Bovata terra.* So much land, anciently, as was worth twenty shillings a year: for in Henry the Third's time, he that had *quindecim libras terræ*, was to receive the order of knighthood. See *Farding-deal*.

**LICENCE** [*licentia*.] A power or authority given to a man to do some lawful act; and is a personal liberty to the party to whom given, which cannot be transferred over; but it may be made to man, or his assigns, &c. 12 *Hen. 7. 25.* There may be a parol licence, as well as by deed in writing; but if it be not for a certain time, it passes no interest. 2 *Nels. Abr.* 1123. And if there be no time certain in the licence, as if a man license another to dig clay, &c. in his land, but doth not say for how long, the licence may be countermanded; though if it be until such a time, he cannot. *Poph.* 151. If a lessor license his lessee (who is restrained by covenant from aliening without licence) to alien, and such lessor dies before he aliens, this is no countermand of the licence: so it is if the lessor grants over his estate. *Cro. Jac.* 133. But where a lord of a manor for life granteth a licence to a copyhold tenant to alien, and



dieth, the licence, is destroyed and the power of alienation ceaseth. 1 *Inst.* 52. Copyhold tenants leasing their copyhold for a longer time than one year, are to have a licence for it, or they incur a forfeiture of their estates. 1 *Inst.* 63. If any licence is given to a person, and he abuses it, he shall be adjudged a trespasser *ab initio*. 8 *Rep.* 146.

A. grants to B. a way over his ground, or licence to go through it to the church; by this none but B. himself may go in it. But if one give me licence to go over his land with my plough, or to cut down a tree therein, and take it away, by this I may take what help is needful to do the same. So if it be to hunt, and kill, and carry away deer; not if it be to hunt and kill only. 12 *Hen.* 7. 25; 13 *Hen.* 7. 8; 8 *Rep.* 146.

A mere licence to enjoy a privilege in land, may be granted without deed, and even without writing, notwithstanding the Statute of Frauds. *Say.* 3; *Palm.* 81; 8 *East.* 310; 7 *Bing.* 692. See further *Copyhold*, *Lights*, *Trespass*, *Way*, &c.

By licence a man may practise physic and surgery in London, and do divers other things. Licences are also necessary for the carrying on various trades and professions, on which a duty is laid for the purpose of raising a revenue to government. See *Taxes*.

**LICENCE TO ALIEN IN MORTMAIN.** Alienations in mortmain to ecclesiastical persons, &c. are restrained by several statutes; but the king may grant licences to any person or bodies politic, &c. to alien or hold lands in mortmain. See 7 & 8 *Wm.* 3. c. 37; and *tits. Charitable Uses, Mortmain*.

**LICENCE TO ARISE** [*licentia surgendi*.] A liberty or space of time anciently given by the court to a tenant to arise out of his bed, who was essoigned *de malo lecti*, in a real action; and it was also the writ thereupon. *Bracton*. And the law in that case was, that the tenant might not arise or go out of his chamber until he had been viewed by knights thereto appointed, and had a day assigned to him to appear; the reason whereof was, that it might be known whether he caused himself to be essoined deceitfully or not; and if the demandant could prove that he was seen abroad before the view or licence of the court, he should be taken to be deceitfully essoined, and to have made default. *Bract.* lib. 5; *Fleta*, lib. 6. c. 10. See *Essoin*.

**LICENCE TO FOUND A CHURCH.** Granted by the king. See *Church*.

**LICENCE TO GO TO ELECTION** of bishops, is by *congré d'elire* directed to the dean and chapter to elect the person named by the king, &c. *Reg. Writs*, 294. 25 *Hen.* 8. c. 20. See *Bishops*.

**LICENCE OF THE KING** to go beyond sea may be revoked before the time expires, because it concerns the public good. *Jenk. Cent.* See *Ne exeat Regnum*.

**LICENCE OF MARRIAGE.** Bishops have power to grant licences for the marrying of persons; and parsons marrying any person without publishing the banns of matrimony, or without licence, incur a forfeiture of 100*l.* &c. by 7 & 8 *Wm.* 3. c. 35. See also 4 *Geo.* 4. c. 76; and *tit. Marriage*.

**LICENCE TO ERECT A PARK, WARREN, &c.** See *Park*, *Warren*.

**LICENSING OF BOOKS.** See *Libel*, *Printing*.

**LICENTIA CONCORDANDI.** Is that licence for which the king's silver was paid on passing a fine. See *Fine of Lands*.

**LICENTIA SURGENDI.** See *Licence to arise*.

**LICENTIA TRANSFRETANDI.** A writ or warrant directed to the keeper of the port of Dover, or other seaport, commanding them to let such persons pass over sea, who have obtained the king's licence thereunto. *Reg. Orig.* 193.

**LICKING OF THUMBS.** A form by which bargains of importance were amicably completed; and still in use in trifling bargains among the lower orders. *Scotch. Dict.*

**LIDFORD LAW.** A proverbial speech, intending as much as to hang a man first, and judge him afterwards.

**LIEGE** [*Ligeus*.] Is used for liege lord, and sometimes for liege man. Liege lord is he that acknowledgeth no superior; and liege man is he who oweth allegiance to his liege lord. The king's subjects are called liege people, because they owe and are bound to pay allegiance to him. 8 *Hen.* 6. c. 10; 14 *Hen.* 8. c. 2. But in ancient times, private persons, as lords of manors, &c. had their lieges. *Skene* saith, that this word is derived from the Italian *liga*, a bond or league; others derive it from *litis*, which is a man wholly at the command of the lord. *Blount*. See *Allegiance*.

**LIEGES and LIEGE PEOPLE** [*Ligati*.] See *Liege*.

**LIEGE POUSTIE.** A state of health, in contradistinction to death-bed. A person possessed of the lawful power (*legitima potestas*) of disposing, is said to be in liege poustie.

**LIEN** [*Fr.*] Is a word used in the law, of two significations; personal lien, such as bond, covenant, or contract; and real lien, a judgment, statute, recognizance, which oblige and affect the land. *Terms de Ley*. It signifies an obligation, tie, or claim annexed to, or attaching upon, any property;

without satisfying which such property cannot be demanded by its owner.

In 2 *East*, 235, Lord *Ellenborough* defined a lien to be a right in one man to retain that which is in his possession belonging to another, till certain the demands of him, the person in possession, are satisfied.

The possession must be lawful: a creditor cannot tortiously seize upon his debtor's goods, and then claim to retain them by virtue of a lien. 2 *Moore*, 730. See 8 *Price*, 567.

There are two kinds of lien known to the law, viz. particular or general. 3 *B. & Burr*. 494. A particular lien is a right to retain the thing itself in respect of which the claim arises. 4 *Burr*. 2214, 2223; 7 *East*, 240. A general lien is a right to hold, not only for demands arising out of the thing retained, but for a general balance of accounts relating to dealings of the like character.

The former is recognized and favoured by the common law, with some exceptions. See 1 *Atk.* 228; *Doug.* 100. But the latter is regarded strictly, and is only to be established either by express contract, or by that which is evidence of a contract, (6 *T. R.* 14,) the usage of trade, (7 *East*, 224,) or previous dealing between the same parties wherein such a right has been allowed. 1 *Atk.* 236; 4 *Burr.* 2221.

1. Who have particular liens.
2. Who have general liens.
3. How a lien may be lost or waived.

1. When a person has bestowed labour and skill in the alteration or improvement of any article delivered to him, he has a lien on it for his charge. Thus a tailor, (9 *East*, 433) a miller and shipwright, (1 *Atk.* 235; 4 *B. & A.* 341), have each a lien; so has a farrier for the expense of keeping and training a race-horse, for, by his instruction he has wrought an essential improvement in the animal's character and capabilities. 1 *M. & M.* 236. But the rule does not appear to extend to keepers of livery stables, *R. & M.* 193; 1 *C. & M.* 743; although it does to innkeepers, principally on the ground, it would seem, that the latter are bound by law to entertain travellers, and to take care of their goods and horses. See 3 *B. & A.* 283; and tit. *Innkeepers*, III.

Every one, whether an attorney or not, has by the common law a lien on the specific deed or paper delivered to him to do any specific work or business upon; but not on other papers of the same party, unless he be an attorney. 4 *Taunt.* 807.

The master of a ship has no lien on it for money expended, or debts incurred by him for repairs done to it on the voyage. 9 *East*, 426. 1 *B. & A.* 575.

2. An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. 1 *M. & S.* 535. A factor has a lien upon each portion of goods in his possession for his general balance, as well as for the charges upon those particular goods. 6 *T. R.* 262; 2 *East*, 529. So have packers, where they are in the nature of factors. 4 *Burr.* 2214. Bankers also have a lien upon bills deposited with them for a general account, 5 *T. R.* 488; 1 *B. & P.* 546; 9 *East*, 14; but not on securities pledged with them for a specific sum; 3 *Bro. C. C.* 21; or on muniments casually left in their banking-houses after they have refused to advance money upon them. 7 *Taunt.* 278. Policy brokers have also a general lien. 4 *Campb.* 60, 349. It has likewise been determined that calico-printers, 3 *Esp.* 268; dyers, 4 *Esp.* 53; and wharfingers, 1 *Esp.* 109; 3 *Esp.* 81; have liens for their general balance, but not fullers; 2 *B. Moore*, 547.

A printer has a general lien upon the copies of a work not delivered, for his balance. 3 *M. & S.* 167.

The lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by instances sufficiently numerous and general to warrant so extensive a conclusion, affecting the custom of the realm, is not to be favoured; nor can it be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular words of dealing between the respective parties. 6 *East*, 519. See also 7 *East*, 224.

3. Goods subject to a lien are in the nature of a pledge, 3 *T. R.* 123; 6 *T. R.* 263; which being personal, cannot be transferred, 5 *T. R.* 606; 1 *East*, 337; so that if they are parted with, the lien in general is lost; 1 *Burr.* 494; 1 *Bla.* 114; 1 *East*, 4.

But where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight. 1 *M. & S.* 157.

If a party having a lien on goods cause them to be taken in execution at his own suit, and purchase them, he so alters the nature of the possession, that his lien is destroyed, though the goods may never have left his premises. 8 *Taunt.* 149. So if he abuse the goods, as

for instance by pledging them, his lien is forfeited. 1 *M. & Rob.* 252; 3 *Tyrr.* 577.

Where a person, when goods are demanded from him, claims to retain them on some other ground, and makes no mention of his lien, he will be considered as having waived it. 1 *Comph.* 410, *n.*; 6 *B. & C.* 36.

The right of lien may also be lost or waived by the special agreement of the parties. If a factor enter into a contract inconsistent with the exercise of the right (as if he stipulate for a particular mode of payment,) he must be understood as waiving it. 16 *Ves.* 280; 6 *T. R.* 258; 7 *T. R.* 64.

A vendor who takes a promissory note in payment, and negotiates it, loses his lien, nor is it revived by the dishonour of the note outstanding in the hands of an indorsee. 5 *T. R.* 313; 3 *B. & A.* 497; 6 *B. & C.* 373; 1 *N. & M.* 229. See further *Attorney, Factor, &c.*

**LIEU.** Instead or in place of another thing. And when one thing doth come in the place of another, it shall be of the same nature as that was; as in case of an exchange, &c. 2 *Shep. Abr.* 359. See *Exchange.*

**LIEU CONUS.** In law proceedings signifies a castle, manor, or other *notorious place*, well known and generally taken notice of by those that dwell about it. 2 *Lit. Abr.* 641. A *venire facias* for a jury to appear, may be from a *lieu conus*; and a fine or recovery of lands in *lieu conus*, was good; but it is said in a *scire facias* to have execution of such fine, the will or parish must have been named. 2 *Cro.* 574; 2 *Mod.* 48, 49.

**LIEUTENANT** [*Locum Tenens.*] Is the king's deputy, or he that exercises the king's or any other's place, and represents his person; as the Lieutenant of Ireland. See 4 *Hen.* 4. c. 6; 2 & 3 *Edw.* 6. c. 2. The Lieutenant of the Ordnance. See 39 *Eliz.* c. 7. And the Lieutenant of the Tower, an officer under the Constable, &c. The word lieutenant is also used for a military officer next in command to the captain.

**LIFE ESTATES.** Estates of freehold, not of inheritance. Of these some are conventional, or expressly created by the act of the parties; others merely legal, or created by construction and operation of law. See *Curtsey, Dower, Estates Tail, Tail after Possibility, &c.*

Expressly for life estates, created by deed or grant, (which alone are properly conventional,) are, where a lease is made of lands or tenements to a man to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases he is styled tenant for life; only when he holds the estate by life of another, he is usual-

ly called *tenant per autre vie* (for another's life.) *Lit.* § 56.

These estates for life are, like inheritance, of a feudal nature: and were for some time the highest estate that any man could have in feud. See *Tenures*. They are given and conferred by the same feudal words and solemnities, the same investitures or livery of seisin, as fees of inheritance; and they are held by exactly the same tenure, and stand conventional rents and services as the lord and lessor and his tenant or lessee have agreed on. 2 *Comm.* c. 8. p. 120.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As if one grant to A. B. the manor of Dale, this makes him tenant for life. *Co. Lit.* 42. For though, as there are no words of inheritance or heirs mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or grant for term of life generally, shall be construed to be an estate for the life of the grantee, in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the King. *Co. Lit.* 36, 42.

Such estates for life will endure, generally speaking, as long as the life for which they are granted; but there are some estates for life which may determine upon future contingencies before the life which they are created expires. As if an estate be granted to a woman during her widowhood, or to a man until he is promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. *Co. Lit.* 42; 3 *Rep.* 20. Yet while they subsist, they are reckoned estates for life; because the time for which they will endure being uncertain, they may by possibility last for life; if the contingencies upon which they are to determine do not sooner happen.

In case an estate be granted to a man for his life generally, it may also determine by his civil death for which reasons, in conveyances the grant is usually made for the term of a man's natural life, which can only determine by his natural death. This civil death was formerly held to commence if any man was banished or abjured the realm, by the process of the common law, (see *Abjuration*.)



or entered into religion, that is went into a monastery, and became there a monk professed; in which cases he was absolutely dead in law, and his next heir should have his estate; for such banished man was entirely cut off from society; and such monk, upon his profession, renounced solemnly all secular concerns.—But even in the times of Popery the laws of England took recognizance of profession in any foreign country, because the fact could not be tried in our courts, *Co. Lit.* 132; and, therefore, since the Reformation this disability is held to be abolished, 1 *Salk.* 162; as is also the disability of banishment consequent upon abjuration, by 21 *Jac.* 1. c. 28. One species of civil death may, however, still exist in this country, that is, where a man by act of parliament is attainted with treason or felony, and saving his life, is banished for ever; this Lord *Coke* declares to be a civil death; but he says, a temporary exile is not a civil death. Under this reasoning, where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, there can be very little doubt but this amounts to a civil death; this practice did not exist in the time of Lord *Coke*, who says, that a man can only lose his country by authority of parliament. 1 *Inst.* 133. See 1 *Comm.* c. 1. p. 131, 133, and *n.*

The incidents to an estate for life are principally the following, which are applicable not only to those species of tenants for life, which are expressly created by deed, but also to those which are created by act and operation of law. See 2 *Comm.* c. 8.

*First*, every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable estovers or botes. *Co. Lit.* 41. For he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. See *Common of Estovers*. But he is not permitted to cut down timber, or do other waste upon the premises; for the destruction of such things as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance. 1 *Inst.* 53. See *Waste*.

In the *second* place, Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate; because such a determination is contingent and uncertain. *Co. Lit.* 55. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors have the emblements or profits of the crop; for the estate was determined by the hand of God, and it is a maxim in the law, *actus Dei nemini facit injuriam*.—

The representatives therefore of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring, and sowing the lands, and also, for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it.—Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord who was entitled to the reversion was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole.—From hence our law of emblements seems to have been derived, but with very considerable improvements; and its advantages are particularly extended to the parochial clergy by 28 *Hen.* 8. c. 11; for all persons who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation. 1 *Comm.* c. 8. p. 122, 123. See title *Emblements*.

A *third* incident to estates for life relates to the under-tenants or lessees; for they have the same, nay, greater indulgencies than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place. *Co. Lit.* 55. Greater, for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking a husband is her own act, and therefore deprives her of the emblements, but if she leases her estate to an under-tenant, who sows the lands, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her. *Cro. Eliz.* 461; 1 *Roll. Abr.* 727. The lessees of tenants for life had also at the common law another most unreasonable advantage; for at the death of their lessors, the tenants for life, these under-tenants might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land, since the last quarter-day or other day assigned for payment of rent. 10 *Rep.* 127. To remedy which, it was enacted by 11 *Geo.* 2 c. 19. § 15. that the executors or administrators of tenant for life, on whose death any lease determines, shall recover of the lessee a rateable proportion of rent, from the last day of payment to the death of such lessor.

By the 4 & 5 *Wm.* 4. c. 22. the provisions

of the above act are extended to rents reserved on leases determining on the death of the persons making them, (though not strictly tenants for life,) or on leases of lands held *pur autre vie*.

By § 2. all rents-service, rents-charge, and other rents, annuities, pensions, moduses, compositions, and all other payments due at fixed periods, reserved in leases made, or payable under instruments executed, or (being a will) coming into operation, after the passing of the act, shall be apportioned, and a proportional part thereof, from the last time of payment to the day of the death of the party interested therein, paid to his or her executors, &c. See further *Rent*.

By 19 *Car. 2. c. 6.* where persons for whose lives estates are held, shall absent themselves for seven years, they shall be presumed dead. And by 6 *Ann. c. 18.* person for whose lives estates are held, shall on application to the lord chancellor, be produced. The tenant holding after the determination of life, deemed a trespasser. See *Death*. Posthumous children enabled to take in remainder, where the life estates is determined. 10 & 11 *W. 3. c. 16.* See *Occupancy*.

**LIFE RENT.** A rent which a man receives for term of life, or the sustentation of it. *Skene*.

**LIGEANCE** [*Legeancy, ligentia.*] The true and faithful obedience of a subject to his sovereign; and is also applied to the territory and dominion of the liege lord; as children born out of the ligeance of the king, &c.—35 *Edw. 3;* *Co. Lit.* 126. See *Alligiance*.

**LIGHTING AND WATCHING.** By the 11 *Geo. 4. c. 27.* provisions was made for the lighting and watching of parishes in England and Wales. But doubts having arisen as to the construction of some of its clauses, that act was repealed by the 3 & 4 *W. 4. c. 90.* The latter statute (§ 5.) enacts, that on the application of the three rated inhabitants the churchwardens of any parish are to convene a meeting of the rate-payers to determine whether the provisions of the act shall be adopted. By § 8. the majority in favor of the adoption must consist of two-thirds of the votes of the rate-payers.

**LIGHTS.** A right to the enjoyment of light and air may have its commencement in an express agreement, or in mere occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall: for there the first occupancy is rather in him than me. 2 *Comm.* 402. Every man in his own land has a right to all the light and air which will

come to him, and he may erect even on the extremity of his land, buildings, with as many windows as he pleases, without any consent of the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbor. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his own land shall continue to enjoy his light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. Per *Littledale, J.*, 3 *B. & Cr.* 340. See 2 *B. & Cr.* 691.

A parol licence given to put out a window, after it has been acted on and expense incurred, cannot be revoked. 8 *East*, 308.

The enjoyment of lights for twenty years without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them. 2 *B. & Cr.* 686; *Darwin v. Upton*, cited 3 *T.R.* 159; 2 *Wms. Saund.* 175.

Previous, however, to the recent act (2 & 3 *W. 4. c. 71.*) the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years, and a presumption against the owner of lands was not so easily inferred in the case of lights as in cases of rights of way or common, where the tenant suffered an immediate injury. Thus it was held, that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises, by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to such enjoyment; although he would have been bound by twenty years acquiescence after having known that the windows were opened. 11 *East*, 370. So where light had been enjoyed for more than twenty years contiguous to land which within that period had been glebe land, but was conveyed to a purchaser under the 55 *Geo. 3. c. 147.*, it was

decided that no action would lie against such purchaser for building so as to obstruct the lights; inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. 4 B. & Ald. 579. See also 2 B. & Cr. 686.

Now by the 2 & 3 W. 4. c. 71. § 3. when the access and use of light to and from any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Under the above clause an absolute right to light may be acquired by an enjoyment without interruption for twenty years, as the eighth section of the act, providing for possession during particular estates, does not extend to lights.

A man cannot derogate from his own grant, and therefore where a person possesses a house, having the actual use of certain lights, and also possesses the adjoining land, and sells the house to another, although the lights be new, neither he nor any one claiming under him can build on the adjoining land, so as to obstruct or interrupt the enjoyment of such lights. 1 Lev. 122; 1 Vent. 237; 1 Price, 27; 1 R. & M. 24; 1 M. & M. 396; 9 Bing. 309; 2 Cr. & Jerv. 128. Upon the same principle, where several adjoining portions of land, on which the building of houses had been commenced, were sold, and by the conditions of sale were to be finished according to a particular plan within the space of two years, it was held that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser who had built his house according to the plan. 1 Price, 27. For the lots were sold under an implied condition, that nothing should be done by which the windows for which spaces were then left might be obstructed. *Ibid.* And where the plaintiff purchased a house of A., and the defendant at the same time purchased the adjoining land, upon which an erection of one story high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building ground belonging to the defendant; it was held, that the defendant was not entitled to build a greater height than one story, if by so doing he obstructed the plaintiff's lights. 9 Bing. 305.

Shutting up windows with bricks and mortar for above twenty years will destroy the privilege of light. 3 Camp. 514. And the

right to the use of light and air, which a party has appropriated to his own use, may be lost by a mere non-user, even for a less period than twenty years, unless an intention of resuming the right in a reasonable time be shown when it ceased to be used. Thus where a person entitled to ancient lights pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place where there had formerly been a window in the old wall, it was held, in an action for obstructing the light of the new window, that it must at least be shown (which the plaintiff was bound to prove) that at the time of the erection of the blank wall, and the apparent abandonment of the former lights, it was not a perpetual but a temporary abandonment of the enjoyment, with an intention to resume it at a reasonable time. 3 B. & Cr. 336. And it was said by *Littledale, J.*, that if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light had ceased. But he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. *Ibid.* 341.

Stopping lights of a house is a nuisance; but stopping a prospect is not, being only matter of delight, not necessity; and a person may have either an assize of nuisance against the person creating any such nuisance, or he may stand on his own ground and abate it. 9 Rep. 58; 1 Mod. 54.

When a party has acquired a right to the use of light, an action lies on the case for obstructing it. 9 Rep. 59 a; *Boury v. Pope*, 1 Leon. 168. In order to sustain such an action, it is not necessary to show a total privation of light. If the plaintiff can show that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient. 4 Esp. 69. Where an ancient window is enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the space occupied by the ancient window, although a greater portion of light be admitted by the unobstructed part of the enlarged window than was anciently enjoyed. 3 Camp. 80. A building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light which it possessed



in its former state. 1 *Camp.* 392. So where an old house is pulled down and a new one built, the light in the new house must be in the same place, of the same dimensions, and not more in number than in the old house. 2 *Vern.* 616. Where one party has the enjoyment of light, and alterations are made in the adjoining buildings, the diminution of light, as a ground of action against the party building, must be such as makes the premises to a sensible degree less fit for the purpose of business or occupation. 5 *Car. & Payne*, 438. The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build on the adjoining land, opposite the offensive window. 3 *Campb.* 80. See 9 *Rep.* 58 b; 4 *Esp. N. P. C.* 69. So the building of a wall which merely intercepts the prospect of another without obstructing his lights, is not actionable. 1 *Mod.* 55; 2 *Keb.* 611, 642. See 2 *Ves. sen.* 453. In a recent case it was held, that the use of an open space of ground for the purpose of requiring light and air, as a timber yard and sawpit, for twenty years, did not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air. 1 *Mo. & Rob.* 230. A reversioner may maintain an action for obstructing lights, for if he were prevented from suing for such an injury during the continuance of the lease, he might have great difficulty in proving his right when he come into possession. 1 *Mood. & Malk.* 350. See 5 *Taunt.* 139. And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery. 2 *B. & Adol.* 97. And the owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. *Say. R.* 215. See also *Burr.* 2141; 3 *Leo.* 109. Such an action may be brought not only against the party who first erected the nuisance, but also his lessee or assignee for continuing it. 12 *Mod.* 635; 2 *Salk.* 460; 1 *Ld. Raym.* 713. See also *Carth.* 456; 1 *Keb.* 194. But after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given, 12 *Mod.* 640; *Carth.* 455; unless a continuance of the nuisance be laid in the declaration. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen who performed, and the clerk who superintended the works, are liable to an action. 6 *B. Moore*, 47.

The court of Chancery will grant an injunction to restrain the owner of a house from making any erection or improvements, so as to darken or obstruct the ancient lights or windows of an adjoining house. 2 *Russ.* 121.

The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent as well as remedy an evil, for which damages, more or less, would be given at law; but the court will not interfere upon every degree of darkening ancient lights, nor in every case where an action may be maintained. 16 *Ves.* 338. See *Injunction*.

**LIGHT-HOUSE.** See *Beacon*.

**LIGNAGIUM.** The right of cutting of fuel in woods; and sometimes it is taken for a tribute or payment due for the same.

**LIGNAMINA.** Timber fit for building. *Dufresne*.

**LIGULA.** A copy or transcript of a court-roll or deed mentioned by Sir John Maynard in his *Mem. in Scaccar.* 12 *Edw.* 1.

**LIGURITOR.** A flatterer. *Leg. Canut.* 29. *Somner* is of opinion that it signifies a glutton, from the Saxon *licera*, *gulosus*. *Cowell*.

**LIMBS.** The limbs as well as the life of a man are of such high value, in the estimation of the law of England, that it pardons even homicide, if committed *se defendendo*, or in order to preserve them. 1 *Comm.* 130. See *Assault*, *Homicide*, *Maim*.

## LIMITATION.

[LIMITATIO.] A certain time, assigned by statute, within which an action must be brought. In Scotland it is termed *Prescription*.

I. *The Nature and Origin of Periods of Limitation.*

II. *The various Statutes of Limitation as applicable to—1, Actions relating to Real Property; 2, Penal; and, 3, Personal Actions.*

III. *Of the Time when the Right of Action accrues so as to be affected by the Statute (21 Jac. 1. c. 16.) and of the Courts bound thereby.*

VI. *The Exceptions in that Statute—1, Relating to Infants; 2, Merchants' Accounts; 3, Persons beyond Sea; 4, Executors and Administrators; 5, In cases of Defect in Jurisdiction; 6, Of suing out a Writ to save the Statute; 7, Of reviving a Debt barred by the Statute; 8, Of Pleading.*

I. The time of limitation is two-fold; first, in writs by divers acts of parliament; secondly, to make a title to any inheritance, and that is by the common law. *Co. Lat.* 114, 115.

It seems that by the common law there was no stated or fixed time to bring actions; for

though it be said by Bracton, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet Lord Coke says, that the limitation of actions was by force of divers acts of parliament; also, says he, this general position of Bracton's admitted of several exceptions. *Bract. lib. 2 fol. 228*; *2 Inst. 95*; *Co. Lit. 115*; *4 Co. 10, 11*.

By the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, that is to say, a year and a day after he was fourteen years old, or else he lost his land, according to the feudal text; *Preterea si quis infeudatus major quatuordecim annis sua incuria, vel negligentia per ann. et diem steterit, quod feudi investituram à proprio domino non peterit, transacto hoc spatio, feudum amittat et ad dominum redeat. Spelm. Gloss. 32*.

The fixing upon the period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule; and on this occasion was pitched upon because the services appointed seem to be annually computed; therefore the feud was ordered to be taken up within such time as such annual services became due, or else it was lost and returned to the lord; and the same time that was appointed to the tenant to claim from the lord was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor dying seised cast the right of possession upon the heir; and this was to keep the same uniformity in point of time through the law, as also that the lord might be at a certainty whom he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right and possession, in case he did not claim within the same time upon the disseisor; that the heir of the disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also if the disseisee did not claim within the same time, the right of possession was relinquished. *Spelm. Gloss. annus et dies, 32, 33*.

Before the 32 Hen. 8. c. 2. certain remarkable periods were fixed upon within which the titles whereon men designed to be relieved must have accrued; thus in the time Henry III. by the statute of Merton, 20 Hen. 3. c. 8. at which time the limitation in a writ of right was from the time of King Henry I. it was reduced to the time of King Henry II.; and

for assizes of *mort d'ancestor*, they were thereby reduced by the last return of King John out of Ireland, which was 12 Johannis; and for assizes of *novel disseisin à prima transfretatione Regis in Normanniam*, which was 5 Hen. 3. and which before that had been *post ultimum reditum Henrici III. de Britannia*: and this limitation was also afterwards by the statutes *Westm. 1. (3 Edw. 1.) c. 39*, and *Westm. 2. (3 Edw. 1.) c. 46*. reduced to a narrower compass, the writ of right being limited to the first coronation of Henry III. For these ancient limitations, see *Co. Lit. 14 b, 15 a*; *2 Inst. 94, 95*; *2 Rol. Abr. 111*; *Hale's Hist. of the Law, 122*; *2 Keb. 45*. This last date of limitation continued so long unaltered, that it became indeed no limitation at all; it being above three hundred years from Henry III.'s coronation to the year 1540, when the Statute of Limitations, 32 Hen. 8. c. 2. was made. This statute, therefore, instead of limiting actions from the date of a particular event, as before, which in process of years grew abused, took another and more direct course, which might endure for ever, by limiting a certain period of time previous to the commencement of every suit. See 3 Comm. c. 10. p. 189.

Since the passing of that act, various other statutes of limitation have been enacted, which will be noticed under the next division.

By 21 Jac. 1. c. 2. a time of limitation was extended to the case of the King, viz. sixty years precedent to February 19, 1623; 3 Inst. 189. But this becoming ineffectual by efflux of time, the same term of limitation was fixed, by 9 Geo. 3. c. 16. to commence and be reckoned backwards, from the time of beginning any suit or other process, to recover the thing in question; so that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim, *nullum tempus occurrit regi*. And the like provision was extended to Ireland by 48 Geo. 3. c. 47. The King is likewise bound by the Prescription Act. (2 & 3 W. 4. c. 71.) and by the Modus Act. (2 & 3 W. 4. c. 100.) See tit. King. V. 2.

II. 1. By 32 Hen. 8. c. 2. it is enacted, "That no person shall from thenceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim, to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodiess, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements,

rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within *three-score* years next before the *teste* of the same writ, or next before the said prescription, title, or claim so hereafter to be sued, commenced, brought, made, or had." See title *Possession*.

Par. 2. "No manner of person shall sue, have, or maintain, any assize of *mort d'ancestor*, cosenage, ayle, writ of entry upon disseisin, done to any of his ancestors or predecessors, or any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was, or hereafter shall be, seised of the same manors, lands, tenements, or other hereditaments, within *fifty* years next before the *teste* of the original of the same writ hereafter to be brought."

Par. 3. "No person shall sue, have, or maintain any action for any manors, lands, tenements, or other hereditaments, of or upon his or their own seisin or possession therein, above *thirty* years next before the *teste* of the original of the same writ hereafter to be brought."

Par. 4. "No person shall hereafter make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service, in the same avowry, or cognizance in the possession of any other, whose estates shall pretend or claim to have, above *fifty* years next before the making of the said avowry or cognizance."

Fifty years is the true term of limitation in this instance; though Rastall's, and some other editions of the statutes, make it only forty years; an error adopted by Coke (2 *Inst.* 95,) and other writers. See 3 *Comm. c.* 10. p. 189. in n.

Par. 5. "All formedons in reverter, formedons in remainder, and *scire facias* upon fines of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within fifty years next after the title and cause of action fallen, and at no time after the fifty years past."

In this statute are contained provisions for suits depending or to be commenced within six years after passing the act, as also for parties being at the time of the act under age, covert, or otherwise disabled: but there are no general savings in this act for any such disabilities.

By 1 *Mar. st.* 2. c. 5. it was enacted that the 32 *Hen.* 1. c. 2. should not extend to any writ of right of advowson, *quare impedit*, or assize of *darrien presentment*, nor *jus patronatus*, nor to any writ of right of ward, writ of ravishment of ward for the wardship of the body, or for the wardship of any castles, honours,

manors, lands, tenements, or hereditaments, holden by knight-service; but that such suits might be brought as before the making of the said act.

There was, therefore, no limitations with regard to the time within which any actions touching advowsons were to be brought; at least none later than the times of Richard I. and Henry III. previous to the recent act 3 & 4 *W. 4. c.* 27. See *post*.

By 21 *Jac.* 1. c. 16. which the preamble declares to be for quieting men's estates, and avoiding of suits, it is enacted, § 1. "That all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any right or title of entry, into any manors, lands, tenements, or hereditaments, now held from him or them, shall therein enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law, &c."

"Provided, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one-and-twenty years, feme covert, *non compos mentis*, imprisoned, or beyond the seas; that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years



he executed, bring his action, or make his entry, under only shall extend and be applied to a female as he might have done before this act; so as well as a male."

said person and persons, or his or their heir § 2. "That after the 31st December, 1833, and heirs, shall, within ten years next after his no person shall make an entry or distress or and their fullage, discovery, or finding of sound bring an action to recover any land or rent but on a chargement out of prison, or coming within twenty years next after the time at into this realm, or death, take the benefit of which the right to make such entry or distress, and sue forth the same, and at no time after or to bring such action shall have first accrued the said ten years."

By the 3 & 4 W. 4. c. 27, founded upon the first court of the Real Property Commission-ers, and entitled "An Act for the Limitation of Actions and Suits relating to Real Property, and for amplying the Remedies for trying the Rights thereto," a variety of most important changes have been introduced: real actions, with one or two exceptions, have been abolished, and twenty years adopted as the leading period of limitation.

§ 1. Enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows, that is to say, the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation, sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent," shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land except moduses or compositions belonging to a spiritual or eleemosynary corporation sole; and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or aggregate, and to a class of creatures or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gen-

der only shall extend and be applied to a female as well as a male."

§ 2. "That after the 31st December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same."

§ 3. "That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in the receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been possessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of

such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken."

This clause introduces an important alteration in the law with respect to landlords and tenants. Under the 21 *Jac. 1. c. 16.* the mere non-payment of rent by a lessee was not considered as raising an adverse possession in him, which would cause that statute to operate, although the non-payment had extended over a period of more than 20 years. 2 *Bos. & P.* 542. Now, however, in consequence of the above section declaring that a party's right of entry shall be deemed to have accrued at the last time at which rent was received, it follows that 20 years' possession by a tenant, without payment of rent, or any acknowledgment in writing of the owner's title (see § 14.) will be a complete bar to the landlord.

§ 4. "That when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

A remainder-man or reversioner is not bound to take advantage of a forfeiture, but may waive it, and wait until the expiration of the particular estate, before he proceeds to make his entry, or bring his action. 1 *Ves. sen.* 278. The object, therefore, of the above section is to continue to him his option.

§ 5. "That a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which

shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

§ 6. "That for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

The intention of this section is to get rid of a practical inconvenience which resulted from the former state of the law, under which it had been decided that as the property of an intestate only vested in his administrator from the time of the grant of administration (see 5, *B. & A.* 744.) the Statute of Limitations, as to rights accruing after the death of the deceased, only began to run from the obtaining of such grant. Consequently a right to a term of years might have been kept alive for an indefinite period, notwithstanding adverse possession, by delay or neglect to administer on the part of the next of kin.

§ 7. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagor or trustee."

§ 8. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

§ 9. "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on

the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

Previous to this act, if there was a subsisting lease, a right of entry was preserved to the owner until the determination of the term, although no rent had been received by him. *Orrell v. Maddox, Runn. Eject.* No. 1; nor did the adverse receipt of rent by another person for upwards of twenty years, deprive the party of his right of entry at the expiration of the lease. 7 *East*, 299; and see 2 *Sch. & Lef.* 625.

§ 10. "That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon."

§ 11. "That no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action."

§ 12. "That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

This section alters the rule of law that the possession of any one coparcener, joint tenant, or tenant in common, was the possession of the others of them, so as to prevent their being barred by the former statutes of limitation. Possession by one coparcener created a seisin in another, which carried her share by descent to her heirs, although she never actually entered, 7 *T. R.* 386; and the entry of one coparcener, when not adverse to the rest, enured to the benefit of all. *Co. Lit.* 243 b; 6 *East*, 173.

Neither was the receipt of the rents and profits by one held to be as an ouster of the others. *Co. Lit.* 243 b. n. (1). 373 b.; 1 *Salk.* 285. Thus the bare receipt of rent for twenty-six

years by a tenant in common, without accounting to the other, was considered to be no evidence of ouster. 5 *Burr.* 2604. But possession for 40 years by one tenant in common, where there was no evidence of any account having been demanded, or any rent paid, or of any claim on the part of the lessors of the plaintiff, or of any acknowledgment of title in them, or in those under whom they claimed, was held sufficient ground for the jury to presume an actual ouster. *Coop.* 207. And a claim of the whole, by one tenant in common in possession, who denied possession to the other, was decided to be evidence of an ouster of the latter. 11 *East*, 49.

§ 13. "That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

This clause is also an alteration of the law. Where a younger son, on the death of his father, entered by abatement into his lands, and had issue, and died seised thereof, the elder son, or his issue, might enter, notwithstanding the descent, nor did the Statute of Limitation operate; as the law intended that when the younger son abated into the land, he entered claiming as heir to his father, and the elder son, or his issue, claimed by the same title.—See *Lit.* 396.

§ 14. "Provided always, that when any acknowledgement of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry of distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

§ 15. "Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or receipt of the rent, shall not at the time of the passing of this act have been



adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

§ 16. "Provided, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened.)"

Imprisonment, which was one of the disabilities comprised in the 21 Jac. 1. c. 16. is omitted in the above section, as well as in the 2 & 3 W. 4. c. 71. and 2 & 3 W. 4. c. 100.

§ 17. "Provided nevertheless, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired."

§ 18. "Provided always, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have

died, shall be allowed by reason of any disability of any other person."

Under the 21 Jac. 1. c. 16. the time when that statute began to run, might be protracted for an indefinite period by a succession of disabilities in the person having the right of entry, or his heir, provided that no interval between such disabilities to which the statute could attach, occurred; for when once the statute began to run, no subsequent disability, whether voluntary or involuntary, would prevent its operation. 4 T. R. 310; 4 Taunt. 286; 6 East, 80.

§ 19. "That no part of the United Kingdom of Great Britain and Ireland, nor the island of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his majesty) shall be deemed to be beyond seas within the meaning of this act."

§ 20. "That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after, or in defeasance of such estate or interest in possession."

§ 21. "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

§ 22. "That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land

or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

These two last clauses effect a great alteration, with respect to persons having remainders in reversion dependant upon estates tail. The 21 *Jac.* 1. c. 16. in no case began to operate with respect to any individual, until his title to the possession had accrued; and, therefore, as the right of entry of a remainder-man did not arise until the failure of the tenant in tail's issue, the statute did not commence to run against him until that event had happened; nor could he be prejudiced by any neglect of the tenant in tail or his issue. Consequently the remainder-man might, notwithstanding there had been an adverse enjoyment of the property for centuries against the tenant in tail and his issue, by which they were barred, at any time within twenty years after the failure of such issue, have brought an ejectment to recover the estate. 1 *Burr.* 60.; *S. C. Cowp.* 689. Now, adverse possession for twenty years against a tenant in tail is made a bar to him, and to all those in remainder or reversion whom he might have barred.

§ 23. "That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail."

Previous to the act, where an heir in tail brought an ejectment against a defendant who had been in receipt of the rents for thirty years during the life of the ancestor in tail (who had had seisin), and for seven years after his decease: it was held, that such possession by

the defendant was no bar to the action, and that the heir was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. For though he might have so conveyed, he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred the next tenant in tail; and the long possession by the defendant might be referable to such a state of things. 3 *B. & Ad.* 738; *S. C.* 1 *N. & M.* 385. It is to be observed, that the above clause relates only to cases where there has been an assurance made by a tenant in tail, and does not apply where, as in the decision just quoted, there has been no conveyance from the tenant in tail. It is probable, however, that were a similar case to occur, the courts would now hold that the possession was evidence of an assurance by the tenant in tail, sufficient to bring the case within the above clause, or at least that it raised a presumption, which the heir in tail must rebut by showing there had been no assurance.

§ 24. "That after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity."

Courts of equity have always considered equitable rights as bound by the same limitations as were imposed by statute on proceedings at law. 1 *P. Wms.* 742; 3 *P. Wms.* 143; and see 2 *Sch. & L.* 630. They also adopted the exceptions in the statute of limitations, and permitted persons to prosecute their claims within ten years after the removal of their disabilities. 3 *P. Wms.* 287, n.; 4 *B. C. C.* 441.

§ 25. "That when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

In the case of a direct trust, time is not allowed, as between the trustee and the cestui que trust, to operate as a bar to the latter.—

*Barnard*. 449; 1 *B. C. C.* 551. But the rule was held not to apply to a claim after a great length of time against a trustee by implication of law arising upon a doubtful equity. 1 *Cox*, 28. And a court of equity will not permit a case of constructive trust to be made out at any distance of time; and where relief would originally have been given upon the ground of constructive trust, it is refused after long acquiescence by the party seeking it. 17 *Ves.* 97.

The rule, however, that trusts are not within the statute of limitations, is confined to cases between the cestui que trust and the trustee; therefore, where both are out of possession for the limited time, they are both barred. *Barnard*. 445; 6 *Ves.* 199; 8 *Ves.* 106; 2 *Sch. & L.* 629. See further *Trust*.

§ 26. "That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall or, with reasonable diligence, might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed."

It has been long held in equity that length of time is no bar in cases of fraud. 1 *Forbl. Eq.* 331; 3 *B. C. C.* 633; 1 *Mer.* 436; 12 *Ves.* 355; 3 *Swans.* 400. But where the facts constituting the fraud had been in the knowledge of the party, and he had laid by for twenty-five years, relief was refused. 2 *Ball & B.* 118. See further *Fraud*.

§ 27. "Provided always, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act."

Long acquiescence by a party acquainted with the facts, is held in equity to be a bar to relief for setting aside a lease on the ground of fraud or mistake. And an heir at law has been refused an issue *devisavit vel non* after twenty years acquiescence in a will. *McClell.* 424; *S. C.* 13 *Prie*, 119. But acquiescence will not be considered to have taken place, so long as the undue influence on the one side, and

the distress on the other, out of which the transaction arose, continue. 14 *Ves.* 106. And where all the parties are under the influence of a common mistake, the doctrine of acquiescence does not apply. 2 *Mer.* 362.

§ 28. "That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or some person claiming his estate, to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."



Previous to the above act, twenty years' possession by a mortgagee without any acknowledgement of the mortgagor's title, was a bar in equity to the claim of the latter. 2 *J. & W.* 158. But if within the 20 years the mortgagee had kept accounts, or otherwise dealt with the property as mortgagee, he was not protected by the mortgagor's negligence. 6 *Mad.* 181; *S. C.* 1 *Ves. & B.* 536. So an acknowledgment to a third party, as an assignment by the mortgagee of his interest, treating it as a mortgage, 4 *Ves.* 478, or recognizing it in a will, or in any other deed, as such, 2 *Eq. Cas. Abr.* 600; 2 *Br. C. C.* 399; 18 *Ves.* 455; 1 *Sim. & S.* 347, was held to preserve the mortgagor's right to redeem. And a parol acknowledgment of the mortgage within 20 years was sufficient, 6 *Mad.* 274; but the proof must have been clear and unimpeachable. 2 *Cox.* 295. See further, tit. *Mortgage*.

§ 29. "Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December, 1833, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period."

Ecclesiastical corporations, and ecclesiastical persons seised in right of their churches, were not within the former statutes of limitation. But although neither the acts nor neglect of ecclesiastical persons barred their successors, yet incumbents, by submitting to an adverse possession, or by doing other acts, might be individually bound. *Plowd.* 351, 375, n.; 48 *B. & A.* 579. 5 *B. & C.* 696. Ecclesiastical persons are also within the act shortening the time of prescription in certain cases (2 & 3 *W. 4. c.* 71.) And their claims

to tithes are greatly limited by the *Modus Act.* (2 & 3 *W. 4. c.* 100.)

§ 30. "That after the said 31st December, 1833, no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years."

§ 31. "Provided always, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop."

§ 32. "That in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of the estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and to bring any quare impedit action or suit shall be limited accordingly."

§ 33. "Provided always, that after the said 31st day of December, 1833, no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some pre-

ceding estate or interest, or undivided share, or alternate right of presentation or gift held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title."

§ 34. "That at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

The former statutes of limitation were held not to bar the right but only the remedy. 1 *Saund.* 283, a. n.; 2 *B. & Ad.* 413. The present act has wisely put an end to such an absurd distinction.

§ 35. "That the receipt of the rent payable by any tenant from year to year, or other leases, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

§ 36. "That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisio, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrien-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præterit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, coeinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei de forceat, writ of covenant real, writ of warrantia chartæ, writ curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of

dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the 31st December, 1834.

§ 37. "Provided always, that when, on the said 31st December, 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired."

§ 38. "Provided also, that when, on the said 1st June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st of June, 1835, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

§ 39. "That no descent cast, discontinuance, or warranty which may happen or be made after the said 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land."

§ 40. "That after the said 31st December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

§ 41. "That after the said 31st December, 1833, no arrears of dower, nor any damage on account of such arrears, shall be recovered or obtained by any action or suit for a longer

period than six years next before the commencement of such action or suit."

§ 42. "That after the said 31st December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but any time within two years after that year within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgage or other incumbrancer shall have been in possession of any land, or in the receipt of the profit thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgage or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

§ 43. "That after the said 31st December, 1833, no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity."

§ 44. "Provided always, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland."

It is to be observed, that in consequence of the abolition of fines by the 3 & 4 Wm. 4. c. 74. a title to lands can no longer be obtained by a fine levied by proclamations, and non-claim for five years under the provisions of the 4 H. 7. c. 24. See tit. *Fine of Lands*.

2. By 31 Eliz. c. 5. par. 5, it is enacted, "That all actions, suits, bills, indictments, or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the queen, &c. shall be brought within two years after the offence: and that all actions, suits, bills, or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except the statute of tillage, the benefit and suit whereof

is or shall be by the said statute limited to the queen, her heirs or successors, and to any others that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same within one year next after the time committed; and in default of such prosecution, that then the same shall be brought for such arrears of rent or interest, shall be recovered by the queen's majesty, her heirs or successors, covered by any distress, action, or suit, but any time within two years after that year within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgage or other incumbrancer shall have been in possession of any land, or in the receipt of the profit thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgage or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Also see 18 Eliz. c. 5; Jac. 1. c. 4; the former requiring a memorandum of the day of exhibiting an information, the latter an oath from the informer.

In the construction of these statutes it hath been holden,

That the 21 Jac. 1. c. 4, does not extend to any offence created since that statute; so that prosecution on subsequent penal statutes are not restrained thereby, but that statute is to be taken as it were repealed *pro tanto*. 1 Salk. 373; 5 Mod. 125. And that the said statute, 21 Jac. 1. only applies to those penal statutes, on which proceedings may be had before the justices of assize, justice of the peace, &c. 3 Term Rep. 362.

That if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it as of an offence at common law, is no way restrained by any of these statutes. Hob. 270; 4 Mod. 144.

That if an information *tam quam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only as to the informer, but good for the king. Cro. Car. 331; Cro. Jac. 366. See *Dalis*, 60.

That if a suit on a penal statute be brought after the limited time, the defendant need not plead the statute, but may take advantage of it on the general issue. 1 Show. 353.

It seems doubtful whether the suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes. 1 Show. 353, 354.

The party grieved was not within the restraint of these statutes, but might have sued in the same manner as before. Cro. Eliz. 645; Noy, 71; 3 Leon. 237.

But by the 3 & 4 Will. 4. c. 42. § 3. all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, shall be commenced and sued within two years after the cause of such actions or suits, but not after.

It has been held by three judges, that suing out a *latitat* within the year was a sufficient



commencement of the suit to save the limitation of time on a penal statute; because the *latitat* is the original in *B. R.* and may be continued on record as an original. But *Holt* held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in *B. R.* because the statute gives the action; and he held, that there was a difference between a civil action, and an action given by statute; for in the first case, the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within the time, that it may appear so to be on the record itself. *Carth.* 232; *Show.* 235. But upon a writ of error, all the judges in the Exchequer Chamber held, that a *latitat* is a kind of original in the Kings' Bench. 2 *Ld. Raym.* 883. And accordingly, in two subsequent cases, it was holden to be a good commencement of the suit in a penal action. 2 *Burr.* 950; 3 *Bur.* 1243; *Cowp.* 454.

See as to limitation of indictments, and informations in criminal cases, *Indictment, Information, Quo Warranto, Treason, &c.*

3. By the 21 *Jac.* 1. c. 16. § 3. it is enacted, that all actions of trespass *quare clausum fregit*, trespass, detinue, trover, and replevin for taking away of goods and cattle; all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without speciality; all actions of debt for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment of them, shall be commenced and sued within the time and limitation hereafter expressed, and not (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within six years after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within two years next after the words spoken, and not after.

By § 4. where judgment is given for a plaintiff, and reversed by writ of error; or if judgment for a plaintiff be arrested, or if a defendant in an action by original be outlawed, and outlawry reversed, the plaintiff may commence a new action within twelve months after such reversal or arrest of judgment re-

spectively, though it be beyond the time of limitation directed by the statute.

By § 7. an exception is introduced in favour of persons within the age of twenty-one, *femes covert*, persons *non compos mentis*, imprisoned, or beyond seas, who are at liberty to bring the same actions, so as they take the same within such times as before limited after their coming to, or being of full age, discover, of sane memory at large, and return from beyond seas, as other persons having no such impediment should have done. And see 3 & 4 *Wm.* 4. c. 42. § 7. *post*, as to what places shall not be deemed to be beyond the seas within this act.

The action of *assumpsit* is not mentioned *eo nomine* in the statute; but the last proviso extends not only to those actions therein enumerated, but also to an *assumpsit* and all other actions on the case. *Bac. Abr. Lim. of Act.* [E. 1.] In all other cases, therefore, where *assumpsit* is maintainable, the above statute implies.

Under the head of actions upon the cases are included actions for libels, criminal conversation, seduction, and actions for such words as are not actionable without a special damage; and all other actions on the case, being of equal mischief, and plainly within the intention of the legislature. See *Cro. Cur.* 245, 333; 2 *Saund.* 120; 2 *Mod.* 71; 1 *Sid.* 455; 3 *Comm.* c. 8. p. 307, *in n.* As to actions in the Admiralty for seaman's wages, see *post*, III.

Where the plaintiff complained of a plea of trespass, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society, &c., against the peace &c., to his damage &c.; whether this be trespass or case, (and former authorities have considered it to be case,) at any rate a plea of 'not guilty within six years' is good on a general demurrer, 6 *East*, 387.

It seems, that if a man brings trespass for beating his servant, *per quod servitium amisit*, this is not such an action as is within the branch of the statute relating to actions of trespass, being founded on the special damage. 1 *Salk.* 206; 5 *Mod.* 74.

If to an action of assault, battery, and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of limitations, without answering particularly to the battery, otherwise than by using the words *transgressio predicta*, it is sufficient; for these words are an answer to the whole. 1 *Lev.* 31.

In the construction of the branch of the statute relating to words it hath been holden.

That an action of *scandalum magnatum* is

not within the statute. *Ltd. Rep.* 342; 3 *Kep.* 645. is a matter of record. 1 *Mod.* 212, 245; 2 *Show.* 79.

That it extends not to actions for slander of title; for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person. *Cro. Car.* 141.

That if the words of themselves actionable, without the necessity of alleging special damages, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words, at the time of the speaking or them, are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar. 1 *Sid.* 95; *Raym.* 61; and see 3 *Mod.* 111.

That if an action for words be founded upon an indictment, or other matter of record, it is not within this statute. 1 *Sid.* 95.

By 27 *Geo. 3. c.* 44. suits in ecclesiastical courts for defamatory words must be commenced within six months.

It was adjudged, that an action of debt on 2 & 3 *Ed. 6. c.* 13. for setting out tithes, was not within the 21 *Jac. 1. c.* 16: the action being grounded on an act of parliament, which is the highest record. *Cro. Car.* 513; *Talory v. Jackson*, 1 *Saund.* 38; 2 *Saund.* 66; 1 *Sid.* 305, 415; 1 *Kep.* 95; 2 *Kep.* 462.

But by the 53 *Geo. 3. c.* 127. § 5. no action shall be brought for recovery of any penalty for not setting out tithes, nor any suit instituted in any Court of Equity, or Ecclesiastical Court, to recover the value of any tithes, unless such action be brought or such suit commenced within six years from the time when such tithes became due.

So it was held an action of debt for rent reserved on a lease by indenture was out of the statute, the lease by indenture being equal to a specialty. *Hutt.* 109; 1 *Saund.* 38.

Also an action of debt for an escape was not within the statute; not only because it is founded in *malificio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on 1 *Rich. 2. c.* 12. which first gave an action of debt for an escape, there being no remedy for creditors before, but by action on the case. 1 *Saund.* 37; *Jones v. Pope*, 1 *Lev.* 191; 2 *Keb.* 903; 1 *Sid.* 305.

Neither did the statute extend to actions of covenant, nor to any actions of debt in specialties, or other matter of a higher nature. 1 *Saund.* 38. Thus a *scire facias* being founded in matter of record was not within the act.

So this statute could not be pleaded to an action of debt brought against a sheriff for money levied on a *feri facias*; because the action is founded in *maleficio*, as also upon the judgment on which *feri facias* issued, which

And an action of debt on an award under the hand and seal of the arbitrators, though the submission was by parol, was not within the statute. 2 *Saund.* 64; *Sid.* 415; 1 *Lev.* 273; 1 *Keb.* 462, 496, 533.

Nor an action of debt for a fine of a copyholder. 1 *Keb.* 536; 1 *Lev.* 273.

Neither was an action of debt upon bond within the statute, *Cowp.* 102; but after a lapse of twenty years, without payment of interest or any acknowledgment of it by the obligor, the law presumed it to be satisfied, 1 *Term Rep.* 270. and in some cases dissatisfaction was presumed within that period. 1 *Burr.* 434, n. (a); 1 *Term Rep.* 270; 1 *Camp.* 26.

Now by the 3 & 4 *Wm. 4. c.* 42. with a view of fixing a period of limitation for such actions as had been held not to be within the 21 *Jac. 3. c.* 16. it is enacted, § 3. "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyholden estates or for an escape, or for money levied on any *feri facias*, and actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt of *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

Bat by § 4. "if any person or persons that is or are or shall be entitled to any such action or suit, or such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years's *feme covert non compos mentis*, or be-

yond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, are returned from beyond the seas, as other persons having no such impediment should, according to the provisions of the act, have done; and if any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas."

§ 5. Provided, "that if acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff or plaintiffs in any such action in any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

§ 6. "If in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

§ 7. No part of the united kingdom of Great Britain and Ireland, nor the Islands of Man,

Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the 21 Jac. 1. c. 16.

For the clause of the above statute permitting actions of trespass, or trespass on the case to be maintained by or against executors or administrators for injuries done to the real estate of the deceased persons in their lifetimes, or by the latter to the real and personal property of others, provided the cause of action has accrued, and the action is brought within the time prescribed by the act. See tit. *Executor*, VI. 1.

The statute of limitations (21 Jac. 1. c. 16.) bars the remedy, not the debt. Therefore an attorney retains his lien on a judgement for his costs, though his remedy by action is barred. 2 B. & Ad. 413.

III. 1. The 21 Jac. 1. c. 16. cannot be a bar unless the the six years are expired, after there hath been complete cause of action; as if a man promise to pay 10*l.* to J. S. when he came from Rome, or when he marries, and ten years after J. S. marries, or comes from Rome, the right of action accrues from the happening of the contingency; from which time the statute shall be a bar, and not from the time of promise. *Godb.* 437.

So in an action on the case wherein the plaintiff declared, that in consideration that he would forbear to sue the defendant for some sheep killed by the defendant's dog, the defendant promised to make him satisfaction upon request, and that at such a time he requested, &c. it was held that the right of action accrued from the request, not from the time of killing the sheep; that therefore the defendant could not plead the statute of limitations, the request being within six years, though the killing the sheep and promise of satisfaction was long before. *Godb.* 437. See also 1 *Lev.* 48; 1 *Sid.* 66; 1 *Keb.* 177.

And where the plaintiff declared that in consideration, he, at the defendant's request, would receive A. and B. into his house as guests and diet them, the defendant promised &c.; it was held that the statute began to run from the time of the dieting, and not from the time of making the promise. 2 *Salk.* 422; *S. C.* 2 *Lord Ray.* 888.

So if a note or bill of exchange is given, payable at a certain time after date, the cause of action does not accrue until after the expiration of the time specified; and if an action is brought within six years after that time, the statute is not a bar. But if the suit is not commenced within six years after that time, the defendant may plead that the cause of ac-



tion did not accrue within six years, but he must not plead that he did not promise within six years, *i. e.* if he is the person first liable to the payment, because the promise is made at the time of making the notes, &c. It may be otherwise in the case of an indorser, who is not liable until default made by the drawer of the note, or acceptor of the bill; but in this case *non accrevit infra sex annos* is a safe and good plea. And see 1 *Vent.* 191; 3 *Keb.* 613; *Cro. Car.* 245, 6, 333; 1 *John.* 252; 3 *Mod.* 110, &c.; *Allen,* 62; 2 *Salk.* 420; *Comb.* 26; 1 *H. Black.* 631.

The statute is no bar to a bill payable at a specified time after sight, unless it has been presented for payment, for debt does not accrue upon such a bill until it is presented. 2 *Taunt.* 323.

And the statute was held no bar to an action on a promissory note, dated about thirteen years before and payable twenty-four months after demand, no demand having been made until within three years before action brought 1 *R. & M.* 388. But a promissory note payable on demand is payable immediately; and the statute runs from the date of the note. 1 *Selw. N. P.* 137.

Where a demand is necessary to complete the cause of action, the statute only runs from the time of such demand. But in some cases, after a reasonable period has elapsed, a jury may presume that the demand has been made. See 1 *Taunt.* 572.

Where the breach of a contract is attended with special damage, the statute runs from the time of the breach, and not from the time it was discovered or the damage arose. 2 *B. & B.* 73; 3 *B. & A.* 288, 626.

In trover the statute runs from the conversion, 7 *Mod.* 99; 4 *Esp.* 20; and in other actions founded upon tort, from the time when the cause of action is complete.

Where the agreement on the sale of goods was for payment at the end of six months by a bill at two or three months at the option of the purchaser: held, (*Park, J. diss.*) that this was a credit for nine months, and that the statute did not begin to run till the expiration of that time. 2 *B. & Ad.* 431.

2. It has been agreed, that the statute of limitations is no plea in the Court of Admiralty or Spiritual Court, where they proceed according to their law, and in a matter in which they have cognizance. 6 *Mod.* 25, 26; 2 *Salk.* 424; 3 *Keb.* 366, 392.

Therefore, for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations. 6 *Mod.* 26.

So it has been held not to be pleadable to a proceeding in the Spiritual Court, *pro violentia*

*manuum injectione in clericum*, because the proceeding is *pro reformatione morum*, not for damages. 2 *Salk.* 424.

It was formerly doubted, whether, to a suit in the Admiralty for mariners' wages, this statute was a good plea; because it was said, that this was a matter properly determinable at common law; and the allowing the Admiralty jurisdiction therein only a matter of indulgence. 2 *Salk.* 424; 6 *Mod.* 25.

But it was enacted by the 4 & 5 *Ann. c.* 16, that all suits and actions in the Court of Admiralty for seaman's wages shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after.

IV. 1. The statute 21 *Jac. 1. c.* 16, being general, infants had been included, had they not been particularly excepted. 1 *Lev.* 3.

It hath been holden, that if an infant, during his infancy, by his guardian, bring an action, the defendant cannot plead the statute of limitations; although the cause of action accrued six years before; and the words of the statute are, that after his coming of age, &c. 2 *Saund.* 121.

It hath been held in Chancery, that if one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is as much a bar to such a suit as if he had brought an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of the court of equity, the statute shall be no bar to; for he might have his action of account against him at law, and therefore no necessity to come into this court for the account; for the reason why the bills for an account are brought here, is from the nature of the demand, and that they may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law; but if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court. 1 *Abr. Eq.* 304, *c.* 10; *Pre. Ch.* 518.

2. It hath been a matter of much controversy, whether the exception relative to a merchant's accounts extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only; the words of the statute being, "All actions of trespass, &c. all actions of account and upon the case, other than such actions as concern the trade of merchants;" so that by the words, other than such actions, not being said actions of account, it has been insisted that all actions concerning merchants are excepted. But it is

now settled, that accounts open and current only are within the statute; that therefore if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if in such case he to whom the money is due does not bring his action within the limited time, he is barred by the statute. See 1 *Jon.* 401; 2 *Saund.* 121, 125; 1 *Lev.* 287, 298; 2 *Keb.* 622; 1 *Cent.* 90; 1 *Mod.* 270; 2 *Mod.* 312; 2 *Vern.* 456.

So it hath been adjudged, that by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of accounts. *Carth.* 226. But the law is now held to be, that the exception applies to actions on the case. 2 *Will. Saund.* 127, *b. n.* (7).

Also it hath been adjudged, that bills of exchange for value received are not such matters of account as are intended by the exception in the statute of limitations. *Carth.* 226.

An open current account, between tradesmen or others, is not within the statute, supposing the last article of the debt in the account was contracted within the last six years; otherwise, in such case, the statute is a bar. *J. M.*

This exception does not extend to a tradesman's account with his customer; for in this case there are not mutual dealings; and the tradesman is barred by the statute from recovering for more than those articles which have been sold within six years. *Bull. N. P.* 149. See *Rothery v. Munnings*, 1 *B. & Adol.* 15, *acc. Quere.* Whether, in case of a bill for work done (as a proctor's), the right of action accrues *de die in diem*, or whether it is incomplete till the completion of the business in hand? *Ibid.*

3. The clause of the statute, as to persons beyond sea, extends only to such as are actually so. For where to *non assumpsit infra sex annos*, the plaintiff replied, that, when the cause of action accrued, he was resident in foreign parts out of the kingdom of England, viz. Glasgow in Scotland; this was held ill, on demurrer; Scotland not being a foreign part within the meaning of the statute, the express words of which are, beyond the seas. 1 *Bl.* 256. Therefore a foreigner, or person resident abroad, shall never be barred from bringing his action, from any length of time while out of the kingdom, for the statute does not begin to run until he has come into it; though any of the persons, who are under the disabilities mentioned in the statute, may nevertheless, during the time such disabilities exist, bring their actions. *Espinasse, N. P.* 149, 150.

If the plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or (if he dies

abroad) his representative, does not sue within six years, he is barred by the statute. 1 *Wils. par.* 1. 134.

If one only of a number of partners lives abroad, if the others be in England, the action must be brought within six years after the cause of action arises. 4 *T. R.* 516.

It seems to have been agreed, that the exception extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction has the rather prevailed, because it was reputed the creditor's folly that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute. *Cro. Car.* 245, 333; 1 *Jon.* 252; 1 *Lev.* 143; 3 *Mod.* 311; 2 *Lutw.* 950; 1 *Salk.* 420.

But as the creditor's being beyond sea is saved by 21 *Jac.* 1. c. 16; so now by 4 & 5 *Ann.* c. 16, it is enacted, that if any person or persons, against whom there is or shall be any cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detainue, action *sur trover* or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages to rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, within such times as are limited for the bringing of the said actions by 21 *Jac.* 1. c. 16.

If the cause of action accrue in India, and the plaintiff sues the defendant in England within six years after the defendant's return to this country, according to the 4 *Anne*, c. 16, the defendant cannot plead the statute of limitations, although more than six years elapsed in India after the cause of action accrued there. 13 *East*, 439.

See now 3 & 4 *Will.* 4. c. 42, § 7, as to what places shall be deemed not beyond seas within the 21 *Jac.* 1. c. 16, *ante*, II.

4. A. received money belonging to a person who before died intestate, and to whom B. after such receipt took out administration, and brought an action against A. to which he pleaded the statute of limitations; the plaintiff replied, and showed that administration was committed to him such a year, which was *infra sex annos*; though six years were expired since the receipt of the money, yet not being so since

the administration committed, the action not barred by the statute. 1 *Salk.* 421; *Skin.* 555; 4 *Mod.* 376; *Latch.* 335.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. 2 *Salk.* 424, 425.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for though the debt does not become irrecoverable by an abatement of the action after the six years elapsed by the plaintiff's death; yet the executor should make a recent prosecution, to which the clause in the statute, § 4, that provides a year after the reversal of a judgment, &c. may be a good direction, or show that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the benefit of the defendants, to free them from actions when their witnesses were dead, or their vouchers lost. 2 *Str.* 907; *Fitzgib.* 81.

Under the equity of the above-mentioned section, in all cases of executors, if the six years be not elapsed at the time of the testator's death, and the executor takes out proper process within the year, it will save the bar by reason of the limitation, even though the six years, within which the demand accrued, be elapsed before process sued out. *Bull. N. P.* 150; *Cawer v. James*, *Trin.* 15 *Geo.* 2. *C. B.*

If there be no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such cases be imputed to him, 2 *Vern.* 695; and so also where a bill of exchange was drawn, payable to the intestate in his life, but was accepted after his death, it was held, that the statute only began to run from the date of the letters of administration, for till that time there was no person capable of suing. 5 *B. & A.* 204; 8 *B. & C.* 285.

Where a party brings an action within the six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the 21 *Jac.* 1. c. 16. bring a new action, provided he does so within a reasonable time. 2 *Salk.* 425; 1 *Lutro.* 260. What is a reasonable time has not been expressly decided, although it seems to have been thought the period allowed should not exceed one year. See 1 *Lord. Raym.* 434; 2 *Str.* 907; *Fitz.* 170, 289. And the executor

ought to bring a new action as soon as he can, and at all events not delay it beyond a year. 2 *Saund.* 63 *h. note.*

5. It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as where after the civil war an assumpsit was brought, and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action; this replication was held, for the statute being general, must work upon all cases which are not exempted by the exception. 1 *Keb.* 157; 1 *Lev.* 31; *Carth.* 157; 2 *Salk.* 420.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege. 1 *Lev.* 31, 111; *Carth.* 136, 137.

It is said, that if a man sues in Chancery, and pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. 1 *Vern.* 73, 74.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced the suit in an inferior court within the time of limitation, and that it was removed to Westminster by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*. 1 *Sid.* 228; 3 *Keb.* 263; 1 *Lev.* 143; also see 2 *Salk.* 424; 2 *Str.* 719; *Bull. N. P.* 151. See *post*, 6.

6. It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by *journeys accounts*, and thereby take advantage of his first writ. *Carth.* 136; 1 *Salk.* 420; 3 *Mod.* 311.

Also it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit to save the limitation of time, because the *latitat* is the original in B. R. and may be continued on record as an original writ. 1 *Sid.* 53, 60; *Carth.* 232; 1 *Salk.* 421; see *ante*, II. 2.



The same is law as to a bill of Middlesex. (than the payment of money) at a specific time be once barred, no new acknowledgment or promise can revive it.

See *Sty.* 156, 178; 2 *Lord Raym.* 880, 1441; 1 *Stra.* 550; 2 *Stra.* 736; and 2 *Burr.* 961.

But if the suing out of a *latitat* be replied to a plea of the statute of limitations, the defendant, in order to maintain that plea, may aver the real time of suing it out in opposition to the *teste*. 2 *Burr.* 950.—And though the suing out an original, or *latitat*, will be a sufficient commencement of a suit; yet the plaintiff, in order to make it effectual, must show that he hath continued the writ to the time of the action brought. *Carth.* 144; 2 *Salk.* 420; 1 *Lutw.* 101, 254; 3 *Mod.* 33. The continuances may be entered up at any time before the plaintiff replies. The process sued and filed, and the continuances thereon, must be set forth by the plaintiff in his replication. See 3 *T. R.* 662; 1 *Wils.* 167; *Esp. N. P.* 153.

It is sufficient to prove a writ sued out within time, and a declaration within a year afterwards, without showing such writ returned, 7 *T. R.* 6; unless where the first writ is continued by subsequent writs sued out after the time of limitation. 6 *T. R.* 617; and see 2 *Bos. & Pul.* 157.

It is to be observed, that the above decisions are all prior to the Uniformity of Process Act, 2 *Will.* 4. c. 39; but the principle they establish will apply to cases where the new writs given by that act have been sued out. It may also be remarked, that by the general rules of *H. T.* 4 *Will.* 4. the entry of continuances is abolished.

Where a writ of summons under the 2 *Will.* 4. c. 39. tested in time to save the statute of limitations, was resealed in consequence of an alteration in the description of the defendant and of his residence, and was not served till after the expiration of the six years; it was held that the resealing did not amount to a reissuing of the writ, and that the plaintiff need not show when it took place. 2 *C. & M.* 408.

7. Assumpsit appears to be the only action in which it has been held that an acknowledgment or promise has the effect of taking the case out of the statute of 21 *Jac.* 1. c. 16.

See 1 *B. & A.* 92; 3 *Bing.* 331; 6 *B. & C.* 605; although from the framing of the 9 *Geo.* 4. c. 14. hereafter noticed, Lord Tenterden seems to have thought that the doctrine was equally applicable to actions of debt on simple contract. The action of assumpsit must either be a case of guarantee, 1 *B. & A.* 690; or for a simple contract debt. Thus

in 2 *Campb.* 160, Lord Ellenborough held, that if a cause of action, arising from the breach of contract in not doing an act, (other

of sett-off on the part of any defendant, either by plea, notice, or otherwise."

The 9 Geo. 4. c. 14. has made no alteration with respect to the effect of payment of any part of the principal, or of any interest.

In the case of debt due from a single individual, it has been long established, that the payment of either part of the principal, or of interest, is an admission of the debt which would take it out of the statute.

And where there are several debtors, it has been held that a payment by one of them was sufficient to take the case out of the statute. *Dougl.* 652.

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under his commission, on account of the note; this will prevent the other maker from availing himself of the statute of limitations, in an action brought against him for the remainder of the money due on the note; the dividend having been received within six years before the action brought. 2 *H. Bl.* 340.

A payment by one of two makers of a joint and several note, operates as a promise to the full extent of the promise in the instrument, and consequently takes the note out of the statute, as against the administrator of the other, who died after the payment made. 8 *B. & C.* 36. which recognizes 2 *H. Black.* 340; and *Dougl.* 652. But after the death of one maker of a joint and several note, the joint-contract is severed, and a payment by the executor of the deceased will not take the note out of the statute against the surviving maker. 1 *B. & A.* 396; and see 2 *B. & C.* 23.

As to the payment of interest on a note given by parish officers, see 1 *Ad. & E.* 196; and as to the payment of principal and interest to one of two legatees, see 2 *C. & M.* 322; 4 *Tyr.* 94.

8. It seems to be admitted, that the statute of limitations must be pleaded positively by him that would take advantage thereof; and that the same cannot be given in evidence, especially in an assumpsit, because the statute speaks of a time past, and relates to the time of making the promise. 1 *Lev.* 111; 1 *Sid.* 253; and see *Cro. Jac.* 115. See *ante*, II. 2.

But, in debt for rent, upon *nil debet* pleaded, the statute of limitations might have been given in evidence. 1 *Salk.* 278.

The modern practice however has been to plead the statute in debt as well as assumpsit, and it was held by Mr. Justice Bayley, that the statute could not be given in evidence on *nil debet*. *Woodhouse v. Williams, Bac. Ab. Limitation of Actions*, (F.) (7th ed.)

Now by the general rules of H. T. 4 W.

4. the plea of *nil debet* has been abolished, and consequently the statute must in all cases be pleaded.

Where the cause of action is to arise from an executory consideration, as some act to be performed, and a promise to pay in consequence of it, there *non assumpsit infra sex annos*, is not the proper plea; for the assumpsit does not arise till the consideration is performed; it should be *actio non accrevit infra sex annos. Espinasse*, 156. See 2 *Salk.* 422.

In replevin the defendant pleaded Not guilty, *De capt' prædict' infra sex annos jam ultimo elapsos*; and though it was urged, that this was the same with pleading *non cepit*, and if he did not take, he could not be guilty, of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to his action; yet the plea was held ill, because he ought to have answered to the detainer, as well as to the taking; also a thing may be lawfully distrained, although unlawfully kept; as by being put into a castle, &c. by which means it could not be replevied, 1 *Sid.* 81; *Keb.* 279; and see *Lord Raym.* 80; 1 *Lev.* 110; 1 *Keb.* 566.

If a debt be set off by way of plea, the statute of limitations may be replied to it. 2 *Str.* 1271.

Evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six years' standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the statute of limitations was pleaded. 3 *East*, 409.

To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiffs declare, that in consideration of the money being due to the insolvent the defendant promised to pay them as assignees, it is a bad plea to say that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed before the cause of action accrued to the insolvent, and before the suing out of the writ. 2 *H. Blackst.* 561.

Assumpsit on a note payable by instalments; plea in bar as to the said several causes of action, except the last instalment, "that the said several causes of action did not nor did any of them accrue within six years;" held on special demurrer, that though some of the instalments might be barred, and the others not, yet, that the introduction to the plea and the body of it were inconsistent. 2 *Bos. & Pul.* 427.

See further, *Prescription*.

**LIMITATION OF THE CROWN.** See *Case*, (1 *Rep.* 120; *Jenk.* 276; *Poph.* 70; 1 *King*, I. *And.* 309.) it was strongly contended, that

**LIMITATION OF ESTATE** A modification or settlement of an estate, determining how long it shall continue; or is rather a qualification of a precedent estate. A limitation by Littleton, a condition in law. *Lit.* § 380; 1 *Inst.* 234.—It is generally made by such words as *durante vita, quamdiu, dum, &c.* And if there be not a performance according to the limitation, it shall determine an estate without entry or claim; which a condition doth not. 10 *Rep.* 41; 1 *Inst.* 204. See *Condition*, I. 2.

Limitation is also taken for the compass and time of an estate; or where one doth give lands to a man, to hold to him and to his heirs male, and to him and the heirs female, &c., here the daughters shall not have any thing in it so long as there is a male, for the estate to the heirs male is first limited. *Co. Lit.* 3, 13.

If a limitation of an estate be uncertain, the limitation is void; and the estate shall remain as if there had been no such limitation. *Cro. Eliz.* 216. But a thing that is limited in a will by plain words, shall not be afterwards made uncertain by general words which follow. *Hil.* 23 *Car. B. R.* Where a devise is to the eldest son, upon condition that he pays such legacies; and if he refuses, the land to remain to such legacies; on his refusal, the legatees may enter by way of limitation. *Noy*, 51. And in all cases, where, after a condition, an interest is granted to a stranger, it is a limitation. 1 *Leon.* 269; *Cro. Eliz.* 204. See *Condition*, I. 2.

As to the origin and progress of the Limitation of Estates, see 1 *Inst.* 271. b. in n; and see *Conveyance*. See also *Deed, Estate, Feoffment, Gift, Grant, Lease and Release, Powers, Remainder, Trusts, Uses, &c.* From the note above cited has been extracted the following summary with respect to the limitations and modifications of landed property, unknown to the common law, which have been introduced under the statute of uses, 27 *H. 8. c.* 10.

The principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or qualified fee; nor could a fee or estate of freehold be made to cease as to one person and to vest in another, by any common law conveyance. But there are instances where even by the common law these secondary estates seem to have been allowed, when limited, or rather when declared by way of use. See *Jenk. Cent.* 8. c. 52. After the statute of uses the judges seem to have long hesitated whether they should receive them. In *Chudleigh's*

It is now settled, that when an estate in fee simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such, that if it does happen, it must necessarily happen within the compass of one, or more life or lives in being, and twenty-one years and some months over; i. e. as many months as it is possible a child may be legitimately born after the death of its father:] it was long before the courts agreed on this period; which was not arbitrarily prescribed by our courts of justice with respect to these secondary fees, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail by fine or recovery for a longer space. 1 *Inst.* 20. in n.

But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee-simple, does not hold when they are limited upon or after an estate in tail; because in this latter case, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee-simple absolutely discharged from it. See *Page v. Haywood*, 2 *Salk.* 570, and 1 *Lev.* 35; *Goodman v. Cook*, 2 *Sid.* 102. Hence, if these secondary estates are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place to any period. See *Treat. Eq.* ii. 95.

Thus, if an estate be limited to A. and his heirs; and if B. (a person *in esse*) dies without leaving any issue of his body living at the time of his decease; or, having such issue, if all of them die before any of them attain the age of twenty-one years, then to C. and his heirs: here the limitation to C. is limited after a previous limitation in fee-simple, and it is a good limitation; because the event upon which it is



to take place must, if it does happen at all, necessarily happen within the period of a life in being, and twenty-one years and a few months. But if the estate were limited to A. and his heirs; and, after the decease of B., and a total failure of heirs, or heirs-male of the body of B., to C. and his heirs; here as the secondary use is limited after a previous limitation in fee-simple, and the event on which the fee limited to C. is to take place, is not such as must necessarily happen within the period prescribed by law, (for B. may have issue, and that issue may not fail for many years after the expiration of twenty-one years after B.'s decease,) the limitation to C. and his heirs is void. But suppose the estates were limited to A. for life, then to trustees and their heirs, during his life, for preserving contingent remainders, then to A.'s first and third sons successively in tailmale, with several remainders over; with a proviso if B. dies, and there should be a total failure of heirs or heirs-male of his body, the uses limited to A. and his sons, and the remainders over, shall determine, and the lands remain and go over to C. and his heirs; here the limitation to C. and his heirs is limited upon or after previous limitations for life or in tail; and the event upon which it is to take effect may possibly not happen till after a period of one or more life or lives in being and twenty-one years: but so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds mentioned; and so far as it is limited on an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession, by suffering a recovery before the event happens, may bar the limitations over, and thereby acquire an estate in fee-simple: and therefore the limitation to C. and his heirs is good. See tit. *Executory Devise*.

**LIMOGIA.** Enamel; *opus de limogia*, or *opus limoecum*, is enamelled work. *Monast. 5 tom. 331.*

**LINARIUM.** A flax plat, where flax is sown. *Pat. 22. Hen. 4. par. 1. m. 33.*

**LINCOLN.** In attain of a verdict of the city of Lincoln, the jury shall be impannelled of the county of Lincoln. See 13 *Rich. 2. st. 1. c. 18*; 2 *Hen. 5. st. 2. c. 5.*

**LINCOLN'S INN FIELDS.** To be inclosed by trustees, who may employ artificers, &c. And yearly rates shall be made on all houses there, not exceeding 2s. 6d. in the pound: this square and back trees are to be a distinct ward, as the scavengers' rates and watch; and the persons annoying the fields of filth, to forfeit 20s.; and assembling to use sports, or breaking fences, &c. incur a forfeiture of 40s.

levied by the warrant of a justice of the peace. 8 *Geo. 2. c. 26.*

**LINDESFERN.** A place often mentioned in our ancient histories; being formerly a Bishop's see, now *Holy Island*.

**LINEAL CONSANGUINITY.** Is that which subsists between persons, of whom one is descended in a direct line from the other. See tit. *Descent, Kindred*.

**LINEAL DESCENT.** The descent of estates from ancestor to heir, i. e. from one to another, in a right line. See tit. *Descent*.

**LINEAL DESCENT OF THE CROWN.** See tit. *King, I.*

**LINEAL WARRANTY.** Was where the heir derived, or might by possibility have derived his title to land warranted, either from or through the ancestor who made the warranty. See tit. *Warranty*.

**LINEN.** No person shall put up to sale any piece of dowlas, linen, &c. unless the just length be expressed thereon, on pain to forfeit the same. 28 *Hen. 8. c. 4.* Using means whereby linen cloth shall be made deceitfully, incurs a forfeiture of the linen, and a month's imprisonment and a fine. 1 *Eliz. c. 12.*

By 15 *Cha. 2. c. 15. § 2.* any person, native or foreigner, may without paying any thing, in any place privileged or unprivileged, corporate or non-corporate, set up and exercise the occupation of breaking, hickling, or dressing of hemp or flax; as also of making or whitening of thread; as also of spinning, &c. any cloth made of hemp or flax only; as also the mystery of making twine or nets for fishing, or of stoving of cordage; as also the trade of making tapestry hangings.

§ 3. Foreigners that shall use any of the trades aforesaid three years, shall (taking the oath of supremaey before two justices near unto their dwellings) enjoy all privileges as natural born subjects.

Linen of all sorts made of flax or hemp, of the manufacture of this kingdom, may be exported duty free. 3 *Geo. 1. c. 7.*—Stealing of linen, &c. from whitening grounds, or drying houses, to the value of 10s., is felony. 4 *Geo. 2. c. 16.*

By the 17 *Geo. 2. c. 30.* affixing on foreign linens any stamp put upon Scotch or Irish linens, or affixing a counterfeit stamp on British or Irish linens, incurs a penalty of 5l.

Besides various other premiums and encouragements, bounties were granted on the exportation of linen for a long period down to 1830, when they were withdrawn.

By the 6 *Geo. 4. c. 122.* the former acts for the regulation of the linen and hempen manufactures of Ireland were repealed, and other provisions substituted. That act was repealed by the 9 *Geo. 4. c. 62.* which in its turn has

been supplanted by the 2 & 3 Will. 4. c. 77. which is to continue in force for two years, from the end of the then session of parliament, and from their expiration to the end of the then next session.

By the 27 Geo. 3. c. 13. a sum of 6335*l.* 15*s.* was set apart out of the customs for the encouragement of raising and dressing hemp and flax, but that and all other acts authorizing money to be so appropriated have been repealed by the 4 & 5 Will. 4. c. 14.

Linen and other goods are protected whilst in the course of their manufacture by the 7 & 8 Geo. 4. c. 29. § 16. which punishes by transportation for life or years, imprisonment and whipping, the stealing of them to the value of ten shillings, whilst placed or exposed during any stage or process of manufacture in any building, field, or other place.

As to the malicious destruction of linen in the course of manufacture, &c. see tit. *Frames, Malicious Injuries.*

With respect to the copyright of printed lineus, see tit. *Literary Property.*

LION. See *Lyon.*

LIQUORICE. Is among the drugs liable to certain duties on importation, under the laws relative to the Customs.

LITERA. [From the Fr. *litier*, or *lictier*, Lat. *lectum*,] litter: it was anciently used for straw for a bed, even the king's bed. It is now only in use in stables among horses: *tres carectatas literæ*, three cart-loads of straw, or litter. *Mon. Angl. tom. 2. p. 33.*

LITERATURA. *Ad literaturam ponere*, signifies to put children out to school; which liberty was anciently denied to those parents who were servile tenants, without the consent of the lord: and this prohibition of educating sons to learning, was owing to this reason; for fear the son being bred to letters might enter into orders, and so stop or divert the services which he might otherwise do as heir to his father. *Paroch. Antiq. 401.*

LITERÆ. *Ad faciendum attornatum pro sectâ faciendâ*. *Reg. Orig. 192.* See *Attorney.*

LITERÆ. *Canonici ad exercendum jurisdictionem loco suo.* *Reg. Orig. 305.*

LITERÆ. *Per quas dominus remittit curiam suam Regi.* *Reg. Orig. 4.*

LITERÆ. *De Requestu.* *Reg. Orig. 129.* See these in their proper places.

LITERÆ SOLUTORIÆ. Were magical characters supposed to be of such power, that it was impossible for any one to bind those persons who carried these about them. *Bede lib. 4. c. 22.*

## LITERARY PROPERTY.

The property that the author, or his assignee, hath in the copy of any literary work.

The right which an author may be supposed to have in his own original literary compositions, so that no other person without his leave may publish or make profit of the copies, is classed by *Blackstone* among the species of property acquired by occupancy; being grounded on labour and invention. He expresses, however, some doubt whether it subsists by common law: and this being still, after all the determinations on the subject, in some measure, *vezata quæstio*, the following extracts deserve the attention of the student. See 2 *Comm.* 405.

When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases; and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language. The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or to the eye of another, by recital, [see *post*, the case of *Colman v. Watken*,] by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man it hath been thought, can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership: it being then a present to the public, like building a church or bridge, or laying out a new highway. But in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply the copies of that book for sale, than he hath to imitate for the like purpose the ticket, which is bought for admission to an opera or a concert; and, in the other, that the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author before it is printed or published; yet from the instant of publication, the exclusive right of an author, or his assigns to the sole communication of his ideas, immediately vanishes and evaporates; as being a right of too subtle and unsubstantial a nature, to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate. 2 *Comm.* 406.

The Roman law adjudged, that if one man

wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials, meaning thereby the mechanical operation of writing; for which it directed the scribe to receive a satisfaction: for in works of genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter. As to any other property in the works of the understanding the law is silent; though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence, Martial, and Statius. 2 *Comm.* 407.

But whatever inherent copyright might have been supposed to subsist by the common law, the 8 *Ann. c.* 19, hath now declared, that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer: [the words of the statute]; and hath protected that property by additional penalties and forfeitures: directing farther, that if at the end of that term the author himself be living, the right shall then return to him for another term of the same duration. A similar privilege is extended to the inventions of prints and engravings, by 8 *Geo. 2. c.* 13; 7 *Geo. 3. c.* 38. 17 *Geo. 3. c.* 57. The above parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 *Jac. 1. c.* 3; which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same: by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee. 1 *Vern.* 65; 2 *Comm.* 407. See tit. *Patents*.

Whether the productions of the mind could communicate a right of property, or of exclusive enjoyment, in reason and nature; and if such a moral right existed, whether it was recognized and supported by the common law of England, and whether the common law was intended to be restrained by the statute of queen *Anne*, are questions upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted. These questions have, by the supreme court of judicature in the kingdom, been so determined, that an author has no right at present beyond the limits fixed by that statute. See the case of *Donaldson v. Beckett*, *Bro. P. C.*

As that determination, however, was contrary to the opinion of Lord *Mansfield*, of the learned commentator, and of several other judges, Mr. *Christian* has remarked, that every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance; and

he proceeds to deliver his sentiments in the following manner.

Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity, to that savage state, which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right seems to be to inquire whether it is such as the reason, the cultivated reason of mankind, must necessarily assent to. No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted. And if any private right ought to be preserved more sacred and inviolate than another, it is that where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary property, it must be admitted, is very different in its nature from a property in substantial and corporal objects; and this difference has led some to deny its existence as property; but whether it is *sui generis*, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an inviolable right, established in sound reason and abstract morality: no less than eight of the twelve judges were of opinion, that it was a right allowed and perpetuated by the common law of England: but six held, either that it did not exist, or that the enjoyment of it was abridged by the statute of queen *Anne*; and that all remedy for the violation of it was taken away after the expiration of the term specified in the act; and agreeable to that opinion was the final judgment of the house of Lords. 1 *Comm.* 407. in n.

For the arguments at length of the judges of the King's Bench, and the opinions of the rest, see the case of *Miller v. Taylor*, 4 *Burr.* 2303; 1 *Blackst. Rep.* 675. In that case the Court of King's Bench determined that an exclusive and permanent copyright did actually subsist in authors by the common law. But the effect of their opinion was contradicted by the determination of the House of Lords in *Donaldson v. Beckett*, as above stated.

But whatever the common law may be with respect to the copyright of a printed work, it has been decided that, independent of the statute law, an author has an absolute property over his work, whilst it exists in manuscript. 4 *Burr.* 2340, 2379; 2 *Merr.* 435. And the mere delivery of the manuscript to a printer



will not divest his right; for the consent to print must be in writing. 4 *Vin. Ab.* 278. Neither is a person to whom a manuscript has been lent, with liberty to take a copy and make what use of it he thinks fit, empowered to print and publish the work. 2 *Eden*, 329. And it has been decided that the copyright in a piece of music is not lost, although it has been published in manuscript a year before it is printed. 2 *B. & A.* 298.

Injunctions have also been frequently granted to restrain the publication of private letters either by the parties to whom they have been written, or by third persons. 2 *Atk.* 342; *Amb.* 737.

The following is a general abstract of the statutes relative to this interesting subject, and of some points determined on their construction.

The 8 *Ann. c.* 19. and 41 *Geo. 3. c.* 107, enacted, that the author of any book, and his assigns, should have the sole liberty of printing it for fourteen years, and for a further term of fourteen years, if the author were living at the end of the first fourteen.—By 54 *Geo. 3. c.* 156. § 4. this term is extended to twenty-eight years absolute, and to the end of the author's life: and this advantage is given to authors of books published before the act, § 8, 9.

An author whose works had been published more than twenty-eight years before the passing the act 54 *Geo. 3.* is not entitled to the copyright for life. *Brooke v. Clarke*, 1 *B. & A.* 396.

By the acts 41 *Geo. 3. c.* 107. § 1; and 54 *Geo. 3. c.* 156. § 3. booksellers, printers, &c. in any part of the United Kingdom, or in any part of the British European dominions, who shall print, reprint, or import or publish, or expose to sale any such book, without consent of the proprietor, shall be liable to a special action in the case for damages at the suit of the proprietor, and shall also forfeit all the books to the proprietor; and further 3*d.* per sheet, half to the king, and half to the informer.

No bookseller, printer, or other person, shall be liable to these forfeitures, unless the title to the copy of the book, [the whole book and every volume thereof, 15 *Geo. 3. c.* 53. § 6.] shall before such publication be entered in the register book of the Company of Stationers, at their Hall in London, and unless the consent of the proprietor be entered, § 2; nor unless nine copies of each book be delivered to the company's warehouse-keeper before publication, for the use of the royal library, the liberties of the university of Oxford and Cambridge, of the four universities in Scotland, of Sion College in London, and of the advocates at Edinburgh, § 5, and see 15 *Geo. 3. c.* 53. § 6; and 41 *Geo. 3. c.* 107. § 6, requiring copies to

be delivered to Trinity College, and King's Inns Dublin.

Doubts having been entertained, whether the copies required for the several public libraries were to be delivered if the works were not entered at Stationers' Hall, it is enacted by 54 *Geo. 3. c.* 156, that the provisions of the acts 8 *Ann.* and 41 *Geo. 3.* as to delivering copies of books to public libraries, shall be repealed; and that eleven copies of all works whatever, printed or published, shall be delivered to the several universities, &c. if demanded within twelve months after the publication,—but not copies of second or subsequent editions without alteration: and that amendments of early editions may be printed separately, and delivered. 54 *Geo. 3. c.* 156. § 1, 2, 3.

A part of a work published separately and before the completion of the whole, is not demandable by the public bodies mentioned in 54 *Geo. 3. c.* 156, under the words "the whole of every book, and every volume thereof." *British Museum v. Payne*, 4 *Bing.* 450.

All books are required to be entered (within one month if published in London, and three months if published elsewhere,) at Stationers' Hall, and one copy on the best paper to be then delivered for the British Museum. Two shillings to be paid for each entry; penalty for neglect of entry, 5*l.*, and eleven times the price of the book. 54 *Geo. 3. c.* 156. § 5. The warehouse-keeper at Stationers' Hall is to transmit lists of all publications to the librarians of the several libraries entitled to copies: and to demand the copies of the publishers; but who may deliver the books at the several libraries, if they please, § 6, 7.

An action may be brought on an injunction obtained in a Court of Equity, although the publication be not entered in the register of the Stationers' Company. 1 *Black.* 330. In *Beckford v. Hood*, it was explicitly determined that an author whose work is pirated before the expiration of twenty-eight years, from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers' Hall, and although it was first published without the name of the author affixed. 7 *T. R.* 620.

And to remove all doubt it was enacted by the 54 *Geo. 3. c.* 156. § 5. that a failure in making the entry shall not affect the copyright, but only subject the publisher to the penalty imposed.

If the clerk of the Stationers' Company shall neglect to make due entry, or to give a certificate thereof, then notice being given in the Gazette, the proprietor shall have the same benefit as if an entry were actually made:

and the clerk shall forfeit 20*l.* 8 *Ann. c. 19.* § 3; 41 *Geo. 3. U. K. c. 107.* § 4, 5.

The above statute 8 *Ann. c. 19.* particularly provided, by § 9. that the right of the universities or any other person, to the printing or reprinting of any book already printed, should not be either prejudiced or confirmed: after the determination of the case of *Donaldson v. Beckett*, the universities were so much alarmed at the decision, that they applied for and obtained an act, 15 *Geo. 3. c. 53.* which secured to the two universities in England, the colleges or houses of learning within the same, the four universities in Scotland, and the Colleges of Eton, Westminster, and Winchester, a perpetuity in the copyright of all books given, or devised to, or in trust for them by the authors; which was sanctioned by the same penalties as those contained in the 8 *Ann.* so long as the books or copies belonging to the said universities or colleges are printed only at their own printing-presses, within the universities or colleges, and for their sole benefit. § 8.

A fair and *bonâ fide* abridgement of any book is considered as a new work: and however it may injure the sale of the original, yet it is not deemed in law to be a piracy, or violation of the author's copy right. 1 *Bro. C. R.* 451; 2 *Atk.* 141.

A translation of a work, either from the ancient classic authors, or of a work written in Latin by an Englishman, 2 *Merr.* 441. *n.*; or of papers in any of the modern languages, as the French and German, 3 *Ves. & B.* 77. is protracted by the 8 *Ann. c. 19.*

Musical compositions have been held to be within the meaning and protection of the statute, *Corp.* 623; and an action is maintainable for pirating a single sheet of music. 11 *East.* 244.

Every distinct and independent part of a work is also a book within the meaning of the statute, as a tale or piece of music, printed and bound up with other tales or pieces of music. *Id.*; 2 *B. & A.* 295.

The author or publisher of a work of a *libellous* or *immoral* tendency can have no legal property in it: and no action can be maintained for printing such work, (the book in question was the *History or Amours of a Courtesan.*) It is no answer to such objection that the defendant is a wrong-doer in publishing the work, and that, therefore, he ought not to set upon it immediately. *Stockdale v. Onwhym*, 7 *D. & R.* 625; 5 *B. & C.* 173; 2 *C. & P.* 163.

And it makes no difference whether the offensive matter be represented in prints, 4 *Esp.* 97. or pictures, 2 *Campb.* 511, or expressed in books.

Assignments of copyright under 8 *Ann.* must be in writing. 3 *M. & S.* 7.

Evidence that the defendant acted a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication by the defendant, within the meaning of the statute. 5 *T. R.* 245.

And if the author has published a tragedy, it is no piracy to act it abridged at a theatre without his consent. 5 *B. & A.* 657.

But no one has a right to take down a play in short-hand, and to print it before it is published by the author. *Ambl.* 694.

And now by the 3 *Will. 4. c. 15.* dramatists have been placed on an equal footing with other authors. See tit. *Dramatic Literary Property.*

Previous to the union there was no statute in Ireland to protect the copyright of authors, but immediately after that event an act was passed (41 *Geo. 3. c. 10.*) enacting similar provisions with respect to that country as those contained in the 8 *Ann.* and 15 *Geo. 2.* The 54 *Geo. 3. c. 156.* extends to the whole of the United Kingdom, as well as the Isles of Man, Jersey, and Guernsey, and all other parts of the British dominions.

The right of printing books given or bequeathed to Trinity College, Dublin, is secured to that college by 41 *Geo. 3. c. 107.* § 3.

No person shall import into any part of the United Kingdom for sale any book first written or printed and published within the United Kingdom, and reprinted elsewhere, on penalty of forfeiture of the books, 10*l.* and double the value of each copy so imported.—Books may be seized by officers of customs and excise, who shall be rewarded by their respective commissioners.—These penalties do not extend to books not having been printed in the United Kingdom within twenty years; nor to books reprinted abroad, and inserted among other books or tracts for the most part foreign. 41 *Geo. 3. c. 107.* § 7.

Whether an author, by publishing a book abroad, makes his work *publici juris*, is not decided; but it is clear he does so, unless he take prompt measures to publish it also in England. And where an author published his work in 1814 in Paris, and soon after sold the right of publishing to the plaintiff here, but without writing, and the plaintiff thereupon published it, and in 1818 the defendant published the work in England, and in 1822, the author, by writing, assigned the right of printing to the plaintiff, it was held, that the publication by the defendant was lawful and not actionable,—for the work has been published in England by the author, nor was the publication in 1814, by his legal assignee, for want of writing, and the author could not, by the valid assignment in 1822, enable the plaintiff

to maintain an action for selling a copy after that assignment was executed. 2 B. & C. 861.

All actions, indictments, &c. for offences must be commenced within six months after commission of the offence, 41 Geo. 3. c. 107. § 8; within twelve months, 54 Geo. 3. c. 156. § 10.

It is worthy of remark, that the determination of the House of Lords, in *Donaldson v. Beckett*, which was supposed, at the time, to have given a mortal blow to the property and prosperity of authors and booksellers, has, in fact, been one great means of increasing both. Few books are now republished without considerable alterations, additions, or annotations, by means of which they become, in fact, new works; and it is not worth any body's while then to pirate them in their original state.—And an action lies to recover damages for pirating the new corrections and additions to an old work. *East*, 358, 361, 363, *in n.*

This has proved a spur to the industry of authors, and the liberality of booksellers; and perhaps no period ever produced so many publications of acknowledged utility, as that which has elapsed since the memorable decision above alluded to, which for the moment cast a melancholy gloom over those who now enjoy its beneficial effects.

The following are the principal features and distinction of the three statutes relative to prints and engravings. The 8 Geo. 2. c. 13, gives an exclusive privilege of publishing, to those who invent or design any print, for fourteen years only. The 7 Geo. 3. c. 28, extends the term to twenty-eight years absolutely, to all who either invent the design, or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies to be destroyed; and 5s. for each copy. Maps, charts, or plans, are among the prints enumerated in the above act. The 17 Geo. 3. c. 57, gives the proprietor an action on the case to recover damages, and double costs for the injury he has sustained by the violation of his right.

Actions under the two former statutes must be brought within six months, but no limitation is imposed by the 17 Geo. 3.

The assignee of a print may maintain an action on this last statute against any person who pirates it; and in such an action it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence. The date must always appear on the print. 5 T. R. 41.

The statutes only apply to engravings taken from pirated plates, and not engravings struck off illegally from a lawful plate. Therefore, where Heath was employed by Murary to en-

grave plates from drawings belonging to Murray, and H. took off proof impressions for his own use, and then became bankrupt, and his assignees sold them, it was held that neither H. nor his assignees were liable to an action on the 17 Geo. 3. c. 57. His act was a breach of contract, not a piracy. *Murray v. Heath*, 1 B. & A. 804.

The mere seller or publisher of a pirated copy of a print is liable to an action under 17 Geo. 3. c. 57, although it be not an exact copy of the original, and though the seller did not know it to be a copy. 1 D. & R. 400; 5 B. & A. 737.

It is no piracy of one engraving to make another from the original picture. *Berenger v. Wheble*, 2 Stark. 548.

In analogy also to the above doctrine of literary property, the 27 Geo. 3. c. 38. (which was enacted from one year, and afterwards extended by the 29 Geo. 3. c. 19. and made perpetual by the 34 Geo. 3. c. 23.) gives to the proprietors of new patterns in printed linens, cottons, muslins, &c. the sole right of printing them for two months, (enlarged to three months by the 29 Geo. 3. c. 19.) and gives the proprietor injured his remedy by an action for damage.

The jurisdiction of the Courts of Equity is not excluded by the special remedy given by the 34 Geo. 3. c. 23. *Russ. & M.* 159.

There is also a kind of prerogative copyright subsisting in certain books, which is held to be vested in the crown upon several reasons. Thus, 1. The King as the executive magistrate, has the right of promulgating to the people all acts and state of government. This gives the exclusive privilege of printing at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council. 2. As supreme head of the church, he hath a right to the publication of all Liturgies and books of Divine service. 3. He is also said to have a right by purchase to the copies of such law books, grammars, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles combined, the exclusive right of printing the translation of the Bible is founded. See 2 *Comm.* c. 27. p. 410, n.

For the acts giving a property in sculpture models, &c. see tit. *Sculpture*.

**LITH OF PICKERING.** In the county of York, viz. the liberty, or a member of Pickering, from the Saxon, *lid*, i. e. *membrum*.

**LITIGIOUS.** The litigiousness of a church is where several persons have, or pretend to, several titles to the patronage, and present several clerks to the ordinary; it excuses him from refusing to admit any of them, till a trial



of the right by *jure patronatus*, or otherwise. *Jenk. Cent.* 11.

**LITTERA.** Litter;—*Tres carectas litteræ*, three cart loads of straw or litter. *Mon. Angl.* 2. *par. fol.* 33. b.

**LITTLETON.** Was a famous lawyer in the days of the reign of Edward IV., as appeareth by *Staundf. Præf. c.* 21. *fol.* 72. He wrote a book of great account, called *Littleton's Tenures*. See tit. *Law Books*.

**LIVERY** [From *livre*, i. e. *insigne gestamen*; or *liver tradere*.] Hath three significations. In one sense, it was used for a suit of clothes, cloak, gown, hat, &c. which a nobleman or gentleman gave to his servants or followers, with cognizance or without; mentioned in 1 *Rich. 2. c.* 7. and divers other statutes.—Formerly great men gave liveries to several who were not of their family, to engage them in their quarrels for that year; but afterwards it was ordained, that no man of any condition whatsoever should give any livery but to his domestics, his officers, or counsel learned in the law. By 1 *Rich. 2.* it was prohibited on pain of imprisonment; and the one *Hen. 4. c.* 7. made the offenders liable to ransom at the king's will, &c. which statute was farther confirmed and explained *annis 2 & 7 Hen. 4.* and by 8 *Hen. 6. c.* 4; and yet this offence was so deeply rooted that Edward IV. was obliged to confirm the former statutes, and further to extend the meaning of them, adding a penalty of 5*l.* to every one who gave such livery, and the like on every one retained for maintenance, either by writing, oath, or promise, for every month. 8 *Edw. 4. c.* 2. But most of the above statutes are repealed by 3 *Car. 1. c.* 4.

Livery in the second signification, meant a delivery of possession to those tenants who held of the king *in capite*, or knights service; as the king by his prerogative hath *primer seisin* of all lands and tenements so holden of him. *Staundf. Prærog.* 12.

In the third sense, livery meant the writ which lay for the heir of age, to obtain the possession of seisin of his lands at the king's hands. *F. N. B.* 155. By the 12 *Car. 2. c.* 24. all wardships, liveries, &c. are taken away. See *Tenures*.

**LIVERY** [i. e. *DELIVERY*, OF *SEISIN*: *Libratio seisinæ*.] A delivery of possession of lands, tenements, and hereditaments, unto one that hath a right to the same; being a ceremony in the common law used in the conveyance of lands, &c. where an estate of fee-simple, fee-tail, or other freehold passeth. *Bract. lib. 2. c.* 18. And it is a testimonial of the willing departing of him who makes the livery, from the thing whereof the livery is made; and of willing acceptance of the other party receiving the livery; first invented that the

common people might have knowledge of the passing or alteration of estates from man to man, and thereby be better able to try in whom the right of possession of lands and tenements were, if the same should be contested, and they should be impanelled on juries, or otherwise have to do concerning the same. *West. Symb. par. 1. lib. 2.*

The common-law conveyance by feoffment is by no means perfected by the mere words of the deed; this ceremony of *livery of seisin* is very material to be performed, for without this the feoffee has but a mere estate at will.—*Lit. §* 66. This livery of seisin is no other than the pure feudal investiture or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation. 2 *Comm. c.* 20. *p.* 311. See *Conveyance, Deed, Estate, Feoffment, III., Tenures*.

Investitures, in their original rise, were probably intended to demonstrate in conquered countries, the actual possession of the lord, and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means might know against whom to bring their actions. 2 *Comm.* 341.

In all well-governed nations some notoriety of this kind has ever been held requisite in order to acquire and ascertain the property of lands. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporeal possession is required at this day to vest the property completely in the new proprietor, who, according to the canonists, acquires the *jus ad rem*, or inchoate and imperfect right by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporeal possession. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction; without which no temporal rights accrue to the minister; though every ecclesiastical power is vested in him by institution. So also even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir had not until recently *plenum dominium*, or full and complete ownership, till he had made an actual corporeal entry into the lands; for if he died before entry made, his heir was not entitled to take the possession, but the heir of the

person who was last actually seized. 2 *Comm.* livery of seisin; which livery, being an actual material tradition of the land, must take effect in present, or act et al. 2 *Comm.* 311. See 312. See *Descent*.

The corporeal tradition of lands being sometimes inconvenient, a symbolical delivery of *Terminum*, III., *Limitation of Estate, Remainder*, possession was in many cases anciently allowed.

ed, by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself.—With our Saxon ancestors the delivery of a turf was a necessary solemnity to establish the conveyance of lands. And to this day the conveyance of our copyhold estates is usually made from the seller to the lord or his steward, by delivery of a rod or verge; and then from the lord to the purchaser, by delivery of the same in the presence of a jury of tenants. 2 *Comm.* 313.

Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten and misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations, for the purpose of raising money without an absolute sale of the land; and sometimes like the proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views; none of which could be effected by a mere simple corporeal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still, for a very long series of years, they were never made use of but in company with the more ancient and notorious method of transfer by delivery of corporeal possession. 2 *Comm.* 314.

*Livery of Seisin*, by the common law is necessary to be made upon every grant of an estate of freehold in hereditament corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made, for they are not objects of the senses; and in leases for years, or other chattel-interests, it is not necessary; the solemnity being appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro*, because they cannot at the common law be made but by

On the creation of a freehold remainder at one and the same time with a particular estate for years at the common law, livery must be made to the particular tenant, without which nothing passeth to him in remainder, it being for the benefit of him in remainder, and not the lessee, who hath only a term; and if the lessee entereth, before livery and seisin made to him, the livery shall be void. *Lit.* 60; 1 *Inst.* 49. But if such a remainder be created afterwards, expectant on a lease for years now being, the livery must not be made to the lessee for years, for then it operates nothing; *nam quod semel meum est, amplius meum esse non potest*; but it must be made to the remainder-man by consent of the lessee for years; for without his consent no livery of the possession can be given; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for reasons connected with the doctrine of attainments. 2 *Comm.* 314, 315. See 1 *Inst.* 48, 49.

A man may make a letter of attorney to deliver seisin by force of the deed, which may be contained in the same deed; and a letter of attorney may be likewise made to receive livery and seisin. 5 *Rep.* 91; 1 *Inst.* 49, 52.

This livery of seisin is either in deed or in law; the distinctions between which are stated and explained *ante*, *Feoffment*, III. Anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law, *pares debent interesse investitura feudi, et non alii*; for which this reason is expressly given; because the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers may be apt to connive at.—And though afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed, (like that of all other attestations) was still reserved to the *pares*, or jury of the county; and this is the reason why, if lands conveyed by feoffment lie in several counties, there must be as many liveries of seisin as there are counties. 2 *Comm.* 315, 316. See *Feoffment*, III.—In addition to what is there said, the following determinations afford information on the subject.

Where a house and lands are conveyed, the house is the principal, and the lands accessory;

and there the livery must be made, and not upon the land. 2 *Rep.* 31; 4 *Leon.* 374.

If a house or lands belong to an office, by grant of the office by deed, the house or land passeth without livery; and by a fine, which is a feoffment of record, by a lease and release, bargain and sale by deed inrolled, exchange, &c. a freehold passeth without livery; and so indeed of feoffment to uses, by virtue of the statute of uses. 1 *Inst.* 49. So that livery and seisin is not so commonly used as formerly; neither can an estate be created now by livery and seisin only, without writing. 29 *Car.* 2. c. 3 See *Conveyance, Estate.*

If a deed of feoffment be delivered upon the land, "in the name of seisin of all the lands," it will be a good livery and seisin; but the bare delivery of a deed upon the land, though it may make the deed, it shall not amount to livery and seisin, without those words. 1 *Inst.* 52, 181. If one makes a feoffment to four persons, and seisin is delivered to three of them in the name of all, the estate is vested in all of them. 3 *Rep.* 26.

No person ought to be in the house, or upon the land, when livery is made, but the feoffor and feoffee; all others are to be removed from it; if the lessor feoffor makes livery and seisin, the lessee being upon the land contradicting it, the livery is void. *Cro. Eliz.* 321; *Dalis. Rep.* 94.

But livery of seisin is not invalidated by omitting to remove from the house a child found there, unless such child be part of the family of a person having an immediate estate or interest in the premises, and has been placed there for the purpose of continuing his possession. 2 *M. & M.* 508.

Form of livery and seisin indorsed on the deed.

**MEMORANDUM.** That on the day and year within written, full possession and seisin was had and taken of the messuage or tenement, and premises within granted, by A. B. one of the attornies within named, and by him delivered over unto the within named C. D. To hold to him, his heirs, &c. according to the contents and true meaning of the within written indenture, in the presence of, &c.

**LIVERY and OUSTER-LE-MAIN.**—Where by inquest before the escheator, it was found that nothing was held of the king, then he was immediately commanded by writ to put from his hands the lands taken into the king's hands. 29 *Edw.* 1; 28 *Edw.* 3. c. 4. See *Ouster-le-Main.*

**LIVERYMEN OF LONDON.** In the companies of London, liverymen are chosen out of the freemen, as assistants to the masters and wardens, in matters of council, and for better government; and if any one of the

company refuse to take upon him the office, he may be fined, and action of debt will lie for the sum. 1 *Mod.* 10. See *London.*

**LOAN.** A contract by which the use of any thing is given under condition of its being returned to the owner. See *Bailment.* As to loans of money, see *Usury*; and as to public loans, see *National Debt.*

**LOBBE.** A large kind of North-sea fish. See 31 *Edw.* 3. st. 3. c. 2. And *loich* comprehends lob, ling, and cod.

**LOBSTERS.** May be imported by natives or foreigners, and in any vessels, notwithstanding 10 & 11 *Wm.* 3. c. 24: 1 *Geo.* 1. st. 2. c. 18. No person shall with trunks, hoop-nets, &c. take any lobsters on the sea-coast of Scotland, from the first of June to the first of September yearly, on pain of 5*l.* to be recovered before two justices. 9 *Geo.* 2. c. 33. See *Fish, Navigation Acts.*

**LOCAL.** [*localis.*] Tied or annexed to a certain place. Real actions are local, and to be brought in the county where the lands lie; but a personal action, as of trespass or battery, &c. is transitory, not local; and it is not material that the action should be tried or laid in the same county where the fact was done; and if the place be set down, it is not needful that the defendant should traverse the place, by saying he did not commit the battery in the place mentioned, &c. *Kitch.* 230. See *Action, Venue.* A thing is local that is fixed to the freehold. *Kitch.* 180.

**LOCATION.** A contract by which a hire is agreed to be given for the use of any thing, or for the labour of any person. See *Bailment, Master and Servant.*

**LOCKMAN.** In the Isle of Man the lockman is an officer to execute the order of the governor, much like our under-sheriff. *King's Descrip. Isle of Man*, 26.

**LOCKS,** in navigation. See *Malicious Injuries.*

**LOCUS IN QUO.** The place where any thing is alleged to be done in pleadings, &c. 1 *Salk.* 94. See *Trespass.*

**LOCUS PARTITUS.** A division made between two towns or counties, to make trial where the land or place in question lieth. *Flet.* lib. 4. c. 15.

**LOCUS PENITENTIÆ.** A power of drawing back from a bargain before any act has been done to confirm it in law. See *Agreement, Fraud.*

**LOCUTORIUM.** The monks and other religious in monasteries, after they had dined in their common hall, had a withdrawing room, where they met and talked together among themselves, which room, for that sociable use and conversation, they called *locutorium à loquendo*; as we call such a place in our houses



*parlour*, from the French *parler*; and they had another room which was called *locutorium forinsecum*, where they might talk with laymen. *Walsing.* 257.

**LODE-MANAGE.** The hire of a pilot for conducting a vessel from one place to another. *Cowell.* The pilot receives a lode-manage of the master for conducting the ship up the river, or into port; but the loadsman is he that undertakes to bring a ship through the haven, after being brought thither by the pilot, to the quay or place of discharge; and if through his ignorance, negligence, or other fault, the ship or merchandise receive any damage, action lies against him at the common law. *Roughton, fol.* 27.

**LODE-MEREGE.** Mentioned in the laws of Oleron, is expounded to be the skill or art of navigation. *Cowell.* *Quere*, if it is not a corruption of *lode-manage*.

**LODE-SHIP.** A kind of fishing vessel, mentioned in 31 *Edw.* 3. c. 2.

**LODGERS and LODGINGS.** As to thefts of furniture by lodgers, see *Larceny*.

**LOGATING.** An unlawful game, mentioned in 33 *Hen.* 8. c. 9. now disused.

**LOGIA.** A little house, lodge, or cottage. *Mon. Angl. tom.* 1. p. 400.

**LOGWOOD** [*lignum tinctorium*.] Wood used by dyers, brought from foreign parts, prohibited by 23 *Eliz.* c. 9; but allowed to be imported by 14 *Car.* 2. c. 11.

**LOITH, or LOYCH FISH.** A large North-sea fish, mentioned in 31 *Edw.* 3. st. 3. c. 2. Vide *Lobbe*.

**LOLLARDS.** Are said to have had their name from one Walter Lollard, a German, who lived about the year 1315. They were termed Heretics, and began to abound in England in the reigns of King Edward III. and Henry V. Wyclife being the chief of them in this nation. *Stow's Annals*, 425. *Spotswood*, in his *History of Scotland*, says, the intent of these Lollards was to subvert the Christian faith, the law of God, the church and the realm. See 2 *Hen.* 5. c. 7. repealed by 1 *Edw.* 6. c. 12. and tit. *Heresy*. These Lollards were in fact the founders of the Protestant religion. As to the derivation of the term, see *Life of Wyclife* prefixed to *Baber's edition of Wyclife's Translation of the New Testament*, p. xxxiii. n. 4to. 1810.

**LOLLARDY.** The doctrine and opinion of the Lollards. See 1 & 2 *P. & M.* c. 6.

**LOMBARDS.** The company shall be answerable for their debts. 25 *Edw.* 3. st. 5. c. 23. See *Bills of Exchange*.

## LONDON.

The metropolis of this kingdom, formerly called *Augusta*, has been built above three thou-

sand years, and flourished for fifteen hundred years. Its Exchange, where merchants of all nations meet, is not to be equalled; and for stateliness of buildings, extent of bounds, learning, arts and sciences, traffic and trade, this city gives place to none in the world. *Stow.*

London is a county of itself. 4 *Inst.* 248. See title *Counties Corporate*. So it is a corporation by prescription, known by several names. 2 *Inst.* 330, *quo warranto, passim*.

During the violent proceedings that took place in the latter end of the reign of King Charles II. it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters; and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real forfeiture of their franchises by neglect or abuse of them; and the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and during their state of anarchy the crown named all their magistrates. This exertion of power, though perhaps, in *summo jure*, it was for the most part strictly legal, gave a great and just alarm, the new-modelling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by 2 *W. & M.* st. 1. c. 8. which enacts, that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever. The *quo warranto* against London issued in Trinity term, 35 *Car.* 2. on which judgment was given in *B. R.* that the charter and franchises of the said city should be seized into the king's hands as forfeited. This judgment was reversed by the above 2 *W. & M.* and all officers and companies restored, &c.; and the act provided, that the mayor, commonalty, and citizens of the city of London should for ever thereafter be, and prescribe to be, a body corporate and politic, &c.; and enjoy all their franchises, &c. See 3 *Comm.* 263, 4. Before this, by *Magna Charta*, c. 1, it was provided, that the city of London should have all their ancient usages, liberties, and customs which they had used to enjoy; which is confirmed by 14 *Edw.* 3. st. 1. c. 1.

It is divided into twenty-six wards, over each of which there is an alderman; and is governed by a lord mayor, who is chosen yearly, and presented to the king, or in his absence to his justices, or the barons of the Exchequer at Westminster. *Chart. K. Hen.* 3.

Before the time of Henry III. the city was divided into twenty-four wards. By parliament, anno 17 R. 2. Farringdon-without was severed from Farringdon-within, and made a distinct ward. By charter 1 *Edw.* 3. and patent 4 *Edw.* 6. the king granted to the citizens and their successors, the villa, manor, and borough of Southwark; whereupon, by an order of the Court of Mayor and Aldermen, confirmed by the Common Council, Southwark was made the 26th ward, by the name of the Bridge Ward-without, on the last day of July, 4 *Edw.* 6. See *Com. Dig.* title *London*, (A).

Before and since the Conquest, to the time of Ric. 1. London was governed by a portreeve, and 1 R. 1. by two bailiffs, and afterwards by a mayor appointed by the king; but King John, in the tenth year of his reign, granted them liberty to choose a mayor. 2 *Inst.* 253. See 2 *Stow*, 450; *Com. Dig.* title *London*, (C). The presenting and swearing of the lord mayor at Westminster to be on the 9th of November, new style; 24 *Geo.* 2. c. 48. § 11; to be admitted and sworn at Guildhall, London, the day preceding. 25 *Geo.* 2. c. 20, § 4.

The lord mayor of London for the time being is chief justice of gaol delivery, escheator within the liberties, and bailiff of the river Thames, &c. He is a high officer in the city, having all courts for distribution of justice under his jurisdiction, viz. The court of Hustings, Sheriff's Court, Mayor's Court, Court of Common Council, &c. 2 *Inst.* 330.

King Henry the IV. granted to the mayor and commonalty of London the assize of bread, beer, ale, &c. and victuals, and things saleable in the city. In London every day, except Sunday, is a market overt, for the buying and selling of goods and merchandize. 5 *Rep.* 85. But no person, not being a freeman of London, shall keep any shop or other place to put to sale by retail any goods or wares, or use any handicraft trade for hire, gain or sale within the city, upon pain of forfeiting £5.—8 *Rep.* 124; *Chart. Car.* 1.

Persons making ill and unserviceable goods in London, the chief officers of the company to which such persons do or ought to belong, may seize and carry them to the Guildhall, and have the goods tried by a jury; and if found defective, they may break them, &c. *Trim.* 34 *Car.* 2. B. R. A person must be a freeman of London to be entitled to carry on merchandise there. *Chart. Car.* 1.

By charter Henry 1: all men of London, and all their goods, shall be free from scot and lot, dane-guilt and murder; and from all toll, passage and lestage, and all other customs through all England, and the ports of the sea. So by charters 11 *Hen.* 3. and 50 *Hen.* 3.—

See 4 *Inst.* 253. But he who claims these privileges must not only be a freeman, but an inhabitant of London. 1 *H. Black.* 206; 4 *T. R.* 144.

There are three ways to be a freeman of London: by servitude of an apprenticeship; by birthright, as being the son of a freeman; and by redemption, i. e. by purchase, under an order of the Court of Aldermen. 4 *Mod.* 145.

The child of a freeman, when of age, may, in consideration of a present fortune, bar herself of her customary part. 2 *Strunge*, 947. An agreement on marriage, that the husband shall take up the freedom of London, binds the distribution of his effects. 1 *Strange*, 455. See tit. *Executor*, V. 9.

The city of London is entitled to a fine, imposed for a misdemeanor committed within the city, though it be adjudged by the Court of King's Bench at Westminster. (Charters of 23 *H.* 6; 20 *H.* 7; 14 *Car.* 1; and 15 *Car.* 2.) 1 *C. M. & R.* 1.

The customs of London are many and various.—They are against the common law, but made good by special usage, and confirmed by act of parliament. 4 *Inst.* 249; 8 *Rep.* 126. In setting forth a custom or usage in the city of London, it must be said *antiqua civitas*, or it will not be good. 2 *Leon.* 99.

There is a custom in London to punish by information in the Mayor's Court, in the name of the common serjeant of the city, assaults on aldermen, and affronting language, &c. 7 *Mod.* 28, 26.

Where a woman exerciseth a trade in London wherein her husband doth not intermeddle by the custom she shall have all advantages, and be sued as a feme sole merchant; but if the husband meddle with the trade of the wife, or carry on the same trade, it is otherwise. 1 *Cro.* 63; 3 *Rep.* 290. See titles *Bankrupt*, *Baron and Feme*.

An arrest may be made in London on the plaintiff's entering his plaint in either of the compters, and a serjeant of London need not show his mace when he arrests one; and the liberties of the city extend to the suburbs and Temple Bar. *Jenk. Cent.* 291.

The customs of the city of London shall be tried by the certificates of the mayor and alderman, certified by the mouth of their recorder, upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by the county. 1 *Inst.* 74; 4 *Barr.* 248; *Bro. Abr.* title *Trial* pl. 96. As the custom of distributing the effects of freemen deceased; (see title *Executor*, V. 9.) of enrolling apprentices; or that he who is free of one trade may use another; if any of these or other similar points come in issue.—But this rule admits of an exception where

the corporation of London is party, or interested in the suit; as in action brought for a penalty inflicted upon by the custom, for by 32 *Geo. 3. c. 48.* was extended to the Mid-  
there the reason of the law will not endure so disesex sessions.

partial a trial; but this custom shall in such And see the 9 *Geo. 4. c. 9.* providing for the case to be determined by a jury. *Rub. 85* In holding of the sessions of the peace at West-  
some cases the sheriff of London's certificate minister, notwithstanding the sitting of the  
shall be the final trial; as if the issue be King's Bench.

whether the defendant be a citizen of London Now by the 4 & 5 *W. 4. c. 36.* after recit-  
or foreigner, in case of privilege pleaded to be ing that "it is expedient, for the more effec-  
sued only in the city Courts. 1 *Inst. 714.* — tive and uniform administration of justice in  
See title *Customs of London.* criminal cases, that offences committed in the

Upon the customs of London concerning metropolis and certain parts adjoining thereto,  
the payment of the wharfage, &c. by every should be tried by justices and judges of oyer  
freeman to the corporation, the trial shall not at a terminer and gaol delivery in the city of  
be by the mouth of the recorder, as customs London," it is enacted,  
generally are, out by the country, and a jury § 1. That the lord mayor of London, the  
from Surrey adjoining. *Moor, c. 129.* lord chancellor, the judges of the courts of law

The mayor of London is to cause errors, and of bankruptcy, and of the admiralty, the  
defaults, and misprisions there to be redressed, dein of the arches, the aldermen, recorder, and  
under the penalty of 1000 marks; and the common serjeant of London, &c. and such  
constable of the Tower shall execute process others as his majesty may appoint, shall be  
against the mayor for default, &c. 25 *Edw. judges of a court to be called the "Central*  
3. c. 10. See 17 *Ric. 2. c. 12*; 1 *Hen. 4. c. 15* Criminal Court," to which his majesty may di-  
by which latter the fine is to be at the discre- rect his general commission as after mentioned;  
tion of the justices. and which court shall have jurisdiction to hear,  
try, and determine all offences as after speci-

The several Courts within the city of Lon- fed.  
don (and other cities and corporations through-

out the kingdom, held by prescription, charac- § 2. His majesty may issue commissions of  
ter, or act of parliament, are of a private and oyer and terminer to inquire of, hear, and de-  
limited species. The chief of those in Lon- termine all treasons, murders, felonies, and  
don are the Sheriff's Court, holden before misdoings committed within the city of  
their steward or judge; from which a writ of London and county of Middlesex, and certain  
error lies to the Court of Hastings, before the parts of the counties of Essex, Kent, and Sur-  
mayor, recorder, and sheriff; and from thence rety; and also commissions of gaol delivery  
to justices appointed by the king's commission, to deliver his majesty's gaol of Newgate of the  
who used to sit in the church of St. Martin's prisoners therein charged with any of the of-  
Grand. *P. N. B. 32.* And from the judg- fences aforesaid, committed within the limits  
ment of those justices a writ of error lies im- aforesaid, and it shall be lawful for the jus-  
mediately to the House of Lords. 3 *Comm. tices and judges of the Central Criminal Court*  
80, n. See titles *Courts, Court of Hastings,* aforesaid, or any two or more of them, to in-  
*Inferior Courts, &c.* quire of, hear, determine, and adjudge all such

The Court of Requests, or Court of Con- treasons, murders, felonies, and misde-  
science for the recovery of debts not exceeding means which might be inquired of, heard,  
40s. was first established in London so early and determined in der any commission of oyer  
as the reign of Henry VIII. by an act of their and terminer for the city of London or county  
Common Council; which was, however, cer- of Middlesex, or commission of gaol delivery  
tainly insufficient for that purpose, and illegal to deliver the gaol of Newgate, or which, in  
till confirmed by the 3 *Jac. 1. c. 15.* expanded case the parts of the counties of Essex, Kent,  
and amended by the 14 *Geo. 2. c. 10.* By the and Surrey, respectively comprised within the  
39 & 40 *Geo. 3. c. 101.* further amendments limits aforesaid and said counties of them-  
have been made in these statutes, and the juris- selves, might have been inquired of, heard, and  
diction of the Court extended to *Ec.* See title determined under commissions of oyer and  
*Courts of Conscience.* terminer and gaol delivery of such counties,  
and to deliver the said gaol of Newgate at

The gaol-delivery for the county of Middle- such times and places in the said city, or the  
sex, as well as that for London, was until re- suburbs thereof, as by the said commissions  
cently held at the Old Buley, in the city of shall be appointed, or as the said justices and  
London, eight times in the year; and it was judges by virtue and in pursuance thereof, or  
by 25 *Geo. 3. c. 17.* provided, that when such any two or more of them, shall appoint, and



to award and issue all precepts and process, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery: provided always, that such court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid, and act under such commission until a new commission shall be issued.

§ 3. The district situated within the limits of the jurisdiction hereinbefore established shall be deemed in all cases tried before the said justices and judges one county, for all purposes of revenue, local description, trial, judgment, and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges, the venue laid in the margin shall be as follows: "Central Criminal Court to wit;" and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall in indictments prepared and tried in the said court, be laid to have been committed, and averred to have taken place "within the jurisdiction of the said court."

§ 4. The sheriffs of the city of London and of the counties of Middlesex, Essex, Kent, and Surrey, respectively, shall execute and obey all precepts and process which the said justices and judges shall award and direct them respectively, and shall, whenever required, summon from the said city of London and county of Middlesex, and from the parts of the said counties of Essex, Kent, and Surrey, within the act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of London or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials, notwithstanding they are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise.

§ 5. His majesty, by order in council, to appoint the places of confinement for prisoners charged with offences committed within the limits of the act.

But by § 6, the Penitentiary at Milbank is to be one of the prisons under this act.

§ 7. Persons sentenced to imprisonment by court beyond the limits of this act, may still be removed to the Penitentiary at Milbank.

And § 8. The regulations in all Penitentiary Acts shall apply to prisoners confined there by the authority of the act.

§ 9. The said justices and judges of oyer and terminer and general gaol delivery, or any two or more, may commit persons brought before them charged with any offence cognizable under the act, or who shall be convicted or attainted before them, to such gaol, house of correction or other prison as may be specified in any order of council made by virtue of the act, or if no such order shall have been made, then to the common gaol, house of correction, or other prison of the city, county, or place to which offender might have been committed if the act had not passed, or to Newgate, there to remain until discharged by due course of law, or in execution of their respective judgments; and in case of such commitment to Newgate, execution of such judgments shall be done upon such persons by the sheriffs of the said city of London.

§ 10. Until his majesty shall order and direct in what gaol, &c. persons charged with or convicted of offences committed within the limits of the act shall be imprisoned, any justice of the peace or coroner for the counties of Essex or Kent, so far as relates to the parishes lying within their respective counties, to commit persons charged with offences aforesaid cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of the act to Newgate; and also for any justice of the peace or coroner for the county of Surrey, so far as relates to the several parishes lying within that county, to commit any person charged with any such offences aforesaid to his majesty's gaol of Horse-monger Lane or Newington, in and for the county of Surrey.

§ 11. Every justice or coroner acting within the limits of the act shall specify in the commitment that the persons charged are committed under the authority of the act; and such justice or coroner shall take the like examinations, informations, bailments, and recognizances, and certify the same to the said justices of oyer and terminer and gaol delivery; as required by the 7 Geo. 4, c. 64; and any justice or coroner, in default of so doing, shall be liable to the same fines and penalties to be imposed by the said justices and judges of oyer and terminer and gaol delivery, in the same manner as mentioned in the said act; and when any person shall be committed to his majesty's gaol for the county of Surrey, for any offence cognizable by virtue of this act, by a commitment specifying that such persons are committed under the act, the sheriff of the said county of Surrey, or the keeper of the gaol for the said county, shall, six days at

least before the sitting of the next court of oyer and terminer and gaol delivery appointed under the act, or at such other time as the said justices and judges of oyer, &c. or any two or more, shall from time to time direct, cause such persons, with their commitments and detainers, to be safely removed from the gaol of the said county of Surrey, without the issuing of any writ of *habeas corpus* or other writ, to the said gaol of Newgate, there to remain until delivered by due course of law.

§ 12. Any two of the said justices and judges of oyer, &c. may order the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses shall by law entitle thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for the act; and every such treasurer some known agent shall attend the said justices and judges during the sitting of the court, to pay all such orders.

§ 13. No bill of indictment for any crime (other than perjury or subornation of perjury) which can be presented to the grand jury at any sessions of the peace for the city of Westminster and borough of Southwark, and counties of Middlesex, Essex, Kent, and Surrey respectively, in which such indictment was committed, shall be presented to the grand jury summoned under the act, unless the prosecutor or other person presenting such indictment shall have been bound by recognizance to prosecute, or give evidence at the sessions to be held under the act; and the persons accused of such offence, or unless such persons accused shall have been detained in custody, or shall be bound by recognizance to appear at the said sessions to be held under the act.

§ 14. The court of the lord mayor and aldermen of London may contract with the justices of Essex, Kent, and Surrey, for the support of their prisoners in Newgate, and if they cannot agree, the judges are to settle the amount.

§ 15. The said justices and judges of oyer, &c. to be appointed under the act, or any two or more, shall hold a session for the said city of London and county of Middlesex, and the parts of the counties of Essex, Kent, and Surrey respectively mentioned, in the said city of London or suburbs thereof, at least twelve times in every year, and on such other needful such times to be fixed by general orders of the said court, which any eight or more of the said judges of his majesty's courts of Westminster are hereby empowered to make from time to time.

§ 16. His majesty's Court of King's Bench, or any judge thereof, or any commissioner of

oyer and terminer and gaol delivery under the act, being a judge of any of the superior Courts at Westminster, or the chief judge or any other judge of the Court of Bankruptcy, or the recorder for the said city of London for the time being, if such court, judge, or recorder shall think proper, may issue any writ or writs of certiorari, or other process, directed to his majesty's justices of the peace for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, commanding them to certify and return into the said court of oyer and terminer and gaol delivery indictments or presentments found or taken before them, of all offences cognizable by virtue of this act, and the several recognizances, examinations, and depositions relative to such indictments so that all such offences may be tried by the said justices and judges of oyer and terminer and gaol delivery; and also for the like purpose, by writ or writs of *habeas corpus*, to cause any person or persons, who may be in the custody of any gaol or prison charged with any offences cognizable under the act, to be removed into the custody of the keeper of the gaol of Newgate.

§ 17. "The justices of the peace for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, shall not, at their respective general or quarter sessions of the peace, or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or to be committed within the limits of this act: that is to say, house-breaking, taking above the value of five pounds in dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, burglary, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or do some grievous bodily harm, administering drugs or other things, or carrying any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, the breaking of shops, warehouses, counting-houses, and buildings, and the carrying of dwelling-houses, stealing sheep with intent to steal the carcasses, the uttering of all forged instruments, and the various offences enumerated in the act passed in the first year of the reign of his present majesty, intitled "An act for reducing into one act all such forgeries as shall henceforth be punished by death; and for otherwise amending the laws relative to forgery," forging the assays marks on gold or silver plate, and all

offences relating to coin enumerated in the by required that such court, &c. shall cause act passed in the second year of the reign of the party applying for such writ or writs, his present majesty, intitled "An act for whether he be the prosecutor or party charged consoling and amending the laws against with such offence, to enter into a recognizance offences relating to the coin," the abstract of of in such sum, and with or without sureties, as women, bankrupts not surrendering under the court, judge, or recorder may direct, con- their commission or concealing their offences, ordered to give such notice as aforesaid to breaking down bridges and banks of rivers, the parties bound by such recognizance to ap- taking rewards for helping to stolen goods, pear before the said court of oyer and termi- personating any officer, seaman, or other per- ner and gaol delivery instead of before the said son, in order to receive any wages, pay, allow- other justices respectively, and to do such- ance, or prize money due or supposed to be other things as such court, &c. shall direct.

due, or any out-pensioner, of Greenwich Hos- § 19. The said justices of the peace for pital, in order to receive any out-pension allow- the cities of London and Westminster the- ance due or supposed to be due, sending threat- liberty of the Tower of London, the borough- ening letters and using threats to extort money, of Southwark, and for the counties of Middle- larceny on navigable rivers and canals, and sex, Essex, Kent, and Surrey, if they shall stealing and destroying goods in progress of think fit, may certify, transmit, and deliver to manufacture, and larcenies after a previous the said justices and judges of oyer and ter- conviction, embezzlement, larceny by clerks miner and gaol delivery any indictment or pre- and servants, and receivers of stolen goods, sentment found or taken before them at their said general of quarter sessions of the peace, whether such person or persons shall be charg- or at any adjournment thereof, for offences ed as principal offenders or as accessories be- cognizable by virtue of the act, in the same fore or after the fact."

§ 18. Every recognizance entered into for the prosecution before his majesty's justices of the peace aforesaid of any person for any of- fence cognizable under the act, and any recog- nizance for the appearance as well of any witness to give evidence upon any bill of in- dictment or presentment for any such offence as of any person to answer our lord the king concerning such offence, or to answer generally before such justice of the peace, shall, in case any such writ of certiorari or habeas corpus be issued for removing such indictment or pre- sentment or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence and do all other things therein mentioned with reference to the indict- ment or presentment or the person so removed as aforesaid before the justices and judges of oyer and terminer and gaol delivery acting and by virtue of the act; provided that in case of removal from the jurisdiction of justices of the peace for the cities of London or Westminster, the liberty of the Tower of London, the bo- rough of Southwark, or counties of Middle- sex and Surrey, two days' notice, and in case of removal from the jurisdiction of the jus- tices of the peace for the counties of Essex and Kent, one week's notice, shall have given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein de- scribed, to appear before the court of oyer and terminer and gaol delivery instead of the said other justices: Provided also, that the court, judge, or recorder who shall grant such writ of certiorari or habeas corpus, and it is here-

in the same manner as the said justices might do if the said court of oyer and terminer and gaol de- livery was holden in the county where such indictments or presentments were found or taken.

§ 20. The said justices and judges of oyer and terminer and gaol delivery, in sessions as- sembled, are authorised and required to make a table of fees and allowances to be received by the officers of the said court, and from time to time to alter the same; which said table of fees and allowances shall be hung up in the Court of Sessions and a copy thereof trans- mitted to the clerks of the peace of the coun- ties of Middlesex, Essex, Kent, and Surrey; or the said justices and judges may settle a salary in lieu of such fees and allowances, to be paid to the said officers or either of them for the performance of their respective duties, and order how and by whom such fees and allowances or salary shall be paid, and also order such on portion as they shall think fit of the expense of preparing calenders and ses- sions papers, and of other expenses incident to the act, to be borne and paid by the trea- surer of each of the said counties: Provided that the county of Middlesex shall not be lia- ble to any portion of the expense of preparing calendars or sessions papers, or of any other expenses incident to the act, to which the said county would not have been liable in case the act had not been passed.

§ 21. Provided that nothing herein contain- ed shall prevent the justices of the peace for the said cities of London and Westminster, the liberty of the Tower of London, the bo- rough of Southwark, and the said counties of



Middlesex, Essex, Kent, and Surrey, from holding their respective general or quarter sessions of the peace during the sitting of the said court of oyer and terminer and gaol delivery to be held in pursuance of this act; and that neither this act, nor the commission of oyer and terminer and gaol delivery from time to time issued thereunder, shall supersede or affect any other commission or commissions of oyer and terminer to be at any time issued by his majesty in the said counties of Essex, Kent, Surrey, or the jurisdiction by virtue thereof, nor prevent the justices of oyer and terminer appointed by any commission to be issued under the authority of this act from holding their respective sessions at one and the same time.

By § 22. After reciting that "it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the Admiralty of England, should speedily be brought to trial;" it is enacted that the justices and judges of oyer and terminer and gaol delivery to be appointed by the commissions issued under the act, or any two or more, may inquire of, hear, and determine any offences committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and deliver the gaol of Newgate of any persons detained therein for any offences alleged to have been committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges, shall be valid and effectual; and any three of the said justices and judges may order the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act of the seventh of *George the Fourth*.

§ 23. Provided always, that nothing in the act contained shall extend to prejudice or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, aldermen, and recorder of the city of London, or their successors, the sheriffs of the city of London and county of Middlesex, for the time being, or to prohibit or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, aldermen, and recorder for the time being of the said city might lawfully use or exercise; and that, notwithstanding any practice or custom of the said city of London to the contrary, it, shall be lawful for the Lord Mayor's Court of the City of London to sit on any day on which any session of the peace, oyer and terminer and gaol delivery shall be held within the said city; and that all proceedings of the said Lord Mayor's Court that might have been taken if

such sessions were not held, shall be taken, any practice, custom or law to the contrary notwithstanding.

By § 24. The act is to take effect from and after the 31st October, 1834.

After the fire of London a judicature was enacted for determining differences relating to the houses burnt; and several rules were laid down for rebuilding the city, the several streets, lanes, &c. The lord mayor and aldermen were to set out markets; the number of parishes and churches was ascertained, and a duty granted on coals for rebuilding the churches, &c. See 19 *Car. 2. cc. 2. 3*; 23 *Car. 2. cc. 11. 14*; 25 *Car. 2. c. 10*.

By the 3 & 4 *W. 4. c. 66*, the commissioners of the treasury were empowered to purchase out of the consolidated fund the duties of package, scavage, balliage, and portorage belonging to the corporation of London with a view to the abolition of those offices. By § 4. the corporation may lay out the money so received in land, or (§ 5.) may invest it in the purchase of the ground rents and reversions of the houses and parcels of ground mentioned in the act.

By the 4 & 5 *W. 4. c. 32*. the rates of tonnage imposed on ships frequenting the port of London by various former acts are repealed, and the following reduced sale of charges enacted.

*First Class.*—For every ship or other vessel trading coastwise between the port of London and any port or place in Great Britain, Ireland, the Orkneys, Shetland, or the Western Islands of Scotland, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

*Second Class.*—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Denmark, Norway, or Lapland (on this side of the North Cape,) or from Holstein, Hamburg, Bremen, or any other part of Germany bordering or near the Germanic Ocean, or from or to Holland or any other of the united provinces, or Brabant Antwerp, Flanders, or any other part of the Netherlands, or from or to France (within Ushant), Guernsey, Jersey, Alderney, Sark, or the Isle of Man, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

*Third Class.*—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Lapland (beyond the North Cape), Finland, Russia (without or within the Baltic sea,) Livonia, Courland, Poland, Prussia, Sweden, or any other country or place within the Baltic sea, there shall be paid for every voyage, both in and out of the said port, one halfpenny per ton:

**Fourth Class.**—For every ship or other vessel entering inwards or clearing outwards in the said port from or to France (between Ushant and Spain), Portugal, Spain (without the Mediterranean), or any of the Azores, Madeira, or Canary Islands, or any of the United States of America, or of the British Colonies or Provinces in North America or Florida, there shall be paid for every voyage both in and out of the said port, three farthings per ton:

**Fifth Class.**—For every ship or other vessel entering inwards or clearing outwards in the said port from or to Greenland, Gibraltar, France, or Spain (within the Mediterranean), or any country, island, port, or place, within or bordering on or near the Mediterranean or Adriatic sea, or from the West Indies, Louisiana, Mexico, South America, Africa, East India, China, or any other country, island, port, or place within or bordering on or near the Pacific Ocean, or from any other country, island, port, or place whatsoever to the southward of twenty-five degrees of north latitude, there shall be paid for every voyage both in and out of the said port, three farthings per ton.

By § 4. the said duties shall be under the management of the commissioners of Customs, and recovered in the same manner.

§ 5. Exempts from the above duties his Majesty's ships of war, or any ship or vessel being the property of his Majesty, or of any of the royal family, ships coming to or going coastwise from the port of London or to any part of Great Britain, unless such ships exceed forty-five tons register tonnage, vessels bringing corn coastwise, the principal part of whose cargo shall consist of corn, fishing smacks, lobster and oyster boats, or vessels for passengers, vessels or craft navigating the river Thames above and below London bridge as far as Gravesend only, and vessels entering the port of London inwards, or going from the port of London outwards, when in ballast.

By § 7. the commissioners are empowered after three years to reduce the duties, if they are found to be more than sufficient to defray the expenses of maintaining the mooring chains in the Thames and the salaries of the harbour-masters and their assistants, and the other charges which are by the act to be paid out of such duties.

A great variety of statutes have been passed to regulate various concerns of the city of London besides those already alluded to; the following is a very short abstract of the purport of those most material: and see title *Police*.

By *Cin. London*, 13 E. 1. st. 5, none shall walk the streets armed after *curfew*, unless

noblemen or their servants with lights; taverns and alehouses shall be shut at *curfew*; fencing schools for buckler shall not be kept in London; none but free men shall keep inns in the city; none shall be brokers in London but those who are admitted and sworn by the mayor and aldermen, (see *post*, *Brokers*.) the officers of the city shall not be punished for false imprisonment, unless it appear to be of malice.

Proceedings on a foreign voucher and recoveries. *Glouc.* 6. Ed. 1. cc. 11, 12; *Artic. St. Glouc. correc.* 9. Ed. 1. Damages shall be assessed by the assise in novel disseisin, and amercements shall be offered by the barons of the Exchequer. *Stat. Glouc.* c. 14. Wines sold contrary to the assise shall be presented to the barons. *Stat. Glouc.* c. 15.

The manner of proceeding for arrears of rent and services. *Stat. de Gavelet*, 10 E. 2.

All vintners, victuallers, fishmongers, butchers, and poulterers, to be under the rule of the mayor and aldermen. 31 E. 3. st. 1. c. 10; 7 R. 2. c. 11.

Merchants of London free to pack their cloths. 1 H. 4. c. 16.

Freemen of London may carry their goods to any fair or market, notwithstanding their bye-laws. 3 H. 7. c. 9.

The 2d of September to be observed annually as a public fast, in commemoration of the dreadful fire 1666. 19 Car. 2. c. 3.

See under the several titles following, and the statutes referred to, for further information.

*Aldermen*; not to be elected yearly, but remain till they are put out for reasonable cause. 17 R. 2. c. 11. Their negative in common council established. 11 Geo. 1. c. 18. § 15. Repealed by 19 Geo. 2. c. 8.

*Attaint*; proceeding in, regulated. 11 H. 7. c. 21. § 2; 37 H. 8. c. 5. § 3. (Abolished by the 6 G. 4. c. 50. § 60.)

*Ballastage*; see 6 Geo. 2. c. 29; 3 Geo. 2. c. 16.

*Blackwell-Hall*; market for the sale of woollen-cloth, to be held there every Thursday, Friday, and Saturday; and regulations thereto. 8 & 9 W. 3. c. 9; and see 4 & 5 P. & M. c. 5. § 26; 39 Eliz. c. 20. § 12; 1 Geo. 1. c. 15.

*Bowyers*; see 8 Eliz. c. 10.

*Bread*; see tit. *Bread*.

*Bridges*; see the acts for rebuilding London Bridge, and improving the approaches thereto; 4 G. 4. c. 50; 7 & 8 G. 4. c. 30; 10 G. 4. c. 136; 1 W. 4. c. 3; 2 W. 4. c. 23.

*Brokers*; to pay 40s. per ann. on their admission by the Court of Aldermen; 6 Ann. c. 16.; and to enter in a bond conditioned for honest behaviour, and not to deal on their own account. See the terms *Paley on Prin-*

*cipal and Agent* (ed. by Lloyd.) Although a broker contravenes the act by dealing for himself, this does not render the transaction invalid, but only subjects him to the penalty under the act. It seems that a stockbroker is liable to the payment of this fee of 40s. 7 East, 292.

*Buildings*; regulated and divided into seven rates or classes; their height, party-walls, &c. determined. Preventions against fire (see *Fire*), &c. 14 Geo. 3. c. 78. See *Police*.

*Butchers*; not to slay beasts within the walls of the city. 4 H. 7. c. 3. See further title *Butchers*.

*Carriers*; regulation of their charges. 21 Geo. 2. c. 28.

*Carts*; penalty on drivers riding on their carts, 10s. or 20s. if owner of the cart. 1 Geo. 1. st. 2. c. 57; 24 Geo. 2. c. 43; 30 Geo. 2. c. 22. Owner's name and number to be put on them. 18 Geo. 2. c. 33; 30 Geo. 2. c. 22; 7 Geo. 3. c. 44; 24 Geo. 3. st. 2. c. 27; which also contain regulations for the behaviour of the drivers. See *Police*.

*Cattle*; salesmen not to buy cattle on the road. 31 Geo. 2. c. 40. Regulations as to driving cattle. 21 Geo. 3. c. 67. See *Cattle*, *Police*.

*Chimney-Sweepers*; see the act regulating chimney-sweepers and their apprentices, and for the safer construction of chimneys and flues. 4 & 5 W. 4. c. 35.

*Churches*; see 1 Ann. st. 2. c. 12. Buildings erected on any part of St. Paul's churchyard (except the chapter-house,) to be deemed common nuisances. See also 9 Ann. c. 22; 10 Ann. c. 11; 1 G. 1. c. 23, &c. as to building fifty new churches by a duty on coals.

*Coaches and Chairs*. See title *Coaches*.

*Coals*. See title *Coals*.

*Cooper's Company*; regulated by 23 H. 8. c. 4; 31 Eliz. c. 8.

*Corn*. See title *Corn*.

*Docks, Quays, and Harbours*. See 39 Geo. 3. c. lxix.; 39 & 40 Geo. 3. c. xlvii.; 42 Geo. 3. c. cxiii.; and 43 Geo. 3. c. cxvii.; and several other *local acts*; and the public acts, 44 Geo. 3. c. 100; 46 Geo. 3. c. 118 &c.; 47 Geo. 3. st. 2. c. 60; 47 Geo. 3. st. 2. c. xxxi. c. lxxii.; 48 Geo. 3. c. viii.; 50 Geo. 3. c. 22; 52 Geo. 3. c. 49; 54 Geo. 3. c. 45. For the sale and conveyance of quays, &c. the property of the crown, situate between London bridge and the Tower, see 2 & 3 W. 4. c. 66. amended by 3 & 4 W. 4. c. 8.

*Dyers*; regulations as to journeymen, servants, and labourers. 17 Geo. 3. c. 33. Control of the Dyers' company to prevent frauds in dyeing woollen goods. 23 Geo. 3. c. 15.

*Elections*; of aldermen and common councilmen, are (11 Geo. 1. c. 18. s. 7, 8, 9.) to be

by freemen householders paying scot and lot, and having houses of the value of 10l. a year. Formerly none could vote at the election of members of parliament for the city of London, but liverymen that had been twelve months on the livery, not discharged from payment of taxes, nor having received a pardon; (see 11 Geo. 1. c. 18.); but by the Reform Act, (2 W. 4. c. 45.) the privilege has been extended to all householders paying 10l. a year rent, and complying with the other requisites of the statute. See title *Parliament*.

*Fish*; for regulating Billingsgate market, see 10 & 11 W. 3. c. 24; powers given to the Fishmongers' Company, 9 Ann. c. 26. As to the power of the Court of Mayor and Aldermen, as conservators of the river Thames, and of their deputy the water-bailiff, see 30 Geo. 2. c. 21. Forestalling fish, see 29 Geo. 2. c. 39; 33 Geo. 2. c. 27. (explained and amended by 4 & 5 W. 4. c. 20.); 2 Geo. 3. c. 15; 42 Geo. 3. c. lxxviii.; and see title *Fish*.

*Foreign Attachment*; see tit. *Attachment Foreign*.

*Freemen* of London may dispose of their personal estates by will as they think fit, notwithstanding the custom of the city; but which custom remains in force as to intestates, and in case of marriage agreements. 11 Geo. 1. c. 18. See titles, *Executor*, V. 9; *Marriage*.

*Hay*; regulating the weight and sale of. 2 W. & M. st. 2. c. 8; 8 W. 3. c. 17; 31 Geo. 2. c. 40; 11 Geo. 3. c. 15; 36 Geo. 3. c. 86; 11 G. 4. & 1 W. 4. c. 14; 4 & 5 W. 4. c. 21.

*Horners*; see 4 Edw. 4. c. 8. repealed by 1 Jac. 1. c. 25; but revived in part by 7 Jac. 1. c. 14.

*Insurance*; see title *Insurance*.

*Leather*; regulations for the sale and manufacture of, see 5 & 6 E. 6. c. 15; 1 Mur. st. 3. c. 8; 13 & 14 Car. 2. c. 7. (under which the market at Leadenhall for leather is held every Tuesday;) 1 W. & M. st. 1. c. 33.

*Livery*; see *Elections*.

*Militia*, embodying and regulating; see 13 & 14 Car. 2. c. 3; 26 Geo. 3. c. 107; 34 Geo. 3. c. 81; 36 Geo. 3. c. 92; 39 Geo. 3. c. 82. (37 Geo. 3. cc. 25. 75. *Tower Hamlets*;) 42 Geo. 3. c. 90. § 153; and title *Militia*.

*Oath* of a freeman, altered by 11 Geo. 1. c. 18. § 19.

*Oil*; under the regulation of the tallow chandlers' company. 3 H. 8. c. 14.

*Orphans' Fund*; established, regulated, and applied, see 5 & 6 W. & M. c. 10; 21 Geo. 2. c. 29; 7 Geo. 3. c. 37. See *Orphans*.

*Painters*; regulated, stat. 1 Jac. 1. c. 20.



**Paving**; lighting, cleansing, and watching. The provisions of the statutes for these purposes are various and minute. See 10 *Geo.* 2. c. 22; 11 *Geo.* 3. c. 29. and title *Police*. As to improvements at Temple-bar and Snow-hill, see 42 *Geo.* 3. c. lxxiii; 49 *Geo.* 3. cc. lxx. lxxxiii; and other *local acts*.

**Penitentiary Houses**; building and regulating. 52 *Geo.* 3. c. 44.

**Physicians**, apothecaries, and surgeons, subject to the control of the college of physicians in London, and exempted from offices. See 3 *H.* 8. c. 11; 5 *H.* 8. c. 6; 14 & 15 *H.* 8. c. 5; 32 *H.* 8. c. 40; 34 & 35 *H.* 8. c. 8; 1 *Mary*, st. 2. c. 9; 6 *Will.* 3. c. 4. The companies of barbers and surgeons united, 32 *H.* 8. c. 42. The union dissolved, and regulations made for the surgeons' company. 18 *Geo.* 2. c. 15. And see the 2 & 3 *W.* 4. c. 75. for the formation of anatomical schools.

**Poor**; guardians of the Workhouses appointed, and regulations as to the infant poor. 13 & 14 *Car.* 2. c. 12; 22 & 23 *Car.* 2. c. 18; 2 *Geo.* 3. c. 22.

**Sewers**, in London, subjected to the commissioners of sewers. 3 *Jac.* 1. c. 14.

**Scavengers**. See that title.

**Shoemakers**, regulated. 9 *Geo.* 1. c. 27.

**SOUTHWARK**, regulations as to its market. 22 *Geo.* 2. cc. 9. 23; 30 *Geo.* 2. c. 31. As to paving and lighting, &c. 6 *Geo.* 3. c. 24; 11 *Geo.* 3. c. 17; 44 *Geo.* 3. c. 86.

**Spices**. See tit. *Garbler*.

**Streets**. Scavengers are to be elected in London, and within the bills of morality, in each parish, by the constable, churchwardens, &c. to see that the streets be kept clean; and housekeepers are to sweep and cleanse the streets every Wednesday and Saturday under penalties. 2 *W. & M.* st. 2. c. 1. Further regulations are also made by 8 & 9 *W.* 3. c. 37; 6 *Geo.* 1. c. 6. § 1; 18 *Geo.* 2. c. 33. §§ 2, 3. See tit. *Police*.

**Thames**; rules for the conservation of. 4 *H.* 7. c. 15; 27 *H.* 8. c. 18.

**Tithes** of the parishes in London, settled by 37 *H.* 8. c. 12. according to a decree of the archbishop, &c.

The tithes of the parishes in London, the churches whereof were burnt, were appointed, none less than 100*l.* per ann. nor above 200*l.* per ann., to be assessed and levied quarterly. 22 & 23 *Car.* 2. c. 15.

**Water-works**, to supply the city with water. See 35 *H.* 8. c. 10; and 3 *Jac.* 1. c. 18; 4 *Jac.* 1. c. 12; as to the New River; and 7 *Jac.* 1. c. 9. as to Chelsea waterworks.

Commissioners appointed for supplying the city of London with water from the river Thames, &c. Casting filth into water-courses incurs 40*s.* penalty. 8 *Geo.* 1. c. 26

**Watermen**. See 7 & 8 *Geo.* 4. c. 75. whereby all former acts are repealed, and the company of watermen incorporated, and various new provisions enacted for the better regulation of the watermen and lightermen on the river Thames.

**Wharfage**; regulation of rates of wharfage and cramage, and the situation of wharfs, are settled by 22 *Car.* 2. c. 11.—See 46 *Geo.* 3. c. 118. as to purchasing the legal quays by government.

**Weights and Measures**; inspectors of, appointed in the parish of St. Marylebone. 10 *Geo.* 3. c. 23. § 81—132.

**WESTMINSTER**. Several acts have been passed for the internal regulation of this district of the metropolis, viz. a private statute passed in 27 *Eliz.* continued and confirmed by 16 *Car.* 1. c. 4. for the nomination and appointment of burgesses and chief burgesses. The 29 *Geo.* 2. c. 25; 31 *Geo.* 2. c. 17. as to the appointment of constables and annoyance-juries, and the sealing weights and measures. 31 *Geo.* 2. c. 25. (never carried into execution) for a free market. As to paving, cleansing, and lighting the streets, squares, lanes, &c. in Westminster, and parts adjacent, see 2 *Geo.* 3. c. 21; 3 *Geo.* 3. c. 23; 4 *Geo.* 3. c. 39. [5 *Geo.* 3. c. 13; 26 *Geo.* 3. c. 102. imposing certain street-tolls for those purposes;] 5 *Geo.* 3. c. 50; 11 *Geo.* 3. c. 22; 2 & 3 *W.* 4. c. 56. The 14 *Geo.* 3. c. 90. was passed for regulating the nightly watch within the same precincts or boundaries.

See also 44 *Geo.* 3. c. 61. for building a new sessions house; and 46 *Geo.* 3. c. 89; 48 *Geo.* 3. c. 137; 50 *Geo.* 3. c. 119; 54 *Geo.* 3. c. 154., for improvement of the streets and places near Westminster Hall and two houses of parliament; 53 *Geo.* 3. c. 121; 7 *Geo.* 4. c. 77; 9 *Geo.* 4. c. 70; and 1 & 2 *W.* 4. c. 29, for making various new streets and other improvements in Westminster and London; and 11 *Geo.* 4. c. 70. for the establishment of a wharf and market at Hungerford-market.

**LONDON ASSURANCE**. See *Insurance*.

**LONGELLUS**. A word used in Thorn's Chronicle; it signifies a coverlet. *Cowell*.

**LONGITUDE** of a place, in geography, is an arch of the equator intercepted between the first meridian, and the meridian passing through the proposed place; which is always equal to the angle at the pole, formed by the first meridian, and the meridian of the place.

The first meridian may be placed at pleasure, passing through any place, as London, Paris, Teneriffe, &c. but with us it is generally fixed at London; and the degrees of longitude counted from it, will be either

east or west, according as they lie on the east or west side of that meridian.

In other words to explain the subject in a familiar manner to those wholly unacquainted with it, as by the latitude we learn the distance north or south, so by knowing the longitude, we know the distance from any given place east or west; allowing for the difference of a degree of longitude at the equator (or middle of the globe) and at the arctic circle, &c.

The longitude is, as before described, in other words, the distance of a place east or west from that imaginary line drawn from north to south, through a place fixed on for that purpose and called the first meridian, i. e. the meridian or boundary from whence we reckon east or west; so that by ascertaining the latitude and longitude of a place, its situation on the natural or artificial globe, with respect to all other places, is known.

By 12 *Ann. st. 2. c. 25*; 26 *Geo. 2. c. 25*; 30 *Geo. 3. c. 14.* the lord admiral and commissioners of the admiralty were appointed commissioners to receive proposals for the discovery of a method to ascertain the longitude at sea, and were empowered to give rewards accordingly. Under 5 *Geo. 3. c. 20*; 43 *Geo. 3. c. 118*; 46 *Geo. 3. c. 77.* the commissioners may construct and publish nautical almanacks, which none must publish without their licence, under forfeiture of 20*l.* to be sued for by the commissioners' secretary. By 14 *Geo. 3. c. 66.* (repealing all former acts, except such clauses of them as relate to the authority of the commissioners,) rewards of 5,000*l.* 7,500*l.* and 10,000*l.* are offered to the discoverer of a method to find the longitude; in the first instance if determined within one degree in the second if within two-thirds, and in the last if within half a degree. By this statute, and 21 *Geo. 3. c. 52*; 30 *Geo. 3. c. 14*; 43 *Geo. 3. c. 118*; 46 *Geo. 3. c. 77*; 55 *Geo. 3. c. 75.* the commissioners have been from time to time empowered to grant smaller rewards for less useful discoveries on the same account, not exceeding the sums marked under each statute.

By 16 *Geo. c. 6.* if any ship discovers a passage between the Atlantic and Pacific oceans beyond the 52d degree of north latitude, the owner or commander, if a king's ship, shall receive 20,000*l.*; and 5,000*l.* shall be given in like manner to the first ship that shall approach within one degree of the North Pole.

The statutes, offering rewards for the discovery of the longitude at sea have been repealed. See *North West Passage.*

LOQUELA. An imparlence; *loquela sine die*, a respite in law to an indefinite time. *Paroch. Antiq.* 210. See tit. *Imparlance.*

LORD, [*dominus.*] A word or title of honour, diversely used, being attributed not only to those who are noble by birth or creation, otherwise called lords of parliament, and peers of the realm, but to such so called by the courtesy of England, as all the sons of a duke, and the eldest son of an earl, and to persons honourable by office, as the Lord Chief Justice, &c. and sometimes to a private person, that hath the fee of a manor, and consequently the homage of the tenants within his manor; for by his tenants he is called Lord. In this last signification it is most used in our law-books; where it is divided into lord paramount, and lord mesne; and very lord, &c. *Old. Nat. Br.* 79. See titles *Mean, Nobility, Parliament, Peers.*

LORD HIGH ADMIRAL. See *Admiral.*

LORD HIGH STEWARD. A peer specially appointed by the crown to preside at the trial of any peer, or peeress, in the House of Lords, either upon an Impeachment, or on an indictment found by a grand jury.

His judicial authority appears to have grown out of that which appertained to the *Chief Justiciar* at the period when that office was abolished; and thus in effect wherever he presides for the trial of peers, the power and jurisdiction of the *curia regis* is revived.

Of the trials of peers which have occurred before the lord high steward upon indictment, found by a grand jury, very few of those antecedent to the revolution of 1688 took place during a session of parliament. Subsequent to the revolution every trial of a peer or peeress which has occurred has taken place during some session of parliament.

Foster and Blackstone represent that there are two separate tribunals for the trials of peers, differing both in their constitution and in their jurisdiction, to which they give the distinguishing appellations of the court of parliament, and the court of the high steward. *Fost.* 141. 4 *Comm.* 261. In several cases, both in *Hurgrave's* and *Howell's Collection of State Trials*, there is an error in the statement of the court.

It is settled that the office of lord high steward is not essential to the proceeding on impeachments; and on the impeachment of Lord Danby, and the popish lords, the Lords directed that the commission of the high officer who was then appointed in consequence of an address to the crown, should be altered, by the omission of such expressions as intimated the necessity of his appointment; and the Lords have in several subsequent instances performed various judicial acts previous to his appointment. And in the case of *Lord Ferrers*, convicted of murder, it was decided by the judges that if the day appointed in the

judgment for the execution of a peer convicted on an indictment should elapse before execution done, a new time of execution might be appointed, although no high steward were existing.

On trials, as well by indictment as impeachment, the House directs all parties appearing to address the Lords in general, and not the lord high steward in particular. On indictments it is usual for the Lords to address the King for the appointment of a high steward in the same manner as where the proceeding is by impeachment. See *Amos's Dissertation on the Court of the Lord High Steward*, annexed to the second volume of *Phillips's State Trials*, for much curious information on the subject. And see title *Peers of the Realm*, IV.

**LORD IN GLOSS**, *F. N. B. fol. 3.* Is he that is lord, having no manor, as the King in respect of his crown. *Ibid. fol. 5.* And there is a case wherein a private man is lord in gross, viz. a man makes a gift in tail of all the lands he hath, to hold of him, and dieth; his heir hath but a seigniori in gross. *F. N. B. 8.*

**LORD OF A MANOR.** See *Copyhold*.

**LORD AND VASSAL.** In the time of the feudal tenures, the grantor of land was called the proprietor, or lord; being the person who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use or possession, according to the term of grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines which were afterwards grafted on this system, we now use the word *vassal* opprobriously as synonymous to slave or bondman. 2 *Comm.* 53. See title *Tenures*.

**LORDS OF ERECTION.** On the Reformation in Scotland, the King, as proprietor of benefices formerly held by abbots and priors, gave them out in temporal lordships to favourites, who were termed *Lords of Erection*. *Scotch Dict.*

**LORDS LIEUTENANTS OF COUNTIES.** See titles *County*, *Militia*, *Soldiers*.

**LORDS MARCHERS.** See *Wales*.

**LORDS OF PARLIAMENT.** See *Parliament*, *Peer*.

**LORDS OF REGALTY.** Persons to whom rights of regality, or rights of civil and criminal jurisdiction, were given by the crown. *Scotch Dict.*

**LORIMERS** [*Fr. Lormiers*, from *Lat. lorum*.] One of the companies of London, that make bits for bridles, spurs, and such like small iron ware, mentioned in *st. 1 Rich. 2. c. 12.*

**LOSINGA.** A flatterer, or sycophant. *Prompt. Chron. p. 991.*

**LOT.** A contribution or duty. See *Scot.*

**LOT, or LOTH.** The thirteenth dish of lead in the mines of Derbyshire, which belongs to the King. *Escheat. anno 16 Edw. 1.* See *Copy*.

**LOTHERWITE, or LEYERWIT.** A liberty or privilege to make amends of him that defileth a bond-woman without licence. *Rastall's Exposition of Words*; so that it is an amends for lying with a bond-woman. *Cowell.* See *Leirwite*.

**LOTTERIES.** The 4 *Geo. 4. c. 60.* was the last act authorizing a public lottery, since which time they have been discontinued. These state lotteries were publicly drawn, by commissioners appointed, according to schemes, which varied almost every year.

It was long a disputed point among politicians whether the benefits of a lottery arising from a large sum voluntarily subscribed to the exigencies of the government, were not more than counterbalanced by the evils through this means introduced, by private lotteries, and by the more pernicious mode of gambling by insurance of numbers. Repeated attempts were made to repress this fatal mischief, and the measure of treating the persons taking money for insurance as rogues and vagabonds, seems to have been attended with the most success.

The following is a short summary of the acts in force on this subject. See titles *Advertisements*, *Gaming*.

*Statutes 10 & 11 W. 3. c. 17.* declares all lotteries public nuisances; and all patents for lotteries void, and against law; (the state lotteries were all managed under annual acts of parliament passed for each;) imposes a penalty of 500*l.* on every proprietor of a private lottery, and 20*l.* on each adventurer. And see *stat. 42 Geo. 3. c. 119.*

9 *Ann. c. 6.* commands justices of peace to assist in suppressing private lotteries.

10 *Ann. c. 26.* imposes the like penalty of 500*l.* on persons keeping offices for illegal insurances on marriages, &c. under various pretences.

5 *Geo. 1. c. 9.* puts the sale of Chances on the footing of private lotteries, and imposes a penalty of 100*l.* (above all other penalties,) recoverable by the persons possessed of the ticket, the chance of which was sold; and the offender may also be committed to the county gaol for a year.

8 *Geo. 1. c. 2.* imposes a penalty of 500*l.* on persons keeping offices for the disposal of houses, lands, advowsons, &c. by lottery; and adventures to forfeit double the sum contributed.



This statute and those of 10 & 11 W. 3. and 9 Ann. above mentioned, are explained and rendered more effectual by 12 Geo. 2. c. 28. which imposes 10*l.* penalty on justices neglecting their duty under those acts; and prohibits the games of ace of hearts, pharaoh, basset, and hazard, as lotteries, and imposes 50*l.* penalty on the players: and see 13 Geo. 2. c. 12. as to the game of passage, and other games with dice.

9 Geo. 1. c. 19. and 6 Geo. 2. c. 35. impose a penalty of 200*l.* and a year's imprisonment on persons selling tickets in or publishing schemes of any foreign lottery. Ireland is excepted under 22 Geo. 3. c. 47. and 29 Geo. 3. c. 7. provided that offences against the English acts against private lotteries, though committed in Ireland, shall be liable to all the penalties imposed, as if they were committed in England.

The statutes 22 Geo. 3. c. 47., 27 Geo. 3. c. 1., and many subsequent acts, as to lottery-office keepers and the sale of tickets, are rendered invalid by the discontinuance of public state lotteries. As to the taking in payment of outstanding lottery tickets since the discontinuance of lotteries, see 2 Will. 4. c. 2.

An act of the 1 & 2 W. 4., for the improvement of Glasgow, was inadvertently passed by the legislature, which authorised money to be raised by way of lottery. All future lotteries under that statute have, however, been prohibited by the 4 & 5 W. c. 37. See further title *Gaming*.

**LOVE.** Provoking unlawful love was one species of the crime of witchcraft, punishable by 1 Jac. 1. c. 12. now repealed.

**LOURCURDUS.** A ram or bell-wether. *Cowell*.

**LOWBELLERS.** Such persons as go out in the night time with a light and a bell, by the sight and noise whereof birds sitting upon the ground become stupefied, and so are covered and taken with a net; the word is derived from the Saxon *low*, which signifies a flame of fire. *Antiq. Warwick, p. 4.*

**LOWBOTE.** A recompence for the death of a man killed in a tumult, or, as we say, by the mob. *Cowell*.

**LUCRATIVE SUCCESSION** of an heir to his ancestor; that succession which the heir receives by law without paying any value; and which renders him liable to the debts of his ancestor. *Scotch Dict.* See titles *Descent, Heir, Limitation*.

**LUDI DE REGE ET REGINA.** Playing at cards, so called, because there are kings and queens in the pack. *Cowell*.

**LUMINARE.** A lamp or candle, set burning on the altar of any church or chapel; for the maintenance whereof lands and rent-

charges were frequently given to parish churches, &c. *Kennet's Gloss.*

**LUNATICS.** See title *Idiots and Lunatics*.

**LUNDA.** A weight or measure formerly used here. *Lunda anguillarum constat de 10 sticis. Fleta, lib. 2. cap. 12.*

**LUNDRESS.** A sterling silver penny, which has its name from being coined only at London, and not at the country mints.—*Lond's Essay on Coin, p. 17.*

**LUPANATRIX.** A bawd or strumpet; and by the custom of London a constable may enter a house, and arrest a common strumpet and carry her to prison. 3 Inst. 206, &c. *Claus. 4. Ed. 1. p. 1. m. 16.*

**LUPINUM CAPUT GERERE.** Signified to be outlawed and have one's head exposed like a wolf's, with a reward to him that should bring it in. *Plac. Coron. 4 John. Rot. 2.* See *Outlawry*.

**LUPLICETUM [Lat.]** A hop-garden, or place where hops grow. 1 Inst. 4.

**LURGULARY.** The casting any corrupt or poisonous thing in the water was styled *lurgulary*, and felony. *Stat. pro Sartia London, anno 1573.*

**LUSHBURGHs or LUXENBURGHs.**—A base sort of foreign coin, made of the likeness of English money, and brought into England in the reign of King Edward III. to deceive the king and his people; on account of which it was made treason for any one wittingly to bring any such money into the realm, knowing it to be false. 25 Edw. 3. st. 5. c. 2.; 3 Inst. 1.

**LUSTRINGS.** A company was incorporated for making, dressing, and lustrating alammodes and lustrings in England, who were to have the sole benefit thereof confirmed by the following statute; by which no foreign silks known by the name of lustrings or alammodes are to be imported, but at the port of London, &c. 9 & 10 W. 3. c. 43. See title *Navigation Acts, Silk*.

**LUXURY.** There were formerly various laws to restrain excess in apparel, all repealed by 1 Jac. 1. c. 25. But as to excess in diet there still remains one ancient statute unrepealed, viz. 10 Edw. 3. st. 3. which ordains that no man shall be served at dinner, or supper, with more than two courses, except upon some great holidays there specified, in which he may be served with three. 4 Comm. 170, 171.

**LYEF-YELD (i.e. GELD,) LEF-SILVER.** A small fine, or pecuniary composition, paid by the customary tenant to the lord, for leave to plow or sow, &c. *Soma. of Gavelkind.*

**LYING-IN-HOSPITALS.** See *Hospitals*.

**LYNDEWODE.** Was a doctor both of the civil and canon laws, and dean of the

arches. He was ambassador for Henry V. into Portugal, *anno* 1422, as appeareth by the preface to his Commentary upon the provincials. *Cowell.*

LYNN. An act for regulating worsted weavers and their apprentices in the town of Lynn, &c. See 14 & 15 H. 8. c. 3.

LYON, KING OF ARMS. This officer takes his title from the armorial bearing of the Scotch King, the lion rampant. By Scotch acts 1592, c. 127, 1672, c. 21. he is empowered to inspect the arms, &c. of noblemen and gentlemen, and to grant arms, &c. *Scotch Dict.* See title *Herald.*

## M.

**M** Was the letter with which persons convicted of manslaughter were formerly marked on the brawn of the left thumb. This punishment has recently been abrogated.

**MACE-GRIEFE, or MACE-GREFES** [*Machecarii*,] such as willingly buy and sell stolen flesh, knowing the same to be stolen. *Britton*, c. 29; *Crompton's Justice of Peace*, fol. 193. *Vide Leges Innæ*, c. 20.

**MACE-CARIA, MACHEKUNA** [*Macella*.] The flesh-market or shambles. *Cowell*.

**MACER.** Mace-bearer; an officer attending the Court of Session.

**MACHECARIUS.** A butcher. *Cowell*. *Leg. Ed. Reg.* c. 39. *Stat. Wull.* 12 *E.* 1.

**MACHECOLLARE or MACHECOLLARE,** from the Fr. [*Mashecoulis*.] To make a warlike device, especially over the gate of a castle, resembling a gate, through which sending water or offensive things may be thrown on towers or assaults. *1 Hist. 5 a.*

**MACHINERY.** By the 2 & 3 H. 1 c. 72. the remedy against the hundred given by the 7 & 8 Geo. 1 c. 31 in the cases therein mentioned, was extended to threshing machines damaged or destroyed by riotous or tumultuous assemblies. See tit. *Hundred*.

By the last act for the general regulation of the customs (3 & 4 W. 4 c. 52. § 104.) any machines, utensils, blocks, tools, &c. used in the calico, woollen, cotton, linen, or silk manufactures of this kingdom, are, together with a variety of other kinds of machinery and tools, prohibited to be exported, under the penalty of forfeiture.

For the wilful destruction of machinery, see titles *Frames*, *Malicious Injuries*.

**MACHO,** a mason. *Car. 11*.

**MACKAREL,** may be sold on Sunday, 10 & 11 W. 3 c. 24 § 29.

**MADDER,** to be imported unmixed. 13 & 14 Car. 2. c. 30; repealed 15 Car. 2. c. 16. § 3.

Tithes of madder settled, 31 Geo. 2. c. 12; 5 Geo. 3. c. 18. See title *Tithes*. See further titles *Gardens*, *Malicious Injuries*.

**MADNING MONEY.** Old Roman coins, sometimes found about Dunstable, are so called by the country people; they seem to retain this name from *Magintum*, used by the Emperor Antoninus, in his Itinerary, for Dunstable. *Camden*.

**MADRIGALS.** An old word, signifying country songs. *Cowell*.

**MAEREMIU** [*Meresne*, from Fr.] Properly signifies any sort of timber, fit for building; seu quodvis materiamentum. *Carta de Foresta*; stat. *Claus.* 16 Ed. 2. m. 3.

**MAGAZINES.** See *Gunpowder*, *Malicious Injuries*.

**MAGBOTE or MÆGBOTE,** from the Sax. [*Mag. i. e. Cognatus et bote, compensatio*.] A compensation for the slaying or murder of one's kinsman, in ancient times, when corporal punishments for murder, &c. were sometimes commuted into pecuniary fines, if the friends and relations of the party killed were so satisfied. *Leg. Canuti*, c. 2.

**MAGIC** [*Magia, Necromantia*.] Witchcraft and sorcery. See *Conjuration*.

**MAGISTER.** This title, often found in old writings, signified that the person to whom attributed had attained some degree of eminency in *scientiâ aliquâ, præsertim literariâ*; and formerly those who are now called *doctors* were termed *magistri*.

**MAGISTRATE** [*magistratus*] A ruler; and he is said to be *custos utriusque tabulæ*; the keeper or preserver of both tables of the law. If any magistrate, or minister of justice, is slain in the execution of his office, or keeping of the peace, it is murder for the contempt and disobedience to the King and his laws. 9 *Co.*

The most universal public relation by which men are connected together is that of government; namely, as governors and governed; or, in other words, as *magistrates* and *people*. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere. In all tyrannical governments the supreme magistracy, or the right of both *making and executing laws* is vested in one and the same man, or one and the same body of men: and wherever these two powers are united together, there can be no public liberty. The magistrate (or magistracy) may enact tyrannical laws, and execute them in a tyrannical manner: since he is possessed, in quality of dispenser of justice, with all the power which as legislator he thinks proper to give himself. But when the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own



independence, and therewith of the liberty of the subject. In England, therefore, this *absolute power* is divided into two branches; the one *legislative*, to wit, a parliament consisting of King, Lords and Commons; the other *executive*, consisting of the King alone.

His Majesty's superior officers of state, the lord treasurer, lord chancellor, and a few others, or the like, in and in the capacity of subordinate magistrates, in any considerable degree the object of our laws; nor have they any very important share of magistracy conferred upon them; except that the *seigniors of state* are allowed the power of conviction in order to bring offenders to trial. 1 Leon. 70; 2 Leon. 175; Comb. 143; 5 Mod 81, 82, 317; *Ante* 291. See *tit. A. of the Court*. As to the office and authority of the *judicial magistrates*, and the other judges of the superior courts of justice, see under those titles. The rights and dignities of *mayors and aldermen*, and other magistrates of particular corporations, are more payable and strictly defined rights, depending entirely upon the domestic constitution of their respective franchises. Their magistracy and office is well ascertained and duties are most generally in use, and have a jurisdiction and authority especially throughout the kingdom, are paid by a *tax* of *£1000* *annually*, and are *not* *subject* to *any* *other* *tax* *whatsoever*.

The negligent use of public offices entrusted with the administration of justice makes the offender liable to be taken, and a very serious case will amount to a forfeiture of the office, if it be a beneficial one. *1 H. 6. 140. See further titles, Custody, Justice, King, Office, Parliament, &c.*

MAGNA ASSISA ELIGENDA. A writ directed to the sheriff to send four lawful knights before the justices of assize, there upon their oath to choose twelve knights of the vengage, &c. to pass upon the great assize, between A. B. plaintiff, and C. D. defendant, &c. *Reg. Orig.* 8. See titles *Assize, Jury.*

## MAGNA CARTA.

The GREAT CHARTER OF LIBERTIES granted in the ninth year of King Henry III.—It is so called, either for the excellence of the laws therein contained, or because there was another charter called the Charter of the Forest, established with it, when was the loss of the two; or in regard of the great troubles in obtaining it, and the remarkable solemnity in denouncing excommunication and anathemas against the breakers thereof. *Spelman* calls it *Augustissimum Angliarum Libertatum Diplomata*, & *Sacra Anchora*.

Edward the Confessor granted to the church and state several privileges and liberties by charter, and some were granted by the charter of King Hen. I. Afterwards Stephen and Hen. II confirmed the charter of Henry I. and Rich. I. took an oath at his coronation to observe all just laws, which was an implicit confirmation of former charters. King John took the like

oath. This king, likewise, after a difference be-  
tween him and the pope, and being unbroiled in  
wars at home and abroad, granted the charter  
first specifically known by the name of *Magna  
Carta de Libertatibus*; bearing date at Run-  
nimede, between Windsor and Staines, on 15th  
June, in the 17th year of his reign, being A. D.  
1215; but soon after broke it, and thereupon  
the barons took up arms against him, and his  
reign ended in wars. To him succeeded Hen-  
ry III. who in the ninth year of his reign granted  
the Magna Carta now given in our statute  
books. This he confirmed by a charter granted  
in the 21st year of his reign. In the 37th year  
of his reign, after several breaches, and repeated  
contradictions of this charter, King Henry III.  
came to Westminster Hall, where, in the pre-  
sence of the nobility and bishops, with lighted  
candles in their hands, Magna Carta was read;  
the king all that while laying his hand on his  
breast, and at last solemnly swearing faithfully  
and lawfully to preserve all things therein con-  
tained, as he was a true christian, a scholar,  
and a king. Then the bishops extinguished  
the candles and threw them on the ground;  
and every one said, "I thus let him be extin-  
guished and stink in hell, who violates this  
charter." Upon which the bells were set on  
march, and all persons by their rejoicing ap-  
proved what was done.

But without standing this very solemn confirmation of this charter the very next year King Henry invaded the rights of his people, till the barons levied war against him; and after various success, he confirmed this charter, and the Charter of the Forest, in the parliament of Merton, and in the 52d year of his reign. The Charter of the Forest had been first granted in the 2d year, and more fully in the 9th year of King Henry III. His son, Edward I. confirmed both these charters in the 25th year of his reign, made an explanation of the liberties therein granted to the people, and added some which are new, called *Articuli super Cartas*. See the statute book in the 25th and 29th of Edward I. and the collection of charters prefixed to the first volume of the Statutes of the Realm, published under the authority of his Majesty's commissioners of the records. Magna Carta was confirmed more than thirty times afterwards. Co. L. 81

This excellent charter, or body of law, at that time so beneficial to the subject, and of such great equity, is the most ancient written law of the nation. It is divided into thirty eight chapters, the 1st of which, after the solemn preamble of its being made for the honour of God, the exaltation of the Holy Church, and advancement of the kingdom, &c. ordains, That the church of England shall be free, and all ecclesiastical persons enjoy their rights and privileges. The 2d is of nobility, knights service, relics, &c. The 3d concerns heirs and their being in ward. The 4th directs guardians for heirs within age who are not to commit waste. The 5th relates to the custody of lands, &c. of heirs, and delivery of them up when the heirs are of age. The 6th is concerning the marriage of

heirs. The 7th appoints dower to women, after the death of their husbands, a third part of the lands, &c. The 8th relates to sheriffs and their bailiffs, and requires that they shall not seize lands for debts where there are goods, &c. the surety not to be distrained where the principal is sufficient. The 9th grants to London, and all cities and towns, their ancient liberties. The 10th orders, that no distress shall be taken for more rent than is due, &c. By the 11th the court of Common Pleas is to be held in a certain place. The 12th gives assizes for remedy, on disseisin of lands, &c. The 13th relates to assizes of darrein presentment, brought by ecclesiastics. The 14th enacts that no freeman shall be amerced for a fault, but in proportion to the offence; and by the oaths of lawful men. The 15th, no town shall be distrained to make bridges, &c. but such as of ancient times have been accustomed. The 16th is for repairing of sea-banks and sewers. The 17th prohibits sheriffs, coroners, &c. from holding pleas of the crown. The 18th enacts, that the king's debtor dying, the king shall be the first paid his debt, &c. The 19th directs the manner of levying purveyance for the king's house. The 20th concerns castleward, where a knight was to be distrained for money, for keeping his cattle, on his neglect. The 21st forbids sheriffs, bailiffs, &c. to take the horses or carts of any person to make carriage without paying for it. By the 22d the king is to have lands of others a year and a day, and afterwards the lord of a fee. The 23d requires weirs to be put down on rivers. The 24th directs the writ *precipe in capite* for lords against tenants offering wrong, &c. The 25th declares that there shall be but one measure throughout the land. The 26th, inquisition of life and member, to be granted freely. The 27th relates to knight's service, petit-serjeantry, and other ancient tenures; (taken away, together with wardship, &c. by stat. Car. 2, c. 24. See title *Tenures*.) The 28th directs, that no man shall be put to his law on the bare suggestion of another, but by lawful witnesses. The 29th, no freeman shall be disseised of his freehold, imprisoned and condemned but by judgment of his peers, or by the law of the land. The 30th requires that merchant strangers be civilly treated, &c. The 31st relates to tenures coming to the king by escheat. By the 32d no freeman shall sell land, but so that the residue may answer the services. The 33d, patrons of abbeys, &c. shall have the custody of them in the time of vacation. The 34th, a woman to have an appeal for the death of her husband. The 35th directs the keeping of the county-court monthly, and also the times of holding the sheriff's tourn, and view of frankpledge. The 36th makes it unlawful to give lands to religious houses in *mortmain*. The 37th relates to escuage and subsidy, to be taken as usual. And the 38th ratifies and confirms every article of this great charter of liberties.

The following is Blackstone's summary of this celebrated charter, and its occasion and effect.

In King John's time and that of his son

Henry III. the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories; which at last had this effect, that at first King John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Carta* and *Carta de Foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the crown in the exertion of forest law; and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively, and with this retrospect, they seem but of trifling concern.

But besides these feudal provisions, care was also taken by *Magna Carta* to protect the subject against other oppressions, then frequently arising from unreasonable amercedments, from illegal distresses, or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony, prohibited for the future the grants of exclusive fisheries, and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights, it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children. It laid down the law of dower, and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern, it enjoined an uniformity of weights and measures, gave new encouragement to commerce, by the protection of merchant strangers, and forbade the alienation of lands in *mortmain*. With regard to the administration of justice, besides prohibiting all denials or delays of it, it fixed the Court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits. It also corrected some abuses incidental to the trial by wager of law and of battle; directing the regular awarding of inquests, for life or member; prohibiting the king's inferior ministers from holding pleas of the crown, or trial of any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And lastly, (by which alone it would have merited the title that it bears, of the *great charter*;) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers, or the law of the land. 4 *Comm. c. 33, p. 1.3, 4.*

The following are the words of the often

quoted 29th chapter of *Magna Carta*, 9 Hen. III. relating to the personal liberty of Englishmen.

"Nullus liber homo capiatur, vel imprisonetur, aut disseisnatus de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exiliatur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale, iudicium parium suorum vel per legem terre.—Nulli vendemus, nulli negabimus, aut differemus rectum vel iustitiam." See further, title *Liberty*.

**MAGNA PRECARIA.** A great or general reap-day. And in 21 R. 2. the lord of the manor of Harrow on the Hill, in com. Middlesex, had a custom that by summons of his bailiff on a general reap-day, then called *Magna precaria*, the tenant should do a certain number of days' work for him; every tenant that had a chimney being obliged to send a man. *Phil. Purvey*, p. 145.

**MAGNA CENTUM.** The great hundred, or six score. *Chart. 20 H. 2.*

**MAGNUS PORTUS.** The town and port of Portsmouth.

**MAIHEMATUS.** Maimed or wounded.

**MAHOMERIA.** The temple of Mahomet; and because the gestures, noise, and songs there, were ridiculous to the christians, therefore they called antic dancing, and any thing of ridicule, a momerie. *Mat. Paris.*

**MAIDS.** See title *Abduction, Guardian, Marriage, Rape.*

**MAIDEN ASSISES.** Is when at any assizes no person is condemned to die.

**MAIDEN RENTS.** A noble paid by every tenant in the manor of Builth, in com. Radnor, at their marriage; anciently given to the lord for his omitting the custom of *marceta* (See title *Marchet*.) More probably a fine for a licence to marry a daughter.

**MAIGNAGIUM,** [*Fr. maignen. i. e. faber ararius.*] A brazier's shop; though some say it signifies a house. *Lib. Rames*, § 265.

**MAIHEM,** or **MAYHEM,** [*maihemium*, from the *Fr. mehaigne, i. e. membri mutilationem.*] A main, wound, or corporeal hurt, by which a man loseth the use of any member, proper for his defence in fight. As if a man's skull be broke, or any bone broken in any other part of the body; a foot, hand, finger, or joint of a foot, or any member be cut off; if by any wound the sinews be made to shrink; or where any one is castrated; or if any eye be put out, or any fore tooth broke, &c. But the cutting off an ear or nose, the breaking of the hinder teeth, and such like, was held no maihem by the common law; as they were not a weakening of a person's strength, but a disfiguring and deformity of the body. *Glanv. lib. 4. c. 7; Bract. lib. 3. tract. 2; Britton, c. 25; S. P. C. lib. 1. c. 41.*

Maihem is accurately thus defined; the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. *Brit. lib. 1. c. 25; 1 Hawk. P. C. c. 44.*

By the ancient law of England, he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part, *membrum pro membro.* 3 *Inst.* 118; *Brit. c. 25.* But this went afterwards out of use; partly because the law of retaliation is at best but an inadequate rule of punishment, and partly because on a repetition of the offence, the punishment could not be repeated; so that by the common law, as it for a long time stood, maihem was only punishable by fine and imprisonment. 1 *Hawk. P. C. c. 44. § 3.* Unless perhaps the offence of maihem by castration which all old writers held to be felony; and this, although the maihem was committed on the highest provocation, such as the party maimed being caught in adultery with the wife of the offender. See *Bract. fo. 144; 3 Inst. 62; S. P. C. 32; H. P. C. 133.*

But subsequent statutes put the crime and punishment of maihem more out of doubt. The stat. 37 H. 8. c. 6. directed that if a man should maliciously and unlawfully cut off the ear of any of the king's subjects, he should not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction, but also 10*l.* by way of fine to the king, which was his criminal amercement. But by far the most severe and effectual of these statutes was 22 & 23 C. 2. c. 1. called the Coventry Act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it was enacted, that if any person should, of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, should be guilty of felony, without benefit of clergy; though no attainder of such felony should corrupt the blood, or forfeit the dower of the wife, or lands or goods of the offender.

The above acts, as well as the subsequent one of the 13 Geo. 3. 58. commonly called Lord Ellenborough's Act, were repealed by the 7 & 8 Geo. 4. c. 27, and the 9 Geo. 4. c. 31.

By the 11th section of the latter statute it is enacted, that if any person shall unlawfully and maliciously shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or unlawfully and maliciously stab, cut, or wound any person with intent, in any such case, to murder such person, the offender, and every person counselling, aiding and abetting therein, shall suffer death as a felon. By § 12. the like acts are punishable also with death if committed with intent to maim, disfigure, disable, or to do some grievous bodily harm, or to resist or prevent the lawful apprehension and detaining of the party offending, or any accomplice, for any offence for which they are liable to be apprehended or detained. But it is provided, that if it shall appear on the trial, that



the offence was committed under such circumstances that if death had ensued, it would not in law have amounted to murder, the person indicted shall be acquitted of felony.

By the 3 & 4 W. 4. c. 53. § 59. maliciously shooting at, maiming, or dangerously wounding any officer of the army, navy, or marines, employed for the prevention of smuggling, and on full pay, or any officer of custom or excise or any person acting in his aid, is a capital offence in the party offending, and every one aiding, abetting, or assisting therein.

There is a distinction between the provisions of the 22 Car. 2. c. 1. and the 9 Geo. 4. c. 31. The former required a lying in wait of the offender to render the crime complete, and therefore did not apply to a sudden attack. 1 Hawk. c. 55. s. 12; 1 Leach, 187; 1 East, P. C. 398, 399. It is also to be remarked, that the 43 Geo. 3. c. 58. did not extend to the wounding with a blunt instrument, the words being merely *stab or cut*. See R. & R. 404; 1 Russ. 597. But the 9 Geo. 4. c. 31. extends to a wounding with whatever instrument inflicted, provided the offence is properly charged in the indictment. Where an actual cutting is inflicted by an instrument, it will support a charge of cutting in the indictment, whether the instrument is intended for cutting or not, or is ordinarily used for some other purpose. R. & R. 78. Where a man struck a woman in the face with the claw of a hammer and it cut her, it was holden to be a cutting within the statute. R. & R. 104. To be a wound within the statute, the continuity of the skin must be broken. Moo. C. C. 278. But if the skin be broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick is within the statute. Moo. C. C. 318; 4 C. & P. 558.

With respect to the intents mentioned in the statute, we have noticed what amounts to a maiming. To disfigure is to do a man some external injury, which detracts from his personal appearance; to disable is to do something creating a permanent disability, and not a mere temporary injury. See R. & R. 29. It is not requisite that a grievous bodily harm, within the meaning of the statute, should be either permanent or dangerous. R. & R. 362.

Maihem may be punished by indictment, or a remedial action of trespass *vi et armis* may be brought to recover damages for the injury.

Upon an appeal of maihem, (which formerly might have been brought by the party injured, but which proceeding in this as well as in all other cases of felony is abolished by the 59 Geo. 3. c. 46,) the issue joined was, whether it was maihem or no maihem, and this was to be decided by the court upon inspection; for which purpose they might call in the assistance of surgeons. 2 Ro. Abr. 578. And by analogy to this it is, that now, in an action of trespass for maihem, the court (upon view of such maihem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause, to be the same as was given in evidence to the jury,) may increase the damages

at their own discretion. 1 Sid. 108. As may also be the case upon view of an atrocious battery. Hard. 408; see 1 Wils. 5; 1 Barnes, 106.

A person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 Inst. 127. And by the like reason, a person who disables himself that he may not be impressed for a soldier. Burn's Justice.

As to the maiming of cattle, see *Malicious Injuries*.

**MAIL INDUCTIO.** An ancient custom for the priest and people of country villages to go in procession to some adjoining wood on a May-day morning, and return with a May-pole, boughs, flowers, garlands, and other tokens of the spring. This May-game, or the rejoicing at the coming of the spring, was for a long time observed, and still is in some parts of England, but it was condemned and prohibited in the diocese of Lincoln, by bishop Grotthead.

**MAIL.** [*macula.*] A coat of mail, so called from the Fr. *maille*, which signifies a square figure, or the hole of a net; so *maille de haubergeons* was a coat of mail, because the links or joints in it resemble the squares of a net. Mail is likewise used for the leathern bag wherein letters are carried by the post, from *bulga*, a budget.

**MAILE.** Anciently a kind of money; and silver half-pence were termed mailles. 9 Hen. 5. By indenture in the Mint, a pound weight of old sterling silver was to be coined into three hundred and sixty sterlings or pennies, or seven hundred and twenty mailles or half-pennies, or one thousand four hundred and forty farthings. Lownd's Ess. on Coin, 38. See *Black-mail*.

**MAILS and DUTIES.** In Scotch law, the rents of an estate, whether in money or victual; an action for the rents of an estate is therefore termed an action of mails and duties. By act 1669. c. 9. a tenant is not liable to arrears of rent after five years from the time of his removing from the lands.

**MAIMING.** See *Maihem*.

**MAINAD.** A false oath, or perjury. Leg. Int., c. 34.

**MAINE-PORT,** [*In manu portatum.*] A small tribute, commonly of loaves of bread, which in some places the parishioners pay to the rector of their church, in recompence for certain tithes. Couell.

This mainport bread was paid to the vicar of Blyth. See *Antiq. of Nottinghamshire*, p. 173.

**MAINOVRE,** or *Mainœuvre*, [from the Fr. *main*, i. e. *manus*, and *œuvrer*, *operari*.] Handy-work; some trespass committed by a man's hand. See 7 Rich. 2. c. 4.; Brit. 62; and the succeeding article.

**MAINOUR,** or *MANOUR*, or *MEINOUR*; [from the Fr. *manier*, i. e. *manu tractare*.] In a legal sense denotes the thing taken away, found in the hand of the thief who taketh away, or stealeth. Thus to be taken with the *mainour*, Pl. Cor. fol. 179, is to be taken with the thing stolen about him; and

again, *fol. 194*, it was presented, that a thief was delivered to the sheriff or viscount, together with the *mainour*; and again, *fol. 186*, if a man be indicted, that he feloniously stole the goods of another, where, in truth, they are his own goods, and the goods be brought into the court as the *mainour*, and it be demanded of him what he saith to the goods, and he disclaim them; though he be acquitted of the felony, he shall lose the goods. *Cowell*.

Thus the court of attachments in the forest may attach all offenders against vert and venison, by their bodies, if taken with the *mainour*, that is, in the very act of killing venison, or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done, else they must be attached by their goods. *Carth. 79; 4 Inst. 289*.

One mode of prosecution, by the common law, without any previous finding by a jury, was, when a thief was taken with the *mainour*, that is, with the thing stolen upon him, *in manu*; for he might, when so detected, *flagrante delicto*, be brought into court, arraigned and tried without indictment. But this proceeding was taken away by several statutes in the reign of Edward III., though in Scotland a similar process remains to this day. See 2 *Hal. P. C. 149; 4 Comm. c. 23. p. 307*; and tit. *Court-leet*.

**MAINPERNABLE.** That may let to bail. See (the repealed) stat. *West. 1. 3 Edw. 1. c. 15.*; and *Bail, Mainprize*.

**MAINPERNORS**, [*manu captiores*.] Are those persons to whom a man is delivered out of custody or prison, on their becoming bound for his appearing, &c. which, if he do not do, they shall forfeit their recognizances; and they are called *manu captiores*, because they do as it were *manu capere et ducere captivum è custodia vel prisonâ*.

**MAINPRISE**, [*manu captio*, from the Fr. *main*, i. e. *manus et pris, captus*.] The taking or receiving of a person into friendly custody, who otherwise might be committed to prison, upon security given that he shall be forthcoming at a time and place assigned. Thus to let one to mainprise is to commit him to those that undertake he shall appear at the day appointed. *Old Nat. Br. 42; F. N. B. 249*.

*Manwood* makes this difference between mainprise and bail: He that is mainprised is said to be at large, after the day he is set to mainprise, until the day of his appearance; but where a man is let to bail by any judge, &c. until a certain day, there he is always accounted by the law to be in their ward of time; and they may, if they will, keep him in prison, so that he that is so bailed shall not be said to be at large, or at his own liberty. *Manwood, p. 167*.

A man under mainprise is supposed to go at large, under no possibility of being confined by his sureties or mainpernors, as in case of bail. *4 Inst. 179*. Mainprise is an undertaking in a certain sum; bail answers the condemnation in civil cases, and in criminal, body for body. *Sed qu.* If this, as to body for body, is now law? If it is, it is never put in force.

Mainprise may be where one is never arrested, or in prison; but no man is bailed but he that is under arrest, or in prison; so that mainprise is more large than bail. *H. P. C. 96; Wood's Inst. 582, 618*. Upon a *capias* or exigent awarded against a man, he shall find mainprise for his appearance; and if the defendant make default, his manucaptors are to be amerced, &c. And a bill of mainprise, acknowledged and put into court, is good, though it be not rolled. *Jenk. Cent. 129*.

There is an ancient writ of mainprise, whereby those who are bailable, and have been refused the benefit of it, may be delivered out of prison. *Reg. Orig. 269; F. N. B. 250*.

The writ of mainprise, *manu captio*, is a writ directed to the sheriff, (either generally when any man is imprisoned for a bailable offence, and a bail hath been refused, or especially when the offence or course of punishment is not properly bailable below,) commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large. *F. N. B. 250; 1 Hal. P. C. 141; Co. Bail & M. c. 10*; and see 2 *Hawk. P. C. c. 15. § 30*.

Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day. Bail are only sureties that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. 3 *Comm. c. 8. p. 128*, cites *Co. Bail & M. c. 3; 4 Inst. 179*.

Of the writ of mainprise little notice is taken in the late books; yet the law relating to it seems to be still in force in many cases; and consequently in such cases those who are bailable, and have been refused the benefit of the bail, may still, by virtue thereof, be delivered out of prison; (upon their finding sureties to the sheriff that they will appear and answer to the crimes alleged against them, before the justices, in the writ mentioned, &c.) as those who are imprisoned for a slight suspicion of felony, or indicted of larceny before the steward of a leet, or of trespass before justices of peace, and many other persons. 2 *Hawk. P. C. c. 15. § 29*.

The 3 *Edw. 1. c. 15*. directed what prisoners should be mainpernable by the sheriffs, and which not. That statute, together with several subsequent acts, was repealed by the 7 *Geo. 4. c. 64. § 32*. which empowers justices in certain cases to admit parties charged with felony or suspicion of felony to bail. See *Bail, II*.

**MAINSWORN.** See *Male-sworn*.

**MAINTAINORS.** Are those that maintain or second a cause depending between others, by disbursing money, or making friends, for either party, &c. not being interested in the suit, or attornies employed therein. 19 *Hen. 7. c. 14*. See *Maintenance*.

**MAINTENANCE**, [*manutenentia*.] The unlawful taking in hand, or upholding of a cause or person; metaphorically drawn from the succouring of a young child that learns to go by one's hand; and in law is taken in the worst sense. See 32 *Hen. 8. c. 9*. Also it is

used for the buying or obtaining of pretended rights to lands. *Stat. Ibid.*

Maintenance is an offence that bears a near relation to barrettry; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it; a practice that was greatly encouraged by the first introduction of uses. 4 *Comm. c. 10. p. 134.*

Maintenance is either *ruralis*, in the country; as where one assists another in his pretensions to lands, by taking or holding the possession of them for him; or where one stirs up quarrels or suits in the country: or it is *curialis*, in a court of justice; where one officiously intermeddles in a suit depending in any court, which no way belongs to him, and he had nothing to do with, by assisting the plaintiff or defendant with money or otherwise, in the prosecution or defence of any such suit. *Co. Lit. 368; 2 Inst. 213; 2 Rol. Abr. 115.* And he who fears that another will maintain his adversary, may, by way of prevention, have an original writ grounded on the statutes prohibiting him so to do. 1 *Hawk. P. C. c. 83. § 42; Reg. Orig. 182.*

*Who are guilty of Maintenance.*—Not only he who lays out his money to assist another in his cause, but he that by his friendship or interest saves him that expense which he might otherwise be put to, is guilty of maintenance. *Bro. Maint. 7, 14, 17, &c.* And if any person officiously give evidence, or open the evidence without being called upon to do it; speak in the cause, as if of counsel with the party; retain an attorney for him, &c. or shall give any public countenance to another in relation to the suit as where one of great power and interest says that he will spend twenty pounds on one side, &c. or such a person comes to the bar with one of the parties, and stands by him while his cause is tried, to intimidate the jury; if a juror solicits a judge to give judgment according to the verdict, after which he hath nothing more to do, &c.; these are acts of maintenance. 1 *Hawk. P. C. c. 83.*

It is said that if a man of great power, not learned in the law, tells another who asks his advice, that he hath a good title, it is maintenance. 1 *Hawk. P. C. c. 83. § 9.* In case any person who is no lawyer, and that hath no interest in the cause, shall take upon him to do the part of a lawyer, this will be unlawful maintenance. And after a suit is begun, no man may encourage either of the parties, or yield them any aid or help, by money or the like, but he hath that interest therein. 22 *Hen. 6. c. 6; 19 Edw. 4. c. 3; 2 Shep. Abr. 406.*

But counsel may speak as *amicus curiæ*. A man cannot be guilty of maintenance, in respect of any money given by him to another, before any suit is actually commenced; nor is it such to give another advice, as to what action is proper to be brought, what method to be taken, or what counsellor or attorney to be employed; or for one neighbour to go with another to his counsel, so as he do not give him any money;

and money may be lawfully given to a poor man, out of charity, to carry on his suit, and be no maintenance. Attornies may lay out their money for their clients, to be repaid again; but not at their own expense, on condition of no purchase no pay, if they carry the cause or lose it. *Fitz. Maint. 18; 3 Rol. Abr. 118; 2 Inst. 564.*

Whether an attorney's laying out money for his client be maintenance, see *Freem. 71, 81.*

If a person hath any interest in the thing in dispute, though in contingency only, he may lawfully maintain an action relating to it; as if tenant in tail, or for life, be impleaded, he in reversion or remainder, &c. may maintain the defence of the suit with his own money; and a lessor may lawfully maintain his lessee. 2 *Rol. Abr. 115.* A lord may justly maintaining a tenant, in defence of his title; and the tenant may maintain his lord: one bound to warrant lands, may lawfully maintain the tenant impleaded; and a man may maintain those who are enfeoffed of lands in trust for him, concerning those lands, &c. An heir apparent, or the husband of such an heir, may maintain the ancestor in an action concerning the inheritance of the land whereof he is seised in fee; a master may maintain his servant, and assist him with money, but not in a real action, unless he hath some of his wages in his hands; and a servant by a reason of relation may maintain his master in all things, except laying out his own money in the master's suit. 1 *Hawk. P. C. c. 83; 1 Inst. 368.*

A landlord may sue in the name of his tenant to try a right, and a mortgagee, not a party in a suit, may, without being guilty of maintenance, advance money to support the title, for maintenance is justifiable from the priority of the parties in the estate. *Bac. Abr. tit. Maintenance (B.) 3. 7th ed.*

And one who has only an equitable interest in lands or goods, as a cestui que trust, or a vendor of lands, or an assignor of a bond for a good consideration, may lawfully maintain another in a suit concerning the thing in which he has such an equity. 4 *T. R. 430.* So where a defendant, at the request of another person, defended an action for the recovery of a sum of money, in which the latter claimed an interest, upon his undertaking to indemnify the defendant from the consequences of the action: this agreement was held not to amount to maintenance. 6 *Barr. 209.*

A father, a son, or an heir apparent to the party, or the husband of an heiress apparent, may lawfully lay out money for the party to prosecute his suit; and whoever is of kin to either of the parties, or related by any kind of affinity still continuing, or the godfather of either, may also lawfully stand by him in court and counsel him, and pay another to be of counsel for him, but cannot lawfully lay out his money in the cause. 1 *Hawk. c. 83. s. 20.*

By stat. *Westm. 1. 3 Edw. 1. c. 25.* none of the king's officers shall maintain pleas or suits in the king's court for lands, &c. under covenant to have part thereof or any profit therein:



and clerks of justices are not to take part in quarrels, or delay right, on pain of treble damages. By 1 *Edw. 3. st. 2. c. 14.* further enforced by 20 *Edw. 3. c. 4.* none of the kings ministers, nor no great man of the realm, by himself nor by any other, by sending of letter or otherwise, nor none other person, great or small, shall take upon them to maintain quarrels, to the let and disturbance of the common law. The king's counsellors, officers or servants, or any other person whatsoever, shall not sustain quarrels by maintenance, upon pain to lose their offices and services, and of imprisonment and ransom. 1 *Rich. 2. c. 4.* No person whatsoever shall unlawfully maintain any suit concerning lands, or retain any person for maintenance, by letters, rewards or promises, under the penalty of 10*l.* for every offence, to be divided between the king and prosecutor. 32 *Hen. 8. c. 9.*

*What rights and titles, &c. are within the meaning of the law.* Maintaining suits in the Spiritual Court is not within the statutes relating to maintenance. *Cro. Eliz. 519.* But maintenance in a court baron is as much within the purview of the 1 *Rich. 2* as maintenance in a court of record. A pretended right to copyhold lands sold is within the statute 32 *Hen. 8. c. 9*; 4 *Rep. 26.* If A. be owner of land in possession, and another who hath no right granteth the land, although the grant upon a covenant yet the grantor and grantee are liable to this statute. 1 *Inst. 369.* So where he that hath a pretended right, and none in truth shall get the possession wrongfully, and then sell the land, &c. But a remainderman in fee may obtain the pretended title of a stranger. 1 *Inst. 369*; 3 *Inst. 76, 77.* And a person who hath good right and title, at the time of the bargain or lease, will not be within the above statute, although neither he nor his ancestors have been in possession thereof, &c. for a year before. *Plowd. 47*; *Dyer, 74.*

And although the vendor's title rests merely on an agreement for the purchase of the estate, the statute does not apply. *Wood v. Griffiths, Sugd. Vend. & Purch. 488, 7th ed.*

If a person make a lease to try a title in ejectment, unless it be to a great man, it is out of the statute. 1 *Inst. 369*; *Dyer, 374.* A lessor having good right to land, but not in possession, made a lease of it, and did not seal it on the land, it was adjudged within the 32 *Hen. 8. c. 9.* 1 *Leon. 166.*

The law will not suffer any thing in action, entry, &c. to be granted over, this is to prevent titles being granted to men of substance, to oppress the poorer sort of people. 1 *Inst. 214.* Where a bond was given for performance of covenants in a lease, and after the covenants being broken, the lessee assigned both the lease and bond to another, and then the assignee put the bond in suit; this was held maintenance; so it would have been if the lessee had assigned the bond and not the lease, and afterwards the covenants were broken, and the bond put in suit. *Godb. 81*; 2 *Nels. Abr. 1142.*

*How punishable.* By the common law, persons guilty of maintenance may be prosecuted by indictment, and be fined and imprisoned; or be compelled to make satisfaction by action, &c. And a court of record may commit a man for an act of maintenance done in the face of the court. *Hell. 79*; 1 *Inst. 368.*

Prosecutions for maintenance are now rarely instituted; where more than one person is implicated in this offence, the practice is to indict them for a conspiracy.

See further on this subject, 1 *Hawk. P. C. c. 83*; *Vin. Abr. tit. Maintenance: and tits. Champerty, Embracery, &c.*

**MAJOR.** A mayor, doth not come from the Latin *major*, but from an old English word *maier*, i. e. *poteslas*. *Covell.* See *Mayor.* M. is also applied to a person of full age, as distinguished from a minor.

**MAJORITY.** Sometimes used to distinguish the state of being at full age; more usually referred to the only method of determining the acts of many, by a majority in numbers. The major part of members of parliament enact laws, and the majority of electors choose members of parliament; the act of the major part of any corporation is accounted the act of the corporation, and where there is only one vote by the law, is the whole. By 33 *Hen. 8. c. 27,* all rules made by founders of colleges, &c. whereby the effect of the assent of the majority is hindered by a minority of negative voices, are declared void.

It is a general rule of law, that where a public trust is to be executed by a definite number of persons, it cannot be executed at any meeting where a majority of the whole number is not present, unless there be a custom to the contrary; therefore, where a select vestry of twenty-six were appointed, a rate made at a meeting where fourteen were not present, was declared bad. 9 *B & C. 851.*

**MAISNADA.** A family, *quasi mansionata.* *Meigne; Mon. Angl. 2. 219.*

**MAISON DE DIEU.** A monastery, hospital, or almshouse. All hospitals, *maisons de Dieu*, and abiding places, for poor, lame, and impotent persons, erected by the 39 *Eliz. c. 5.* or at any time since founded, according to the intent of that statute, shall be incorporated and have perpetual succession, &c. 21 *Jac. 1. c. 1.* See *Corporation, Hospitals.*

**MAISURA.** A house or Mansion; a farm; from the French *maison*, *MS. Antiq.*

**MAJUS JUS.** Is a writ or law proceeding in some customary manors, in order to a trial of right of land; and the entry in the old books is thus: *Althinc a cum cnil A B in p'p' a personu sc'd d'at Dominu, & ad vidend. Rotul. Curie. Et petit inquirend. utrum ipse habeat Majus jus in uno messuagio, &c. Et super hoc homag. dicunt, &c. Ex libro MS. Episcop. Heref. temp. Edw. 3.*

**MAKE, facere.]** To perform or execute; as to make his law, is to perform that law which he hath formerly bound himself to; that is to clear himself of an action commenced against him by his oath, and the oaths of his

neighbours. *Old Nat. Brev.* 161; *Kilchen*, 192. This ancient law seems to have been borrowed from the Feudists; who call those that came to swear for another in this case *Sacramentales*. See *Hotoman*. The formal words used by him that made his law, were commonly these: *Hear, O ye justices, that I do not owe this sum of money demanded, neither in all nor any part thereof, in manner and form declared. So help me God, and the contents of this book.* Hence, probably, to make oath, is to take oath.

**MAKE SERVICES AND CUSTOMS.** To perform them. *Old Nat. Brev.* 14.

**MALA.** A male or port-mail; a bag to carry letters, &c. *Old Nat. Brev.* 14.

**MALA FIDES.** Is opposed to *bona fides*, and applies to the case of a person who possesses a property not his own, and which he knows, or might on reflection know, not to be his own.

**MALANDRINUS.** A thief or pirate. *Walsing.* 388.

**MALBERGE.** *Mons placiti.* A hill where the people assembled at a court, like our assizes; which by the Scots and Irish are called *parley hills*. *Du Cange*.

**MALECREDITUS.** One of bad credit, who is suspected, and not to be trusted. *Fleta*, lib. 1. c. 38.

**MALEDICTION**, *maledictio*.] A curse which was anciently annexed to donations of lands made to churches and religious houses, against those who should violate their rights. *Si quis autem (quod non optimum) hanc nostram donationem infringere temptaverit, perperussit sit gelidis glacierum flatibus et malignorum spirituum; terribiles tormentorum cruciatus evasisse non quiescat, nisi prius in regius penitentiae gemitibus, et pura emendatione emendaverit.* *Chart. Reg. Athelstani Monast. de Wilton, anno 933* And we read in a charter of William de Warren, Earl of Surrey, *Venientibus contra hæc et destruentibus, ea, occurrat Deus in gladio ira et furoris et vindictæ et Maledictionis æternæ; Serrantibus autem hæc et defendentibus ea, occurrat Deus in pace, gratiâ et misericordiâ et salute æternâ. Amen, Amen, Amen.*

**MALESWORN.** More accurately perhaps *Malsworn*; sometimes more corruptly still. *Malsworn*. In the north signifies forsworn. *Brownl.* 4; *Hob.* 8.

**MALETENT.** Is interpreted to be a toll for every sack of wool, by statute. Nothing from henceforth shall be taken for sacks of wool, by colour of maletent, &c. 25 *Edw. I.* c. 7.

**MALFEASANCE**, from the French *mal-faire*, i. e. to offend.] Is a doing of evil, or transgressing. 2 *Cro.* 266.

**MALICE.** Is a term of law, importing directly wickedness, and excluding a just cause of excuse: thus Lord Coke, in his comment on the words *per malitiam* says, "if one be appealed of murder, and it is found that he killed the party *se defendendo*, this shall not be said

to be *per malitiam* because he had a just cause. 2 *Inst.* 384.

Amongst the Romans and in the civil law, *malitia* appears to have imported a mixture of fraud and of that which is opposite to simplicity and honesty. Cicero speaks of it in his treatise *de Nat. Deor. lib. 3. sect. 10*.

In its proper or legal sense, this word is different from that sense which it bears in common speech. In common acceptation, it implies a desire of revenge, a settled anger against a particular person; but this is not the legal sense. *Holt, Ch. J.* in considering homicide said, "some men have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*; *envy*, *hatred*, and *malice*, are three distinct passions of the mind." *Kel.* 127.

In the stat. 25 *H. 8. c. 3.* where mention is made of persons standing mute "of *malice* or froward mind," the word *malice*, explained by the accompanying words, seems merely to signify a wickedness or frowardness of mind in refusing to submit to the course of justice. Where the question of malice has arisen in cases of homicide, the matter for consideration has been, whether the act was done with or without just cause or excuse, so that it has been suggested (*Chapple, J. MSS. Sum.*) that what is usually called *malice implied*, by the law, would perhaps be expressed more intelligibly to the understanding, if it were called *malice in a legal sense*. See title *Homicide*, 3. VII.

Previous to the 7 & 8 *Geo. 4. c. 30.* it was necessary, under several of the statutes against malicious injuries to property, to prove express malice in the offender towards the owner, which frequently rendered it difficult to convict the party. But that statute applies, whether the offence be committed from malice to the owner of the property or not. See *post*, *Malicious Injuries*, IX.

**MALICIOUS INJURIES TO PROPERTY.** By the 7 & 8 *Geo. 4. c. 27.* all the former statutes relative to the subject, with a few exceptions hereinafter mentioned, were repealed with a view to a consolidation of the law with respect to offences of this description, under the 7 & 8 *Geo. 4. c. 30.* Many of the provisions of this act have already been given under separate titles. See *Cattle, Fence, Fish, Gardens*, &c.

The following seems the most convenient arrangement of such of the clauses of the act as are intended to be noticed under the present head.

1. Of injuries to buildings.
2. ————— to manufactures and machinery.
3. ————— to mines.
4. ————— to ships.
5. ————— to sea-banks, canals, bridges, turnpike-gates, fish-

6. ————— *eries, mill-ponds, &c. to stacks of corn, &c. crops, plantations, &c.*  
 7. ————— *to hopbinds and trees.*  
 8. ————— *to any other property.*  
 9. *The general provisions of the statute.*

### 1. *Of Injuries to buildings.*

By § 2. maliciously setting fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, duly registered or recorded, or to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, is a capital offence.

By § 8. if any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church, &c. (as in the above section) or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted, shall suffer death.

### 2. *Of injuries to manufactures and machinery.*

By § 3. if any person shall maliciously cut, break or destroy, or damage with intent to destroy or to render useless any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and being convicted shall be liable to be transported beyond the seas for life, or for any term

not less than seven years, or to be imprisoned not exceeding four years; and if a male, to be whipped, in addition to such imprisonment.

By § 4. if any person shall maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace,) every such offender shall be guilty of felony, and being convicted shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned not exceeding two years; and if a male, to be whipped, in addition to such imprisonment.

### 3. *Of injuries to mines.*

By § 5. maliciously setting fire to any mine of coal or cannel coal, is a capital offence.

By § 6. maliciously causing any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, is a felony, and subjects the offender to be transported beyond the seas for seven years, or to be imprisoned not exceeding two years; and if a male, to be whipped, in addition to such imprisonment: provided that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

By § 7. maliciously pulling down or destroying, or damaging with intent to destroy or render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, wagon-way or trunk be completed or in an unfinished state, is a felony, liable to any of the punishments last mentioned.

And see § 8. *ante*, 1.

### 4. *Of injuries to ships.*

By § 9. maliciously setting fire to or in anywise destroying any ship or vessel, whether the same be complete or in an unfinished state, or setting fire to, casting away, or in anywise destroying any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, is a capital felony.



By § 10. maliciously damaging, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, is also a felony punishable with transportation for seven years, or imprisoned not exceeding two years; and if the offender be a male, with whipping.

By § 11. if any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, or shall by force prevent or impede any person endeavouring to save his life from such ship or vessel (whether he shall be on board or shall have quitted the same) every such offender shall be guilty of a capital felony.

And see *post* as to injuries to the king's ships.

5. *Of injuries to sea banks, canals, bridges, turnpike gates, fisheries, mill ponds, &c.*

By § 12. maliciously breaking down or cutting down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or throwing down, leveling, or otherwise destroying any lock, sluice, floodgate, or other work on any navigable river or canal, is a felony, subjecting the offender to be transported for life, or for not less than seven years, or to be imprisoned not exceeding four years; and, if a male, to be whipped, in addition to such imprisonment; and maliciously cutting off, drawing up, or removing any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or opening or drawing up any floodgate, or doing any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, is also a felony punishable with seven years transportation, or imprisonment for two years; and if the offender be a male, whipping.

By § 13. maliciously pulling down or in anywise destroying any public bridge, or doing any injury with intent and so as thereby to render such bridge or any part thereof dangerous or impassable, is a felony, subjecting the offender to be transported for life, or for not less than seven years, or to be imprisoned for not exceeding four years; and if a male, to be whipped, in addition to such imprisonment.

By § 14. if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any

house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted, shall be punished accordingly.

By § 15. maliciously breaking down or otherwise destroying the dam of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond of water, or so as thereby to cause the loss or destruction of any of the fish, or putting any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or breaking down or otherwise destroying the dam of any millpond, is a misdemeanor, and punishable with transportation for seven years, or imprisonment for two years; and if the offender be a male, with whipping.

6. *Of injuries to stacks of corn, &c. crops, plantations, &c.*

By § 17. maliciously setting fire to any stack of corn, grain, pulse, straw, hay, or wood, is a capital felony; and maliciously setting fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, is a felony, subjecting the offender to seven years transportation, or two years imprisonment; and if a male, whipping.

7. *Of injuries to hopbinds and trees.*

By § 18. maliciously cutting or otherwise destroying any hopbinds growing on poles in any plantation of hops, is a felony, punishable with transportation for life or not less than seven years, or imprisonment for four years, and whipping.

By § 19. maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound,) is a felony, subjecting the offender to be transported for seven years, or to be imprisoned for not exceeding two years; and if a male, to be whipped; and maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, is also a felony (in case the amount of the injury done shall exceed the sum of five pounds,) liable to any of the punishments hereinbefore last mentioned.

By § 20. if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount

of one shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, not exceeding five pounds; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, he shall for such second offence be committed to the common gaol or house of correction there to be kept to hard labour for not exceeding twelve calendar months; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be whipped after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.

Dwarf apple and pear trees are trees within the statute. *R. & R. 373.*

As to injuries to fruit, &c. see *Gardens.*

#### 8. *Of injuries to any other property.*

By § 24. if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under the act is hereby directed to be applied; and if such sum of money, together with costs (if ordered,) shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for not exceeding two calendar months, unless such sum and costs be sooner paid; provided that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of the act.

#### 9. *The general provisions of the statute.*

By § 25. every punishment and forfeiture by the act imposed on any person maliciously

committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

By § 26. in the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for not exceeding two years; and every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender.

By § 27. where any person shall be convicted of any indictable offence punishable under the act, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour.

By § 28. for the more effectual apprehension of all offenders against the act, it is enacted, that any person found committing any offence against the act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

By § 29. the prosecution for every offence punishable on summary conviction under the act, shall be commenced within three calendar months; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any forfeiture incurred by the offence, may be payable to the general rate of such county, &c.

By § 30. where any person shall be charged on the oath of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode,) the justice may either proceed to hear and determine the case ex parte, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit) without any previous summons (unless where otherwise spe-

cially directed) issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case.

By § 31. where any offence is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, any person who shall aid, abet, counsel, or procure the commission of such offence shall on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring to the same forfeiture and punishment to which a person guilty of a first second, or subsequent offence as a principal offender is by the act made liable.

§ 32. directs the application of forfeitures and penalties upon summary convictions.

By § 33. in every case of a summary conviction, where the sum forfeited for the amount of the injury done, or imposed as a penalty by the justice shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, he may cause such offender to be imprisoned only, or to be imprisoned and kept to hard labour for not exceeding two calendar months where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be) together with the costs, shall not exceed five pounds; and for not exceeding four calendar months where the amount, with costs, shall not exceed ten pounds; and for not exceeding six calendar months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

By § 34. where any person shall be summarily convicted before a justice of the peace of any offence against the act, and it shall be a first conviction, the justice may discharge the offender from his conviction, upon his making satisfaction to the party aggrieved for damages and costs.

By § 35. the king may extend his royal mercy to any person imprisoned by virtue of the act, although he shall be imprisoned for non-payment of money to some party other than the crown.

§ 37. gives a general form of conviction.

By § 38. in all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two

sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make sue for the same with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall if necessary, issue process for enforcing such judgment.

By § 39. no such conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of His Majesty's superior courts of record, and no warrant of commitment shall be had thereon by reason of any defect therein, provided it be returned, judged that the party has been convicted, and there be a good and valid conviction to sustain the same.

By § 40. every justice of the peace, before whom any person shall be convicted of any offence against this act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court, and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the convictions shall be presumed to have been so kept and against which the contrary be shown.

By § 41. persons acting in the execution of all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action: and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defend-



ant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

By § 42. nothing in the act contained shall extend to Scotland or Ireland.

By § 43. where any felony or misdemeanor punishable under the act shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

The following statutes were not included among those repealed by the 7 & 8 Geo. 4. c. 27. and are still in force.

By the 12 Geo. 3. c. 24. § 1. if any person shall wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be so done, or aid, procure, abet, or assist in so doing, any of his majesty's ships or vessels of war, whether on float, or building or repairing in any private yards, or any of his majesty's arsenals, magazines dock-yards rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto, or any timber or materials there placed for building repairing or fitting out of ships or vessels, or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where the same shall be kept, placed, or deposited, he is guilty of a capital felony.

By § 2 any person who shall commit any of such offences out of the realm may be indicted and tried in any county within the realm.

By the 4 Geo. 3. c. 37. for establishing and incorporating the British Linen Company it is enacted, § 16. "that if any person shall, by day or night, break into any house, shop, cellar, vault, or other place or building with intent to steal, cut, or destroy any linen belonging to any manufactory, or the looms, tools, or implements used therein or shall wilfully or maliciously cut in pieces or destroy any such goods, either when exposed to bleach or dry, every such offender shall be guilty of felony, and shall suffer as in cases of felony without benefit of clergy."

By the 13 Geo. 3. c. 38 § 29 for incorporating the British Plate Glass Company, (revived by 33 Geo. 3. c. 17. § 21.) it is enacted, "that if any person or persons shall, by day or night, break into any house shop cellar vault, or other place or building belonging to the said manufactory, or wherein the same shall be then carrying on, with intent to steal, cut, break, or otherwise destroy any glass or plate glass, wrought or unwrought, or any materials, tools, or implements, used in, for, or about the making thereof, or any goods and wares belonging to the said manufactory, or shall steal or wilfully or maliciously cut, break, or otherwise destroy any such glass materials tools, or implements, every such offender, being lawfully convicted,

shall be guilty of felony, and be transported for not exceeding seven years."

By the 54 Geo. 3. c. 42. the destruction of goods in the course of manufacture, and of the machinery employed therein, are felonies punishable with transportation for life or years. Its provisions seem to be embodied in the 3d section of the 7 & 8 Geo. 4. c. 30. See *ante*, 2.

The enactments of the 7 & 8 Geo. 4. c. 29, with respect to destroying records, wills, title-deeds, and other documents, have already been noticed under tit. *Larceny*, I.

**MALIGNARE.** To malign, to slander; it has been interpreted to maim. See *Leg. Hen.* 1. c. 11.

**MALIGNUS**, *i. e.* *Diabolus*.

**MALO GRATO.** In spite; unwillingly. Hence the French *malgré*, and the old English, *maugre*. *Libertatem ecclesie, &c. malo grato stabiliuerunt, i. e.* he being unwilling. *Mat. Paris*, 1245.

**MALT.** By stat. 12 An. st. 1. c. 2. no malt shall be imported on pain of forfeiting the same and the value thereof.

The intercourse of malt between Great Britain and Ireland is now permitted and regulated under stat. 50 Geo. 3. c. 34 § 3.

Malt may be exported from any part of the United Kingdom without duty or bounty, 54 Geo. 3. c. 69.

By the 7 & 8 Geo. 4. c. 52. the laws relative to the making of malt, and the revenue of excise thereon, were consolidated and amended; but many of its provisions have been repealed and others substituted by the 11 Geo. 4 and 1 Wm. 4. c. 17.

By the 1 & 2 Wm. 4. c. 55. the laws for suppressing the illicit making of malt, and distillation of spirits in Ireland, were consolidated and amended and a variety of former acts repealed.

By the 2 Wm. 4. c. 29 the allowance in spirits made from malt only, in Scotland and Ireland, was reduced.

By the act for the general regulation of the customs, 3 & 4 Wm. 4. c. 52 § 58 malt is prohibited to be imported under the penalty of forfeiture, but by § 59 it may be warehoused for exportation.

There was formerly not only a direct heavy duty on malt but another on beer which together were equivalent to an *ad valorem* tax of from 140 to 175 per cent. The beer duty was however repealed in 1830.

**MALT-HOUSE.** See *Malicious Injuries*, I.

**MALT MULNA.** A quern, or malt-mill. *Mat. Paris's Lives of the Abbots of St. Albans, &c.*

**MALT-SHOT.** *Malt-scot* Some payment for making malt. *Somner of Gavelkind*, p. 27.

**MALVEILLES**, from Fr. *malveillance* ] It is used in our ancient records, for crimes and misdemeanors, or malicious practices. *Record*, 4 Edw. 3.

**MALVEIS** A warlike engine to batter and beat down walls. *Mat. Paris*

**MALVEISIN**, Fr. *mauvais voisin*, *malus vicinus*.] An ill neighbour.

**MALVEIS PROCURORS**. Are understood to be such as used to pack juries, by the nomination of either party in a cause, or other practice. *Artic. super Chart. cap. 10*.

**MALUM IN SE**. Our law books make a distinction between *malum in se* and *malum prohibitum*. *Vaugh. 332*. All offences at common law are generally in *malum in se*; but playing at unlawful games, and frequenting of taverns, &c. are only *malum prohibita* to some persons, and at certain times, and not *malum in se*. *2 Rol. Abr. 355*. See *Homicide*, II.

**MAN, ISLE OF**. An island off the coast of Cumberland, Westmoreland, and Lancashire, in the channel that parts Ireland from England.

This island was a distinct territory from England, and out of the power of our chancery, or of original writs which issue from thence. And in the case of the Earl of Derby, it was adjudged, that no man had any inheritance in this isle, but the earl and the bishop; and that they are governed by laws of their own, so that no statute made in England did bind there without express words, in the same manner as in Ireland. *1 Inst. 9*; *4 Inst. 284*; *7 Rep. 21*; *2 And. 115*.

According to Blackstone, it seems that this distinction is still preserved; he states that it is a distinct territory from England, and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there. *1 Comm. 105*; *Introd. § 4*; cites *4 Inst. 284*; *2 And. 116*.

It was formerly a subordinate feudatory kingdom subject to the kings of Norway; then to King John and Henry III. of England; afterwards to the kings of Scotland; and then again to the crown of England; and at length we find King Henry IV. claiming the island by right of conquest, and disposing of it to the Earl of Northumberland, upon whose attainder it was granted by the name of the Lordship of Man, to Sir John de Stanley, by letters patent, *7 Hen. 4*. In his lineal descendants it continued for eight generations, until the death of Ferdinando, Earl of Derby, A. D. 1594; when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent, the island was seized into Queen Elizabeth's hands, and afterwards various grants were made of it by King James I. All which being expired or surrendered, it was granted afresh in *7 Jac. 1*. to William Earl of Derby and the heirs male of his body, with remainder to his heirs general: and by a private act of that year, *chap. 4*. confirmed and assured to the right heirs of James Lord Stanley seventh Earl of Derby, with the restraint of the power of alienation. On the death of James the late Earl of Derby, A. D. 1735, the male line of Earl William failing, the Duke of Athol succeeded to the island, as heir-general by a female branch.

In the mean time, though the title of *King* had long been disused, the Earls of Derby, as Lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws, and exercising an appellate jurisdiction; yet, though no *English writ* or process from the Courts of Westminster was of any authority in *Man*, an appeal lay from a decree of the Lord of the Island, to the King of Great Britain in council. *1 P. Wms. 329*. But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the treasury, by *12 Geo. 1. c. 28*. to purchase the interest of the then proprietors for the use of the Crown; which purchase was at length completed in the year 1765, and confirmed by *5 Geo. 3. c. 26*. called the Vesting Act; whereby, in consideration of the sum of 70,000*l.*, the whole island and all its dependencies so granted as aforesaid, (except the landed property of the Athol family, their manorial rights and emoluments, and the patronage of the bishoprick, and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs. By *45 Geo. 3. c. 123*. a further compensation was made by paying to the Duke of Athol, and the heirs general of the seventh Earl of Derby, an annuity equal to one fourth of the revenue of the customs at that time arising within the Isle of Man: to be paid annually out of the British Consolidated Fund.

The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by *33 H. 8. c. 31*.

*Stat. 11 Geo. 3. c. 52*. (amended by *54 Geo. 3. c. 143*.) provides for the repairing its harbours.

No acts (except revenue acts) having as yet been passed which interfere with the private laws or general immunities of the Isle of Man, it still remains as commodious an asylum as ever for debtors and outlaws.

By the *6 G. 4. c. 115*. the laws regulating the trade of the Isle of Man and the duties of customs were consolidated and amended, and that statute was followed by several others, all of which were consolidated into one act by the *3 & 4 W. 4. c. 60*.

By *§ 11* of the last mentioned statute, foreign goods are not to be exported from the Isle of Man to any part of the United Kingdom, under the penalty of forfeiture, together with the ships, &c. used therein, &c. *§ 12*.

There are also many clauses in the *3 & 4 W. 4. c. 52*. (amended by *4 & 5 W. 4. c. 89*.) for the general regulation of the customs; in the *3 & 4 W. 4. c. 53*. for the prevention of smuggling; in the *3 & 4 W. 4. c. 54*. for the encouragement of British shipping and navigation; in the *3 & 4 W. 4. c. 55*. for the registering of British vessels; in the *3 & 4 W. 4. c. 57*. for the warehousing of goods; and in the *3 & 4 W. 4. c. 58*. granting certain bounties of cus-

toms; relating to the trade of the Isle of Man, and its intercourse with the United Kingdom.

For further particulars relative to the Isle of Man, see *Com. Dig.* title *Navigation*, (F. 2); and tit. *Navigation Acts*.

MANA. An old woman. *Gerov. of Tilb.* cap. 95.

MANAGIUM, from the Fr. *manage* or *manance*, a dwelling or inhabiting.] Is a mansion-house or dwelling-place.—*Concessi capitale managium meum cum pertinentiis, &c.* *Mon. Angl. tom. 2. p. 82; Blount, Cowell.*

MANBOTE, *Sax.*] A compensation or recompence for homicide; particularly due to the lord for killing his man or vassal. *Spelm. de Conc. vol. 1. p. 662.* See *Lambard* in his *Explication of Saxon Words*, verbo *Æstimation*, and *Hoveden*, in *parte posteriore annal. suor. fol. 344.* and title *Bote*.

MANCA. Was a square piece of gold coin, commonly valued at thirty pence; and *manca* was as much a mark of silver, having its name from *manu cosa*, being coined with the hand. *Leg. Canut.* But the *manca* and *manca* were not always of that value; for sometimes the former was valued at six shillings, and the latter, as used by the English Saxons, was equal in value to our half-crown. *Manca sex solidis æstimetur. Leg. H. 1. c. 69.* *Thorn* in his *Chronicle* says, *Mancusa est pondus duorum solidorum & sex denariorum*; and with him agrees *Du Cange*, who says that twenty *manca* make fifty shillings. *Manca* and *manca* are promiscuously used in the old books for the same money. *Spelm.*

MANCH. Is sixty shekels of silver, or seven pounds and ten shillings; and one hundred shekels of gold, or seventy-five pounds. *Merch. Dict.*

MANCHESTER. Its collegiate church how visible 2 G. 2. 2.)

MANCIPLE, *maniceps*.] A clerk of the kitchen, or caterer; an officer in the Inner Temple was anciently so called, who is now the steward there, of whom *Chaucer*, our ancient poet, sometime a student in that house, thus writes:

*A Manciple there was within the Temple,  
Of which achatours might take ensample, &c.*

This officer still remains in colleges. *Cowell.*

## MANDAMUS.

A Prerogative Writ, introduced to prevent disorder from a failure of justice and defect of police; and, therefore, ought to be used on all occasions where the law has established no specific remedy; and where in justice and good government there ought to be one. 3 *Burr.* 1265. See 1 *Black. Rep.* 552; *Coup.* 378.

This writ is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the king's charter; but not as a private remedy to the party; unless in case of a member or officer of a corporation, if deprived of his office or franchise without sufficient cause, to whom this remedy

by mandamus is given, by 9 *Anna. c. 20.* (see *post.*) *Hardie.* 99.

The general jurisdiction and superintendency of the King's Bench over all inferior courts to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by act of parliament, yet, being in *subsidiis justitiæ*, is now exercised in a vast variety of instances. But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet they are never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy. *Dict.*

This is a writ of right, which the superior court is obliged to issue, in the ordinary form, without imposing any terms on him who demands it. 3 *New Abr.* But though it be a writ of right, yet the court seldom grants it, without giving the party to whom it is prayed a day to show cause why it should not issue; also such matter must be laid before the court, by which it may appear that the party is entitled to it. 3 *New Abr.* And though the Court of King's Bench be entrusted with this jurisdiction of issuing out writs of mandamus, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as where the end of it is merely to try a private right; where the granting it would be attended with manifest hardships and difficulties, &c. So even since the statute 11 *Geo. 1. c. 4.* (see *post.*) for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information. 2 *Str.* 1003.

And in the 2 *T. R.* 385, it was said by *Asheurst, J.* that an application for a mandamus is an application to the discretion of the court, and that a mandamus is a prerogative writ, and is not a writ of right. See also 12 *East*, 336; 1 *B. & C.* 489; 9 *B. & C.* 456.

According to *Blackstone*, a writ of mandamus (considered as a remedy for the refusal or neglect of justice) is in general a command, issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice.

It is a high prerogative writ of a most extensive remedial nature, and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a



right to have any thing done, and hath no other specific means of compelling its performance. 3 Comm. c. 7 p. 110.

Where, however, the party has a complete and specific redress at law, it is conceived that the circumstance of its being a more tedious method will not be sufficient to warrant the court in granting a mandamus. For there must be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus. Per Lord Ellenborough, 8 E. St. 219. But where the remedy is inadequate, the writ may issue, thus, where a party refuses to do some act which by law he ought to do, and the non-feasance of which is injurious to the public, though this be an indictable offence that will not prevent the issuing of a mandamus for the indictment will not directly compel the performance of the act, the offender may be fined or imprisoned, but if he be obstinate, the party injured has no complete remedy. 2 B. & A. 615. Neither does the instance put by Mr. Justice Blackstone, of an admission to an office, seem to be in point; for though a mandamus will undoubtedly lie for such a purpose, yet it lies specifically, because the party without it would have no legal remedy by action. It is proper also to add another qualification; if the right in dispute be strictly and wholly private, the court will not interfere: a mandamus is properly a writ to compel the performance of public or, at least, official duties; and therefore the court, considering the Bank of England as a mere corporation of private traders, so far as regarded its internal management of its own concerns, refused to issue a mandamus upon the application of a member to compel the directors to produce their accounts in order to make a dividend of all their profits. 2 B. & A. 620; 5 B. & A. 899. See Coleridge's Note to 3 Comm. 110.

#### I. In what cases a Mandamus will lie. II. Of the Writ and Return.

I. A mandamus lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting-house, &c. It lies for the production, inspection, or delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But on this part of the subject it is to be particularly remarked, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, wherever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them; and this not only by restraining their excesses, but also by quickening their negli-

gence, and obviating their denial of justice. A mandamus may therefore be had to the courts of the city of London to enter up judgment, (Raym. 214) to the spiritual courts to grant an administration, to swear a churchwarden, and the like. 3 Comm. 110.

This writ of mandamus is also (as has already been hinted) made, by 9 Ann. c. 20 a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to an office or place in any corporation; and, secondly, for wrongful removal when a person is legally possessed. There are injuries for which, though redress for the party interested may be had by assize or other means, yet as the franchises concern the public and may affect the administration of justice, this prerogative writ also issues from the Court of King's Bench, commanding, upon good cause shown to the court the party complaining to be admitted or restored to his office. And the statute requires that a return be immediately made to the first writ of mandamus; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return; and after judgment obtained for the prosecutor, he shall have a peremptory writ of mandamus to compel his admission or restitution; which latter, in case of an action, is effected by a writ of restitution. 11 Rep. 79. So that now the writ of mandamus, in cases within this statute, is in the nature of an action whereupon the party applying and succeeding may be entitled to costs in case it be the franchise of a citizen, burgess, or freeman. 12 Geo. 3 c. 21. Also in general a writ of error may be had thereupon. 1 P. Wms. 351; 3 Comm. c. 17. p. 265.

By 1 W. 4. c. 21. § 3. the enactments of the 9 Ann. c. 20, relating to returns within that statute, are extended to all other writs of mandamus. See post, II.

This writ of mandamus may also be issued in pursuance of 11 Geo. 1. c. 4. in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or being made it shall afterwards become void, requiring the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen. 3 Comm. 265.

By the common law the Court of King's Bench had authority to grant a mandamus to fill up the vacancy occasioned by the death of a mayor or other chief officer of a borough or corporation within the year; but where the vacancy arose from an omission or neglect to elect such officer on the day fixed by the charter, or upon the removal of one unduly chosen, the court could not compel an election before the day again came round. Consequently, an omission to make an election on the appointed day, whether arising from fraud, inadvertence,

or accident, or the removal of an officer improperly elected, might occasion a forfeiture of the charter, and a dissolution of the corporation.

It was to remove these inconveniences that the above statute was passed, and being a remedial act it has been very liberally construed; for though three or four years have elapsed since a regular election, the court will grant a mandamus under it. See *Bull. N. P.* 201 a; *Schw. N. P.* 1064. And a mandamus has been granted where there was a mayor *de facto*, it appearing clearly there was no due election. 2 *Str.* 1003. 1157. And see 3 *Burr.* 452; 4 *Burr.* 2005.

Under the statute a mandamus may be granted to proceed to the election of any annual officer, as well as of the mayor or head officer. 2 *T. R.* 732.

And the statute is not confined to annual officers, but was held to extend to the appointment of burgesses who, under a charter, were elected for life. 8 *East*, 270.

To enumerate, with any degree of particularity, the various offices and situations to which a person may be admitted or restored by this writ, would take up more space than the nature of our work allows. The following, however, is a summary of so general a nature as with what has already been said, to give an idea of the extensive use and nature of this remedy.

It has been granted to admit and restore a mayor, alderman, jurat, coronator, councilman, recorder, high steward, town clerk, mayor, or member of the court of assizes, burgess, sheriff, sergeant or freeman of a city, town or corporation, and it lies where the persons complaining have their right though they never had the possession, and to a situation in reversion after the death of another. It lies for any ancient office, being a freehold, and for every public officer who has no other remedy to be restored, as steward of a court leet or court baron, attorney of any court, treasurer of a public company, scavenger, clerk of the peace, master or fellow of a college where no visitor is appointed, chaplain, fellow of the college of Physicians, master, under-master, or usher of a school, registrar, or deputy-registrar in the Ecclesiastical court, sexton or parish clerk, clerk to commissioners of land tax, ale-taster, director of a chartered company, prebendary, constable, churchwarden, overseer, surveyor of the highways, dissenting minister, teacher and pastor, &c. &c. See *Com. Dig. tit. Mandamus*, (A).

A mandamus lies to restore a mayor, alderman, or capital burgess of a corporation; a recorder, town-clerk, attorney turned out of an inferior court, steward of a court, constable, &c. 11 *Rep.* 99; *Raym.* 153, 1 *Keb.* 549; 2 *Nels. Abr.* 1148. 1149.

A mandamus may be had to restore a freeman; and also to admit one to the freedom of the city, having served an apprenticeship. *Sid.* 107. To restore a fellow of the College of Physicians, it lies; though not for a fellow of a college in the universities, if there is a visitor. 1 *Lev.* 19, 23.

Although the cases are so various and nu-

merous in which writs of mandamus have been granted, yet the instances in which they have been refused are almost equal in number; and the cases are sometimes contradictory, particularly as relates to fellows of colleges, and some other contested cases; which, in fact, have frequently been governed by so many private circumstances as scarcely to afford precedents.

One general rule is, that a mandamus does not lie for a private office, as steward of a court baron, proctor in the spiritual court, clerk of a private company in London, on the ground generally of a private jurisdiction over such officers. It does not lie to any of the inns of court to compel them to call a member to the bar; the only appeal in this case being the twelve judges. See *Inns of Court*. It lies to a visitor of a college only, under special circumstances, as to hear an appeal and give some judgment. It does not lie for an office not known, unless it be specially described. See *Com. Dig. tit. Mandamus*, (B).

It hath been resolved, that a mandamus shall not be granted to restore a fellow or member of any college of scholars or physic, because these are private foundations. *Carthew's Rep.* 92. This writ lieth not for the deputy of an office, &c. yet he who hath power to make such deputy may have it. *Mad. C.* 18, 1 *Lev.* 306; and he may have it to admit his deputy. *Str.* 893, 895. It lies not, generally, to elect a man into any office, nor for a clerk of a company, where it is a private office, or to restore a barrister, excise assessor, a proctor, &c. 2 *Bar.* 1148, 2 *N. P.* 1150. 1151, nor for a vestry clerk. 5 *T. R.* K. B. 743. But a mandamus may lie to remove persons as well as restore them, by virtue of any particular statute, or branch thereof. 4 *Mod.* 233.

A mandamus lies to justices of the peace in a variety of cases connected with the administration of the poor laws; as to appoint overseers in an extra-parochial place, 1 *Str.* 512; or in a hamlet where there were not any before, 1 *Wils.* 138; or to nominate them although the time mentioned in the 43 *Eliz. c. 2. § 1.* has expired, 2 *Str.* 1123. To sign a poor rate, 8 *Mod.* 335; swear an overseer to his accounts, 1 *Wils.* 125; to grant a warrant for levying the balance of an old overseer's accounts, 2 *Str.* 992; or to receive an appeal against an overseer's accounts, 3 *D. & R.* 299.

So a mandamus lies to justices in sessions; as to receive and determine an appeal at a subsequent sessions, 1 *East*, 183; to hear an appeal which they had dismissed, on the ground that they had no authority to try it for want of a sufficient notice to the respondents, 10 *East*, 401; and see 7 *B. & C.* 691.

But the court refused to grant a mandamus to the justices at sessions, to rehear an appeal against an order of removal after judgment given by them, and entered by the clerk of the peace, on the ground that the justices were equally divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal. 1 *M. & S.* 442.

Also a mandamus will lie to justices in order

to enforce the execution of the duties imposed upon them by the acts relating to highways; as to appoint surveyors, 4 *East*, 142; to swear them, 4 *Burr*, 2452; to make a rate to reimburse them. 1 *Stra.* 211

But the court will not issue a mandamus to magistrates to do an act subjecting them to an action, the event of which may be doubtful. 3 *N. & M.* 68; and see 1 *B. & C.* 485.

If justices of peace refuse to admit one to take the oaths, to qualify himself for any place, &c. mandamus lies: so to a bishop or archdeacon, to swear a churchwarden; to grant a probate of a will, and to admit an executor to prove a will, or an administrator; to a rector, vicar, or churchwarden, to restore a sexton. *Wood's Inst.* 568. Also a mandamus will lie to the bishop, to grant a license for a parson to preach, where it is denied, and he is in orders for it: and this writ lies to restore a person to university degrees. 2 *Ld. Raym.* 1206, 1334. But after a man is restored on a peremptory mandamus, he may be displaced again for the same matters for which he was before removed, and others. *Ib.* 1243

A mandamus will be granted to inferior jurisdictions of all kinds, to compel them to do their duty; as to a lord to hold a court baron; to a steward and homage of a manor, to hold courts, to enforce the attendance of tenants of a manor to make a court. See *Com. Dig. up. sup.* To a corporation to proceed to election. 1 *East*, 79.

A mandamus was granted to the ordinary to permit a person to inspect and take extracts from the book of the register touching a living within the diocese, the next presentation of which was claimed both by the ordinary and the person applying for the writ. 8 *B. & C.* 112, *S. C.*; 2 *M. & R.* 127.

But the court will not grant a mandamus to inspect the documents of a corporation on the application of members merely alleging grounds for believing that its affairs were misconducted. It must be shown that the inspection is necessary for some specific object in which the applicant is interested, and the inspection will be limited to that object. 2 *B. & Ad.* 115.

Where a mayor refused to put a motion moved and seconded with the concurrence of a majority of the burgesses, for the repeal of certain bye laws, the court refused a mandamus to compel him, on the ground that there was no precedent of the court possessing such a power. *Ex parte Garrett v. The Mayor of Newcastle*, 3 *B. & Ad.* 258.

The Court of King's Bench refused to grant a mandamus to chapelwardens of a township within a parish, to make a rate to reimburse churchwardens such sums as they had expended, or might expend, upon the parish church. 12 *East*, 556.

The court refused to grant a mandamus to compel a canal company to proceed to an assessment of the value of land taken for the purposes of the canal, and of the recompense to be made for damages thereby sustained; the

parties interested in the land not having made the application within a reasonable time, and there being another remedy by ejectment. 1 *M. & S.* 32.

The court refused a mandamus to the officers of the customs to register a ship transferred by the survivor of two partners; on the ground that the executors of the deceased partner ought to have joined in the transfer. 2 *M. & S.* 223

It does not lie to restore a person where it is confessed he was rightly removed, though he had no notice at the time to appear and defend himself. *Corp.* 523. Nor to restore to an office, though the party was irregularly suspended, if it appear by his own showing that there was good ground for the suspension if the proceedings had been regular. 2 *T. R.* 177. See also 8 *T. R.* 352; and 1 *East*, 562.

On application for a mandamus to be restored the party applying must show that he has complied with all the requisites, to give him a *prima facie* title; because, if properly admitted, he may bring an action for money had and received for the profits. 3 *T. R.* 578.

If an election is doubtful, it should be tried by information in the nature of a *quo warranto*, not on mandamus. 3 *Burr.* 1452.

Where an action will lie for a complete satisfaction equivalent to a specific relief, a mandamus will not lie. It will not therefore be granted against the Bank to transfer stock, because a special action of *assumpsit* will lie. *Dougl.* 526, (508); see also 1 *T. R.* 396, and *ante*.

A mandamus will not be granted to a ministerial officer, to do an act for the neglect of which he can be otherwise punished. 5 *T. R.* 364, 546; 6 *T. R.* 163.

With respect to the issuing of writs of mandamus (which may be done by any of the courts of Westminster), for the examination of witnesses, see *Deposition*.

II. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below; whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made, (except in some general cases where the probable ground is manifest, directing the party complained of to show cause why a writ of mandamus should not issue; and if he shows no sufficient cause, the writ itself is issued at first in the alternative either to do thus, or signify some reason to the contrary; to which a return or answer must be made at a certain day: and if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a peremptory mandamus to do the thing absolutely, to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by



attachment. But if he at the first returns a sufficient cause, although it should be false in fact, the Court of King's Bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the mandamus. But then the party injured may have an action against him for his false return; and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a peremptory mandamus to the defendant to do his duty. 3 *Comm.* 111.

The court will not specify to whom the mandamus shall be directed, for this might be prejudging the right of the electors, but he who applies must at his peril have it properly directed. 2 *Burr.* 784. See 1 *W. L. c.* 21. § 4 *post*.

A writ of mandamus may not be directed to one person, or to a mayor and alderman, &c. to command another to do any act; it must be directed to those only who are to do the thing required, and obey the writ. 2 *Salk.* 446, 701.

Two writs of mandamus may be granted on the application of different parties for the same election. *Hardw.* 178. But the court will not grant cross or concurrent writs without special reasons. 2 *Burr.* 782.

This writ is not to be tested before granted by the court; and if the corporation to which the mandamus is sent be above forty miles from London, there shall be fifteen days between the day of the teste and the return of the first writ of mandamus, taking both days inclusive: but if but forty miles, or under, eight days only; and the *alias* and *pluries* may be made returnable immediate: also, at the return of the *pluries*, if no return be made and there is affidavit of the service, attachment shall go forth for the contempt, without hearing counsel to excuse it. 2 *Salk.* 434; *Stra.* 407.

The return must be made by the person to whom the writ is directed. *Salk.* 368.

But a return by the mayor alone to a mandamus directed to the mayor and burgesses is good. *Comb.* 41.

The return to a mandamus should set out all necessary facts precisely, to show the person removed in a legal and proper manner, and for a legal cause: it is not sufficient to set out conclusions only, the facts must be precisely set out that the court must judge of the matter; so it is the same as to the cause of the amotion, which must likewise be set out. 2 *Burr.* 731.

Where a mandamus to a commissary to swear in M. as churchwarden recited that he had been duly elected, and the defendant returned that M. was not duly elected, the return was held sufficient 8 *B. & C.* 681.

The return to a mandamus may contain any number of concurrent and consistent causes to show why the party should not be admitted or restored. 4 *Burr.* 2044.

After a return has been made to a mandamus, the defendant cannot make any objection to the writ itself. 5 *T. R.* 66.

A case has happened, and others of the

like kind may happen, where an action could not be brought, nor the return pleaded to, or traversed under the statute 9 *Ann. c.* 20. In such case it may perhaps be advisable to move the court of King's Bench for an information against the person or persons making a false return, or such a return as will lay the party, who moved for the mandamus, under the dilemma mentioned above. 4 *Burr.* 2452.

If the return consists of several independent matters not inconsistent with each other, but part of them good in law and part bad; the court may quash the return as to such part only as is bad, and put the prosecutor to plead to or traverse the rest. 2 *T. R.* 456, and see 5 *T. R.* 66.

It has been held, that several persons cannot have one mandamus; nor can several join in an action on the case for a false return. 2 *Salk.* 433. But there has been an instance to the contrary, where the circumstances of the case were such, that it required a variety of persons to join in the application, viz. on the highway acts, to compel the justices to nominate a surveyor out of the list returned by the inhabitants. 4 *Burr.* 2452.

Although by 9 *Ann. c.* 23. § 2, the prosecutor of a mandamus, to which there is a return, and issue taken on the facts therein, has an option to try the question in the same county, in which he may bring an action for a false return; yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the *venire facias* into another county, though he might have originally alleged the facts there, and have there brought his action for a false return. 1 *East*, 114.

There is to be judgment upon the return of the writ, before any action on the case can be brought for a false return of a mandamus. 2 *Ler.* 238. Returns upon writs of mandamus must be certain for the court to judge upon. 11 *Rep.* 99. See *Com. Dig.* tit. *Mandamus*, (d).

By the 1 *W. L. c.* 21. § 3. the enactments contained in the 9 *Ann. c.* 20, relating to the return to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, are extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far only as the same are varied or altered by the act.

By § 4. after reciting, that "writs of mandamus, other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the ninth year of the reign of Queen Anne, are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters, in respect whereof the person to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or

costs to which they may otherwise become liable;" it is enacted, that the court to which application may be made for any writ of mandamus (other than such as relate to the said offices and franchises mentioned in or provided for by the said act of the 9 Ann.) may make rules and orders calling, not only upon the person to whom such writ may be required to issue, but also every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given by any act (see *post*) passed or to be passed during the then session of parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: Provided that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and found by and in the name of the person to whom such writ shall be directed; but the same may, if the court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

By § 5. In case the return to any such writ shall, in pursuance of the authority given by the act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of, the person having made such return, but the same shall be carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall be directed to any successor in office, or right to such person.

§ 6. And in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court, and it may order by whom and to whom the same shall be paid.

By the Interpleader Act, 1 & 2 Wm. 4. c. 58. § 8. on applications under the above or that statute, the court may exercise all powers, and make such rules applicable to the case, as are given or mentioned in either act. See *Interpleader*.

A motion was made for an attachment, for

not returning an alias mandamus; and, by *Holt*, C. J., in case of a mandamus out of chancery, no attachment lies till the pluries, for that is in nature of an action to recover damages for the delay; but upon a mandamus out of B. R. the first writ ought to be returned, though an attachment is not granted without a peremptory rule to return the writ, and then it goes for the contempt, &c. 2 *Salk*. 429.

By 7 Geo. 4. c. 21. for the better regulation of proceedings on writs of mandamus in Ireland, (§ 1.) a return to any mandamus, where the party can be admitted to office without removal of any other person, he may apply to the court by petition to be admitted forthwith: and the court may make order accordingly. By § 2. the court may direct the payment of costs in cases of refusal of admission after notice to mayor, &c. under the Irish act, 33 Geo. 3. c. 38. By § 2. orders of court are subject to alteration by the judgment on the mandamus, but are valid until altered.

For further matter on this subject, see *Vin. Abr.* and *Com. Dig.* tit. *Mandamus*; and *post*, *Quo Warranto*.

MANDAMUS was also a writ that lay after the year and day, (where in the meantime the writ, called *diem clausit extremum*, had not been sent out) to the escheator, on the death of the king's tenant in *aple*, &c commanding him to inquire of what lands holden by knight's service the tenant died seised. *F. N. B.* 561; *Dy.* 209, pl. 19; 248, pl. 81; *Lamb.* 36.

Mandamus was likewise a writ or charge to the sheriff, to take into the hands of the king all the lands and tenements of the king's widow, that, against her oath formerly given, married without the king's consent. *Reg. fo.* 295.

MANDATARY, *Mandatarius*.) He to whom a charge or commandment is given. Also he that obtains a benefice by mandamus.

MANDATE, *Mandatum*.) A commandment judicial of the king or his justices to have any thing done for despatch of justice; whereof there is a great variety in the table of the *Register Judicial*, verbo *Mandatum*. The Bishop of Durham's mandates to the sheriffs are mentioned in 31 *Eliz. c.* 9. *Cowell*, ed. 1727.

*Mandate* is also a contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, of which employment the person accepts and agrees to act; the person giving the employment is termed the mandant, the person receiving it the mandatary. As to particular cases of this contract, or delivery of goods, see tit. *Bailment*.

MANDATI DIES, *Mondie* or *Maunday Thursday*. The day before Good Friday, when they commemorate and practise the commands of our Saviour in washing the feet of the poor, &c. And our kings of England, to show their humility, long executed the ancient custom on that day, of washing the feet of poor men, in number equal to the years of their reign, and giving them shoes, stockings, and money.

**MANDATO, PANES DE.** Loaves of bread given to the poor upon Maunday Thursday. *Clartular Glaston MS fol. 29.*

**MANENTES.** Was anciently used for *tenentes* or tenants; *qui in solo alieno manent*; and it was not lawful for them, or their children, to depart without leave of the lord. *Concil. Synodal. apud Cloversho. Anno 822.*

**MAGANESE.** Stealing, from any bed, mine, or vein, is felony by 7 & 8 Geo. 4. c. 29. § 37 and punishable as simple larceny.

**MANGEL WURZELL.** By the 2 & 3 W. 4. c. 74. licensed distillers may distil spirits from mangel wurzell only, which shall be charged the same duties as spirits made from potatoes.

**MANGONARE.** To buy in the market. *Leg. Ethelred, c. 24.*

**MANGONELLUS.** A warlike instrument made to cast small stones against the walls of a castle. *Cowell.*

It differs from a *petrard* as follows. *viz.*

*Interea grossos petraria mittit ad intus  
Assiduè lapides manganellus qui minores.*

*Vide Spelm. Gloss. voc. Manga, Manganum.*

**MANIPULUS.** An handkerchief which priests always had in their left hands. *Blount.*

**MANNER,** from the Fr. *manier*, or *mainer*, i. e. *manu tractare*.] To be taken with the manner, is where a thief having stolen any thing, is taken with the same about him as it were in his hands; which is called *flagrante delicto*. *S. P. C. 179.* See *Mainour*.

**MANNING,** *manopera*.] A day's work of a man; and in ancient deeds there was sometimes reserved so much rent, and so many mannings.

**MANNIRE.** To cite any one to appear in court, and stand in judgment there; it is different from *bannire*; for though both of them signify a citation, one is by the adverse party, and the other by the judge. *Leg. H. 1. c. 10. Du Cange.*

**MANNOPUS,** *manopera*.] Goods taken in the hands of an apprehended thief. *Cowell.*

**MANNUS.** A horse; a pad or saddle horse. In the laws of Alfred, we find *mantheof*, for a horse stealer. *Cowell.* See *Mantheof*.

**MANOR,** *manerium*.] Seems to be derived of the Fr. *manoir*, *habitatio*, or rather from *menendo*, of abiding there, because the lord did usually reside there. It is called *manerium*, *quasi manerium*, because it is laboured by handy work: it is a noble sort of fee, granted partly to tenants for certain services to be performed, and partly reserved to the use of the lord's family, with jurisdiction over his tenants for their farms. That which was granted out to tenants, we call *tenementales*; those reserved to the lord were *dominicales*; the whole fee was termed a lordship, of old a barony; from whence the court, that is always an appendant to the manor, is called The Court-baron. See *Skene de verb. signif.*

Manors, according to *Blackstone*, are in sub-

stance as ancient as the Saxon constitution, though perhaps differing a little in some immaterial circumstance from those that exist at this day. *Co. Cop. § 2, 10.*

*Dugdale* says the reign of Edward the Confessor is the first in which they are mentioned. *Gloss in voc.* A circumstance which is accounted for the fondness of that king for Norman institutions.

Touching the original of manors, it seems that in the beginning there was a circuit of ground, granted by the king to some baron or man of worth, for him and his heirs to dwell upon, and to exercise some jurisdiction more or less within that compass, as he thought good to grant; performing such services, and paying such yearly rent for the same, as he by his grant required; and that afterwards this great man parcelled his land to other meaner men, enjoining such services and rents as he thought good; and so, as he became tenant to the king, the inferiors became tenants to him. See *Perkin's Reservation*, 670; *Horne's Mirror of Justices*, lib. 1. cap. de Roy Alfred; *Fulbeck*, fol. 18. And according to this our custom all lands holden in fee throughout France were divided into *fiefs* and *arriere fiefs*, whereof the former were such as were immediately granted by the king; the second such as the king's feudatories did grant to others. *Gregorii Syntagm. lib. 6. c. 5. num. 3.*

In these days, a manor rather signifieth the jurisdiction and royalty incorporeal, than the land or site. For a man may have a manor in gross, (as the law termeth it,) that is, the right and interest of a court-baron, with the perquisites thereunto belonging, and another or others have every foot of the land. *Kitchen*, fol. 4, *Broke, hoc titulo per totum*; *Bracton*, lib. 4, cap. 31, n. 3, divideth *manerium* into *capitale et non capitale*. See *Fee*.

*Aula*, *halla*, or *haulta*, a hall or chief mansion was the usual appendage of a manor.

A manor may be compounded of divers things, as of a house, arable land, pasture, meadow, wood, rent, advowson, court-baron, and such like; and this ought to be by long continuance of time beyond the memory of man; for at this day a manor cannot be made, because a court-baron cannot now be made: and a manor cannot be without a court-baron, and suitors or freeholders, two at least; for if all the freeholds except one escheat to the lord, or if he purchase all except one, there his manor is gone *causa quæ supra*, although in common speech it may be so called. *Cowell. Vide Co. Lit. 58, 108; Lil 73; 2 Rol. Abr. 121.*

By a grant of the demesnes and services, the manor passeth; and by grant and render of the demesnes only the manor is destroyed, because the services and demesnes are thereby severed by the act of the party; though it is otherwise, if by act of law, as by partition. *6 Rep. 63.* There are two coparceners of a manor; the demesnes are assigned to one, and the service to the other; the manor is gone, but if one die without issue, and the manor descends to her



who had the services, the manor is revived again, for the severance was by act in law. 1 Inst. 122. 8 Rep. 79. 3 Surt. 25, 10.

A new manor may arise and revive by operation of law. 1 L. on 204.

It may contain one or more villages or hamlets, or only great part of a village &c. And there are capital manors, or honours which have other manors under them the lords whereof perform customs and services to the superior lords. 2 Inst. 67; 2 Rol. Abr. 72. See *How*. There may also customary manors granted by copy of court roll, and field of other manors. 4 Rep. 26; 11 Rep. 17. But it cannot be a manor in law if it be with freehold tenants; nor be a customary manor without copyhold tenants. 1 Inst. 58. Lit. 73. 2 Rol. Abr. 121. But it is said if there be but one freehold tenant the seignior continues between the lord and that one tenant. 1 Ant. 257; 1 Nels. Abr. 521. The custom remains where tenements are divided from the rest of the manor the tenants paying their services; and he who had the freehold of them may keep a court of survey, &c. *Cro. Eliz.* 103. See *Copyhold*.

The *tenement* lands of ancient manors were, from the different modes of tenure, distinguished by different names. First, *baron's land* or *baronial land* which was held by deed under certain rents and free services, and in effect differed nothing from free socage lands. *C. Cy. s. a.* And from thence have arisen most of the freehold tenants who hold a particular manor, and owe suit and service to the same. The other species was called *the lord's land*, which was held by no assurance in writing but distributed among the common folk, or people at the pleasure of the lord, and reserved at his discretion, or granted land held in the villeinage. See tit. *Villainage*. The residue of the manor being undivided, was termed the lord's waste and served for public roads and for common of pasture to the lord and his tenants.

Manors were formerly called *baronies*, as they still are in *France*; and each lord or lord was empowered to hold a domestic court, held the court baron, for redressing misdoings and misadventures within the manor, and for settling disputes of property among the tenants. This court is, in these parts, no longer in use, every manor, and if the number of suits should so far as not to leave sufficient to make a jury or homage, that is two tenants at the least, the manor itself is lost.

In the early times of our legal constitution the king's greater barons, who had a large extent of territory held under the crown, granted out frequently small manors to inferior persons to reward them, and themselves, which therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his manor is frequently termed an *honour*, not a manor, especially if it hath belonged to an ancient lord or baron or hath been at any time in the hands of the crown. See tit. *Honour*. In imitation whereof, these inferior lords began to carve out

and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*, till the superior lords observed that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages and escheats, which fell into the hands of these mesne or middle lords, who were the immediate superiors of the terre tenant, or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby that they were disabled from performing their services to their own superiors. This occasioned first that provision in the 32d *cap. of Magna Carta*, 9 Hen. 3. (which is not to be found in the first charter granted by that prince, nor in the great charter of King John); that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord, and afterwards the statute of *Wilm. 3* or *Quia emptores*, 18 Edw. 1. c. 1 which directs that upon all sales or feoffments of lands, the feoffee shall hold the same not of his immediate feoffor, but of the chief lord of the fee of whom such feoffor himself held it. But these provisions are not extending to the king's own tenant *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. 2 c. 6, 34 Edw. 3 c. 15 by which last all subinfeudations, previous to the reign of King Edward 1. were confirmed; but all subsequent to that period were left open to the king's prerogative. See *Tenures*. From hence it is clear that all manors existing at this day must have existed as early as King Edward 1. for it is essential to a manor that there be tenants who hold of the lord, and by the operation of these statutes no tenant *in capite* except the accession of that prince, and no tenant of a common lord, since the statute of *Quia emptores* could create any new tenants to hold of himself. 2 *Comm. c. 6* p. 90—92.

If a lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services, for the tenant by reason of the statute *Quia emptores* must then hold of the superior lord. 4 *T. R.* 413.

When the lord of a customary manor by his deed, made since the statute of *Quia emptores*, granted to his customary tenant, who then held by the payment of certain customary rents, and other services, that in consideration of a sixty-one penny fine, (being sixty-one years' rent,) he, the lord, ratified and confirmed to the tenant and his heirs, all his customary and tenant-right estates, with the appurtenances &c. and granted that the tenant and his heirs should be thenceforth freed acquitted exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands at any time thereafter happening to become due in respect of the tenancy; except one penny yearly rent, and also excepting and reserving suit of court, with the service incident thereto, and saving and reserving all royalties, escheats and forfeitures, and all other advantages and emoluments belonging to the seignior, so as not to prejudice the immunities thereby granted to the tenant, and also granted

liberty to cut timber, and to sell or lease, &c. without license; the court of King's Bench held, that such confirmation to the tenant, of his customary tenant-right estates, (freed &c. from all rents and services, except, &c.) was tantamount to a release of those rents and services not specifically excepted; and that by virtue thereof the customary tenement became frank-free, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became devisable by the statute of wills. Such customary estates, which are peculiar to the north of England, are not freehold, but seem to fall under the same general considerations as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. 4 *East*, 271. See *Copyhold*.

**MANSE**, *mansa*.] An habitation, or farm and land. *Spelm*. See *Mansum*.

In Scotland, the term was originally applied to a portion of ground set apart for the clergyman, but it is now used to designate his house, the ground to which he is entitled being called his glebe, or glebe land.

**MANSER**. A bastard. *Cowell*.

**MANSION**, *mansio, a manendo*.] Among the ancient Romans was a place appointed for the lodging of the prince, or soldiers in their journey; and in this sense we read *primam mansionem*, &c. It is with us most commonly used for the lord's chief dwelling-house within his fee; otherwise called the capital messuage, or manor-place. *Skene*.

Some say it is a dwelling of one or more houses without a neighbour, (see *Bract. lib. 5. p. 1*); and mansion-house is taken in law for any house or dwelling of another, in cases of committing burglary, &c. 3 *Co. Inst.* 64.

The Latin word *mansia*, according to Sir *Edward Coke*, seems to be a certain quantity of land; *hida vel mansia*, and *mansa*, are mentioned in some old writers and charters. *Fleta, lib. 6*. And that which in ancient Latin authors was termed *hida*, was afterwards called *mansus*.

**MANSLAUGHTER**. See *Homicide*, III.

**MAN-STEALING**. See *Kidnapping*.

**MANSUM CAPITALE**. The manor-house or *mense*, or court of the lord. *Kennel's Antiq.* 150.

**MANSURA** and **MASURA**. Are used in *Domesday* and other ancient records, for *mansiones vel habitacula villicorum*. *Cowell*.

**MANSUS**. Anciently a farm. *Seld.* of *Tithes*. 62.

**MANSUS PRESBYTERI**. The *manse* or house of residence of the parish-priest; being the parsonage or vicarage-house. *Paroch. Antiq.* 431.

**MANTHEOF**, from the Lat. *mannus*, a nag, and Sax. *theoff*, i. e. thief.] A horse-stealer. *Leg. Alfred.* See *Mannus*.

**MANTILE**. A long robe, from the Fr. word *mantea*, mentioned in 24 *Hen.* 8. c. 13.

**MAN-TRAP**. See *Engines*.

**MANUALIA BENEFICIA**. Were the

daily distributions of meat and drink to the canons and other members of cathedral churches, for their present subsistence. *Lib. Statutor. Eccles. Sancti Pauli London.* MS.

**MANUALIS OBEDIENTIA**. Is used for sworn obedience, or submission upon oath.

**MANUCAPTIO**. A writ that lies for a man taken on suspicion of felony, &c. who cannot be admitted to bail by the sheriff, or others having power to let to mainprise. *F. N. B.* 219. See *Mainprise*.

**MANUAL**, *manualis*.] Signifies what is employed or used by the hand, and whereof a present profit may be made; as such a thing in the manual occupation of one, is where it is actually used or employed by him. *Staundf. Prerog.* 54.

**MANUFACTURES** and **MANUFACTURERS**. These are regulated by a vast variety of statutes adapted to the particular nature of each business, to which they are applied, to guard against the frauds and negligence of journeymen and workmen concerned therein.

The following contain the most general provisions. For a reference to those relating to particular branches of manufactures, see this Dictionary under the appropriate titles.

By 1 *Ann. st. 2. c. 18*. made perpetual by 9 *Ann. c. 30*. if any person employed in the working up the woollen, linen, fustian, cotton, or iron manufactures, shall embezzle or purloin any materials which he shall be intrusted with to work, or if any person shall receive such embezzled materials, the offender shall forfeit double the value to the poor, or be committed to the house of correction, and there whipped and kept to hard labour for fourteen days. This statute was further enforced by 13 *Geo. 2. c. 8*. which made a second offence liable to a forfeiture of four times the value. These provisions were however found insufficient.

By *stats. 22 Geo. 2. c. 27*; 17 *Geo. 3. c. 56*. any person employed in working up any woollen, linen, silk, leather, or iron manufacture, who shall purloin, embezzle, secrete, sell, pawn, exchange, or unlawfully dispose of any of the materials, shall be committed to the house of correction for not less than fourteen days nor more than three months, and whipped; and for a second offence to be committed, for not less than three months, nor more than six, and whipped. The receiver to forfeit from 40*l.* to 20*l.*, or be whipped; and for a second offence from 100*l.* to 50*l.* or be whipped. These statutes also empower justices to grant warrants to search for embezzled materials, and to seize them, giving an opportunity to officers to prove the property, and also to compel workmen entrusted with materials to work up the same within eight days, and to prevent their engaging in more than one service at a time. The said stat. 17 *Geo. 3. c. 56*. also contains many other provisions against receivers of embezzled manufactures, and prohibits journeymen dyers in particular from receiving goods to dye without the consent of their employers.

By the said stat. 1 *Ann. st. 2. c. 18*. all wool delivered out to be wrought up shall be delivered

with the declaration of the true weight; and all wages, demands, and defaults of labourers in the woollen, linen, fustian, cotton, and iron manufactures, shall be heard and determined by two justices of peace, with an appeal to the quarter sessions.

By the 7 & 8 Geo. 4. c. 29. § 16. stealing to the value of 10s. goods of silk, woollen, linen, or cotton, or of such materials mixed, laid or exposed during any state, process, &c. of manufacture, subjects the offender to transportation for life, &c.

As to the exportation of machinery used in manufactures, see *Machinery*.

For the offence of destroying machinery and buildings used in the carrying on of any manufacture, see *Frames, Malicious Injuries*. See further, *Labourers, Servants*.

**MANUMISSION, Manumissio.]** The freeing a vassal or slave out of bondage; which was formerly done several ways: some were manumitted by delivery to the sheriff, and proclamation in the county, &c.; others by charter; one way of manumission was for the lord to take the bondman by the head, and say, *I will that this man may be free*, and then shoving him forward out of his hands. And there was a manumission implied, when the lord made an obligation for payment of money to the bondman, or sued him where he might enter without suit, &c. The form of manumitting a person in the time of William I. called the Conqueror, is thus set down: *Si quis velit servum suum liberum facere. tradat eum vicecomiti per manum dextram in pleno comitatu, et quietum illum clamare debet à jugo servitutis suæ per manumissionem, et ostendat et liberas portas et vias, et tradat illi liberum arma, scilicet lanceam et gladium, et deinde liber homo efficitur.* Lamb. Archæi. 126. See title *Villeins*.

**MANU OPERA.** Stolen goods taken upon a thief, apprehended in the fact. See *Mannorjus, Mainour*.

**MANUOPERA.** Cattle or any implements used to work in husbandry. *Mon. Angl. tom. 1. p.* 77. *Fleta*.

**MANUPASTUS.** A domestic. *Spelm. Leg. Hen. 1. c.* 66.

**MANUPES.** A foot of full and legal measure. *Cowell*.

**TO MANURE, Colo, Melioro.]** To till, plough, or manure land. *Lit. Dict.*

**MANUS.** Anciently used for the person taking an oath, as a compurgator. And it often occurs in old records; *tertia, quarta*, &c. *manu, jurare*, that is, *the party was to bring so many to swear with him, that they believed what he touched was true*; and in a case of a woman accused of adultery, *mulieri hoc neganti purgatio sexta manu extitit indicta*, i. e. she was to vindicate her reputation upon the testimony of six compurgators. *Reg. Eccl. Christ. Cant.* If a person swore alone, it was *propriâ manu et unicâ*. The use of this word came probably from laying the hand upon the New Testament on taking the oath.

**MANUS MEDIÆ ET INFIMÆ HO-**

**MINES.** Men of a mean condition, of the lowest degree. *Radulphus de Diceto sub annis*, 1112, 1138, 1185.

**MANUTENENTIA.** The writ used in case of maintenance. *Reg. Orig. fol.* 182, 189. See *Maintenance*.

**MAN-WORTH.** The price or value of a man's life, or head; for of old every man was rated at a certain price, according to his quality, which price was paid to the lord in satisfaction for killing him. *Cowell*. See *Manbote*.

**MAPS and PRINTS.** See *Literary Property*.

**MARA.** A mere, lake, or great pond, that cannot be drawn dry. *Mon. Angl. tom. 1. p.* 666: *Par. Antiq.* 418.

**MARCATUS.** The rent of a mark by the year, anciently reserved in leases, &c. *Et unum marcatum redditus de, &c. Mon. Angl. tom. 1. p.* 341.

**MARCH, EARLDOM OF.** Grants of its lands are to be under the great seal. 4 *Hen. 7. c.* 11.

**MARCHERS or LORDS MARCHIERS.** Were those noblemen that lived on the marches of Wales or Scotland; who in times past (according to *Camden*) had their laws, and *potestatem vitæ*, &c. like petty kings, until they were abolished by the 27 *Hen. 8. c.* 26. See also 1 *Edw. 6. c.* 10; and tit. *Wales*. In old records, the Lords Marchers of Wales were styled *Marchianes de Marchiâ Walliæ*.

**MARCHES, Marchia**, from the German *march*, i. e. *limes*, or from the French *marque signum*: being the notorious distinction between two countries or territories.] 'The limits between England and Wales or Scotland, when those were considered as enemies' countries; which last are divided into West and Middle Marches. See 4 *Hen. 5. c.* 7; 22 *Edw. 4. c.* 8; 24 *Hen. 8. c.* 9. There was formerly a court called the Court of the Marches of Wales, where pleas of debt or damages, not above the value of fifty pounds, were tried and determined; and if the council of the Marches held plea for debts above that sum, &c. a prohibition might be awarded. *Cro. Car.* 381.

In Scotland, the term *Marches* is applied to the boundaries between private properties; the expense of inclosing which is jointly borne by the parties. See *Scotch Acts*, 1661. c. 41; 1685. c. 39; 1669. c. 17.

**MARCHET, Marchetum.]** *Consuetudo pecuniaria in mancipiorum filiabus maritandis.* *Bract. lib. 2. c.* 8. This custom, with some variation, is said to have been observed in some parts of England and Wales, and also in Scotland, and the isle of Guernsey. In the manor of Dinevor, in the county of Carmarthen, every tenant, at the marriage of his daughter, paid ten shillings to the lord, which in the British language is called *Gwafr Merched*, i. e. a maid's fee. The custom for the lord to lie the first night with the bride of his tenant is asserted to have been common in Scotland and the north of England; it was said to be abrogated by Malcolm the Third, at the instance of his queen; and instead thereof a mark was paid



to the lord by the bridegroom; from whence it is denominated *merchetu mulierum*. Sir David Dalrymple, Lord Hailes, has annexed to his *Annals of Scotland*, a short treatise on this *merchetu mulierum*, to prove that no such custom ever existed in Scotland, nor probably in any other place. He explains the term to mean, 1, a fine paid to the lord by a sokeman or villain, when his unmarried daughter chanced to be debauched. 2, a composition or acknowledgment by the sokeman or villain for the lord's permission to give his daughter in marriage to a stranger or person not subject to the lord's jurisdiction; or the fine for giving her away without such permission. See further, *Borough English, Maiden Rents, Merchet*.

**MARESCHALL** or **MARESHAL**. See *Marshal*.

**MARETUM**, French *maret*, a fen or marsh.] Marshy ground, overflowed by the sea or great rivers. *Co. Lit.* 5.

**MARINARIUS**. A mariner or seaman: and *marinarius capitaneus* was the admiral or warden of the ports, which offices were commonly united in the same person; the word admiral not coming into use till the latter end of the reign of King Edward I. before which time the king's letters ran thus—*Rex capitaneis marinariis salutem*. *Paroch. Antiq.* 332. See *Admiral, Insurance, Navy*. And see further *Impressing, Seamen*, &c.

**MARINE FORCES**, While on shore, are regulated and subjected to martial law by annual acts. See *Soldiers*.

**MARINE SOCIETY**. The following account of the origin of this society will be found interesting, and is given from authority.

Lord Harry Pawlet, afterwards Duke of Bolton, in the spring, 1756, then commanding his majesty's ship *Barfleur*, requested John Fielding, esq. afterwards Sir John Fielding, the celebrated magistrate, to collect a number of poor boys for the use of his ship, desiring they might be clothed at his lordship's expense. Fowler Walker, esq. of Lincoln's Inn, happening to meet these boys on their journey, and being struck with their appearance, his humanity suggested to him, that a greater number of such poor boys might be fitted out by a subscription. On his arrival in town, he proposed to Mr. Fielding to solicit the public for a subscription for this purpose, himself offering to open it by a small donation. This worthy magistrate, in his written answer, expressed his doubts of the event, but acquiesced with Mr. Walker's design, and happily succeeded so far, that he collected sufficient to clothe three or four hundred boys.

A merchant of London, totally unconnected with the noble lord and both the gentlemen above-mentioned, desired a meeting of the merchants and owners of ships, and proposed to them to form themselves into a society to clothe landmen and boys for the sea service. The first part was eagerly embraced, and the design as speedily carried into execution. Many days

had not elapsed, when the design relating to the boys fell into their hands.

A regular society was soon formed, from which much temporary benefit resulted.

From the termination of the war in 1763 to May 1769, the operations of the society were suspended. Mr. Flicke, a merchant of Hamburg, seeing the great utility of the design, bequeathed to this society a sum of money, producing 300*l.* per annum, for fitting out poor boys in time of war, to serve the officers on board the royal navy, in order to be brought up as seamen. In time of peace one half of the produce to be expended in fitting out poor boys as apprentices to owners and masters of ships, in the merchants' service and coasting vessels; the other half in placing out poor girls to trades, whereby they may earn an honest livelihood.

In the year 1772, the society procured an act of parliament, 12 *Geo.* 3. c. 67. The preamble of this act recites that the society had clothed and fitted out 5,451 landmen, to serve as seamen on board his majesty's ships; and also clothed, fitted, and placed out as servants or apprentices to officers in the king's ships, and to the merchants' service at sea, 6,306 boys, who had no visible means of support, and who voluntarily offered themselves: for the purpose therefore of enabling them to carry into execution their charitable designs, (that is to say,) the fitting out and apprenticing or placing out poor distressed boys, to and for the service of the royal navy, and to and for the service of other ships and vessels, the property of and belonging to subjects of the king of Great Britain; the society was incorporated, their funds secured, and they were empowered from time to time to place out boys as servants to the commissioned or warrant officers of his majesty's navy, and to apprentice out boys in the merchants' service, and to other subjects as they might think proper. By § 6 of the act it is provided that boys serving out such their respective apprenticeships at sea, not being for a less time than four years, shall be entitled to the liberty of setting up and exercising trade or business in any place in Great Britain or Ireland. By § 15, two justices of the peace in their respective counties are authorized and empowered to hear and determine all complaints of hard and ill-usage from the respective masters to their apprentices, and respectively to make such orders therein as they may by law do in other cases between masters and servants, or apprentices.

The estate and property of the trustees of Westminster fish-market (see 22 *Geo.* 2. c. 49.) vested in the Marine Society, 30 *Geo.* 3. c. 54.

**MARISCAL**. An officer in Scotland, who, with the lord high constable, possessed a supreme itinerant jurisdiction in all crimes committed within a certain space of the court, wherever it might happen to be. See *Marshal*.

**MARJSCUS**. A marshy or fenny ground. *Domesday*.

**MARITAGIO AMISSO PER DEFALTAM**. A writ for the tenant in frank

marriage to recover lands, &c. whereof he is deforced by another. *Reg. fol. 171.*

**MARITAGIUM.** That portion which is given with a daughter in marriage. See *Glanvil, lib. 2. c. 18.* Maritagium, as a fruit of tenure, strictly taken, is that right which the lord of the fee had to dispose of the daughters of his vassals in marriage. In *cap. 7 of Magna Charta*, it seems to designate lands holden by a female in frank-marriage. See *Tenure, li. 4;* and *Marchet, Marriage.*

**MARITAGIUM HABERE.** To have the free disposal of an heiress in marriage; a favour granted by the kings of England, while they had the custody of all wards or heirs in minority. *Cowell.* See *Tenure.*

**MARITIMA ANGLIÆ.** The profit and emolument arising to the king from the sea, which anciently was collected by sheriffs; but it was afterwards granted to the lord admiral. *Ricardus de Lucy dicitur habere maritimam Angliæ. Pat. 8 H. 3. m. 4.*

**MARK, marca, Saxon *mearc.*** Of silver, is now thirteen shillings and four pence; though in the reign of Henry I. it was only six shillings and a penny in weight; and some were coined, and some only cut in small pieces; but those that were coined were worth something more than the others. In former times, money was paid, and things valued often-times by the mark. We read of a mark of gold of eight ounces, of 6*l.* in silver; or as others write, 6*l.* 13*s.* 4*d.* *Stow's Annals, 32; Rot. Mag. Pipæ, Ann. 1 Hen. 2.*

The *marka ami* and *marka argenti* are noticed in *Domesday Book*, as well as the half-mark, both of silver and gold. The mark and the half-mark therein mentioned were however only computations of money, the penny being the sole coin known in England till long after the date of that survey. See *Ellis's Introduct. to Domesday Book, vol. i. 161.*

**MARK TO GOODS.** Is what ascertains the property or goodness thereof, &c. And if one man shall use the mark of another, to the intent to do him damage, upon injury proved, action upon the case lieth. 2 *Cro. 471.* The penalty of counterfeiting the marks on wax, appointed by 23 *Eliz. c. 8.* is 5*l.* or pillory (now abolished) and imprisonment.

**MARKET, mercatus, from *mercando*, buying and selling.]** The liberty by grant or prescription, whereby a town is enabled to set up and open shops, &c. at a certain place therein, for buying and selling, and better provision of such victuals as the subject wanteth; it is less than a fair, and usually kept once or twice a week. *Bract. lib. 2. cap. 24; 1 Inst. 220.*

The establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, is enumerated by *Blackstone* as one of the king's prerogatives. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant. 2 *Inst. 220.*

According to *Bracton*, one market ought to be distant from another, *sex leucas, vel miliar.*

*et dimidiam, et tertiam partem dimidiæ.* If one hath a market by charter or prescription, and another obtains a market near it, to the nuisance of the former, the owner of the former may avoid it. 1 *Inst. 406; F. N. B. 184; 2 Rol. Abr. 140.* But in order to make this out to be a nuisance, it is necessary, 1, that the prosecutor's market or fair be the elder, otherwise the nuisance lies at his own door; 2, that the second market be erected within the third part of twenty miles from the other (*i. e.* as above expressed, six miles and a half, and one-third of half a mile,) for the *dieta* or reasonable day's journey mentioned by *Bracton, l. 3. c. 16.* is constructed by *Hale* to be twenty miles. See 2 *Inst. 567.* So that if the new market be not within the distance above-mentioned of the old one, it is no nuisance; as it is held reasonable that every man should have a market within one-third of a day's journey from his own house; that the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with the old one, it is *primâ facie* a nuisance to that, and there needs no proof of it, but the law will intend it to be so; but if it be on another day, it *may be* a nuisance, though whether it is so or not cannot be intended or presumed, but must be proved to a jury. 3 *Comm. c. 13. p. 218.* Also where a man has a fair or market, and one erects another to his prejudice, an action will lie. *Rol. 140; 1 Mod. 69.*

The fair or market is taken for the place where kept; and formerly it was customary for fairs and markets to be kept on Sundays; but by 27 *Hen. 6. c. 5.* no fair or market is to be kept upon any Sunday, or upon the feasts of the Ascension, Corpus Christi, Good Friday, All Saints, &c. except for necessary victuals, and in time of harvest: and they shall not be held in church-yards. *Stat. Wynton, 13 Edw. 1. c. 6.*

The lord of a manor, to whom the grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*; and whether *villa* extend to the town of *W.* or the township or parish of *W.*, the lord has a right to remove the market-place from one situation to another within the precinct of his grant. And though he should have holden it for above twenty years within the township of *W.*, where the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord. 3 *East, 538.*

All fairs are markets; and there may be a market without an owner; though where there is an owner, a butcher cannot prescribe to sell meat in his own house upon a market-day; for the market must be in an open place, where the owner may have the benefit of it. 4 *Inst. 272.* No market shall be held out of the city of London within seven miles; though all butchers,

victuallers, &c. may hire stalls and standings in the markets there, and sell meat and provisions, on four days in a week, &c. *Cit. lib.* 101.

Every one that hath a market, shall have toll for things sold, which is to be paid by the buyer, and by ancient custom may be paid for standing of things in the market, though nothing be sold, but not otherwise. A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported; the mode of sale by sample being of very modern invention. 4 *Taunt.* 520. A piepowder court is incident as well to a market as a fair (see *Court of Piepowders*); and proprietors of markets ought to have a pillory and tumbrel, &c. to punish offenders. 1 *Inst.* 281; 2 *Inst.* 221; 4 *Inst.* 272. Keeping a fair or market, otherwise than it is granted, as by keeping them upon two days, when only one is granted; or on any other day than appointed; extorting toll or fees where none are due, &c. are causes of forfeiture. *Finch.* 164. If a person erects stalls in a market, and does not leave room for the people to stand and sell their wares, so that they are thereby forced to hire such stall, the taking money for the use of them, in that case, is extortion. 1 *Ld. Raym.* 149. And if the grantee of a market, for his own profit, permit part of the space within it to be used for other purposes, so that there is not sufficient space for the public accommodation, he cannot sue an individual for selling articles near his market, and depriving him of toll, even although at that particular time there is room in the market, unless he shows that on the day when the sale takes place he gave notice to the seller that there was room within the market. *Prince v. Lewis*, 5 *B. & C.* 363.

The lord of an ancient market may by law have a right to prevent other persons from selling goods in their private houses situate within the limits of the market. 7 *B. & C.* 10. And so in a recent case, it was held that a claim by immemorial custom to exclude others from selling marketable articles on the market days, except in the market place, is valid in law. 4 *B. & Ad.* 397. Quære if the grantee of a newly created market can, by virtue of such grant, maintain an action for the disturbance of his franchise against a person for selling such articles in his own shop, within the franchise, but not within the limits of the market-place, on the market-day?

Property may in some cases be transferred by sale, though the vender hath *none at all* in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must be soon at an end.

The general rule of law, therefore, is, that all sales and contracts of any thing vendible in fairs or markets *overt* (that is, open,) shall not only be good between the parties, but also binding on all those that have any right or property therein. 2 *Inst.* 713. And for this purpose the *Mirror* says, tolls were established, viz. to testify the making of contracts; for every private contract was discountenanced by law: in-

so much that our Saxon ancestors prohibited the sale of any thing above the value of 20*d.* unless in open market; and directed every bargain and sale to be made in the presence of credible witnesses. *Mirr. c.* 1. § 3; *Ll. Ethel.* 10, 12; *Ll. Eadg. Wilk.* 80. Market *overt* in the country is only held on the special days provided for particular towns by charter or prescription; but in London, every day except Sunday is market-day. *Cro Jac.* 68. The market-place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market *overt*. *Godb.* 131. But in London, every shop in which goods are exposed publicly to sale, is market *overt* for such things only as the owner professes to trade in. 5 *Rep.* 83; 12 *Mod.* 521. Though if the sale be in a warehouse, and not publicly in the shop, the property is not altered. 5 *Rep.* 83; *Moor.* 300. But if goods are stolen from one, and sold out of market *overt*, the property is not altered, and the owner may take them wherever he finds them. And it is expressly provided by 1 *Jac.* 1. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule. And even in market *overt*, if the goods be the property of the king, such sale, though regular in all other respects, will in no case bind him; though it binds infants, femes covert, idiots or lunatics, and persons beyond sea, or in prison. 2 *Inst.* 713. If the goods be stolen from any common person, and then taken by the king's officer from the felon, and sold in open market, still if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods. *Bur Use of the Law*, 158. So likewise if the buyer knoweth the property not to be in the seller: or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours, the owner's property is not bound thereby. 2 *Inst.* 713, 714; 5 *Rep.* 82. If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price; unless the property had been previously altered by a former sale. *Perk.* § 93. And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice. 2 *Inst.* 713. But the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from any one who has purchased them, and sold them again, even with notice of the theft before the conviction. 2 *T. R.* 750. By these regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as is consistent with that other necessary policy, that purchasers *bona fide*, in a fair,



open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller. 2 *Comm.* 449, 450. See *Restitution*.

Persons that dwell in the country, may not sell wares by retail in a market town, but in open fairs; but countrymen may sell goods in gross there. 1 & 2 *P. & M. c. 7*.

All contracts for any thing vendible in markets, &c. shall be binding, and sales after the property, if made according to the following rules, viz. 1, the sale is to be in a place that is open, so that any one that passeth by may see it, and be in a proper place for such goods; 2, it must be an actual sale, for a valuable consideration; 3, the buyer is not to know that the seller hath a wrongful possession of the goods sold; 4, the sale must not be fraudulent, betwixt two, to bar a third person of his right; 5, there is to be a sale, and a contract, by persons able to contract; 6, the contract must be originally and wholly in the market overt; 7, toll ought to be paid, where required by statute, &c.; 8, the sale is not to be in the night (or on a Sunday,) but between sun and sun (though if the sale be so made, it may bind the parties.) A sale thus made shall bind the parties, and those that are strangers, who have a right. 5 *Rep.* 83.

The statutes which ordain the toll-takers shall be appointed in markets and fairs, to enter into their books the names of the buyers, sellers, vouchers, and prices of horses sold, and deliver a note thereof to the buyer, &c. secure the property of stolen horses to the owner, although sold in a fair or market, if he repays what was *bond fide* paid for the horse. 2 & 3 *P. & M. c. 7*; 31 *Eliz. c. 12*. See *Horses*.

See further, *Clerk of the Market, Fair*.

MARKET TOWNS. See *Market*.

MARKETZELD or MARKETGELD.

Toll of the market. *Cod. MS. in Bibl. Cotton.*

MARKPENNY. Was a penny anciently paid at the town of Maldon, by those who had gutters laid or made out of their houses into the streets. *H. 15 Edw. 1*.

MARLE, *marla*, from the Saxon *margel* i. e. *medulla*] otherwise called *malin*. A kind of earth or mineral, which in divers counties of this kingdom is used to fertilize land. See 17 *Edw. 4. c. 4*.

MARLEBERG. Statutes made there, 52 *H. n. 3*.

MARLERIUM or MARLETUM. A marle pit. *Chart. Antiq.*

MARQUE, from the Saxon *mearc*, signum.] A mark or sign; but in our ancient statutes it signifies reprisals. See *Letters of Marque*.

MARQUESS or MARQUIS, *marchio*.] Is now a title of honour before an earl, and next to a duke; and by the opinion of *Hotoman*, the name is derived from the German *march*, signifying originally *custos limitis* or *comes et præfectus limitis*. In the reign of King Richard II. came up first the title of marquis, which was a governor of the marches, and then called commonly lord marcher, and not marquess, as

Judge *Dodderidge* has observed in his *Law of Nobility and Peerage*. *Selden's Mare Claus. lib. 2. c. 19*. A marquis is created by patent; and anciently by cincture of sword, mantle of state, &c. See *Lords Marchers, Peers, Nobility*.

## MARRIAGE.

[*MARITAGIUM*.] A civil and religious contract, whereby a man is joined and united to a woman, for the purposes of civilized society; *maritagium*, in the feudal law, signified the interest of bestowing a ward or widow in marriage by the lord. *Mug. Chart. c. 6*. See *Tenures*, II. 4.

*Mritagium* is likewise applied to land given in marriage, and is that portion which the husband receives with his wife. *Bract. lib. 2. c. 34*; *Glanv. lib. 7. c. 1*. In this sense there are divers writs *de maritagio*, &c. *Reg. 171*.

There is further a term called *duty of marriage*, signifying an obligation to marry, imposed on women who formerly had lands, charged with personal services, in order to render them by their husbands. *Concell*. See *Tenure*, II. 4.

Marriage is generally the conjunction of man and woman in a constant society and agreement of living together, until the contract is dissolved by death, or breach of faith, or some notorious misbehaviour, destructive of the end for which it was intended. It is one of the rights of human nature, and was instituted in a state of innocence, for preservation thereof; and nothing more is requisite to a complete marriage by the laws of England, than a full free, and mutual consent between parties, not disabled to enter into that state by their near relation to each other, infancy, pre-contract, or impotency. *Dict.*

As to the solemnization of marriage, this is regulated by the laws and customs of the nation where we reside; and every state allows such privileges to the parties it deems expedient, and denies legal advantages to those who refuse to solemnize their marriage, in the manner the state requires, but they cannot dissolve a marriage celebrated in another manner, marriage being of divine institution, to which only a full and free consent of the parties is necessary. Before the time of Pope Innocent III. there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. See 1 *Roll. Abr.* 359; 1 *Sid.* 61.

Marriages by Romish priests, whose orders are acknowledged by the church of England, are deemed to have the effects of a legal marriage in some instances; but marriages ought to be solemnized according to the rites of the church of England, to entitle the parties to the privileges attending legal marriage, as dower, thirds, &c.

Marriage at common law is either in right or in possession; and marriage *de facto*, or in reputation, as among Quakers, &c. is allowed to be sufficient to give title to a personal estate. 1 *Leon.* 53; *Wood's Inst.* 59. But in the case

of a Dissenter, married to a woman by a minister of the congregation who was not in orders, it was held, that when a husband demands a right to himself as husband by the ecclesiastical law, he ought to prove himself a husband by that law, to entitle him to it; and notwithstanding the wife and the children of this marriage may entitle themselves to a temporal right by such marriage, yet the husband shall not, by the reputation of the marriage, unless he hath a substantial right; and this marriage is not a mere nullity, because by the law of nature the contract is binding; for though the positive law of man ordains marriage to be made by a priest, that law only makes this marriage irregular, and not expressly void. 1 *Salk.* 119. See further *Quakers*.

The marriages that are made in an ordinary course, are to be by asking in the church, and other ceremonies appointed by the book of Common Prayer. 2 & 3 *Edw.* 6. c. 21. By the ordinances of the church, when persons are to be married, the banns of matrimony shall be published in the church where they dwell three several Sundays or holidays, in the time of divine service; and if, at the day appointed for their marriage, any man do allege any impediment, as pre-contract, consanguinity, or affinity, want of parent's consent in infancy, &c. why they should not be married, (and become bound with sufficient surties to prove his allegation,) then the solemnization must be deferred until the truth is tried. *Rubrick.* And no minister shall celebrate matrimony between any persons without a faculty of licence, except the banns of marriage have been first published as directed, according to the book of Common Prayer, on pain of suspension for three years; nor shall any minister, under the like penalty, join any persons in marriage, who are so licensed at any unseasonable times, or in any private place, &c. *Canon*, 62. Also on the granting of licences, oath is made, and bond is to be taken that there are no impediments of pre-contract, consanguinity, &c. nor any suit or controversy depending in any ecclesiastical court, touching any contract of marriage of either of the parties with any other that neither of them are of better estate than is suggested; and that the marriage be openly solemnized in the parish church where one of the parties dwelleth, or the church mentioned in the licence, between the hours of eight and twelve in the morning. Licences to the contrary shall be void; and the parties marrying are subject to punishment as for clandestine marriages. *Can.* 102.

But by special licence or dispensation from the Archbishop of Canterbury, marriages, especially of persons of quality, are frequently in their own houses, out of canonical hours, in the evening, and often solemnized by others in other churches than where one of the parties lives, and out of time of divine service, &c.

Marriages are prohibited in Lent, and on fasting days, because the mirth attending them is not suitable to the humiliation and devotion of those times; yet persons may marry with licences in Lent, although the banns of marriage

may not then be published. Formerly, during the establishment of the catholic religion in these kingdoms, priests were restrained from marriage, and their issue accounted bastards, &c. and the 31 *Hen.* 8. c. 14, made such marriages felonious. But on the Reformation, laws were made, declaring that the marriage of priests should be lawful, and their children legitimate; though the preambles to those statutes set forth, that it would be better for priests to live chaste, and separate from the company of women, that they might with more fervency attend the ministry of the Gospel. See 2 & 3 *Edw.* 6. c. 21. But this statute, like all other reforms in the church, was repealed by Queen Mary, and was not revived again till by 1 *Jac.* 1. c. 25; though the thirty-nine articles had passed in convocation in the fifth year of Queen Elizabeth, the thirty-second of which declares, that it is lawful for the bishops, priests, and deacons, as for all other Christian men, to marry at their own discretion. The clerks in chancery, the laymen, were not allowed to marry, till 14 & 15 *Hen.* 8. c. 8. And no lay-doctor of civil law, if he was married, could exercise any ecclesiastical jurisdiction, till 37 *Hen.* 8. c. 7.

Taking marriage in the light of a civil contract, the law treats it as it does all other contracts; allowing it to be good and valid in all cases where the parties at the time of making it were in the first place *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law. 1 *Comm.* c. 15. p. 433.

First, they must be *willing* to contract; "*Consensus non concubitus facit nuptias*," is the maxim of the civil law in this case; and it is also adopted by the common lawyers. 1 *Inst.* 33

Secondly, they must be *able* to contract. In general all persons are able to contract themselves in marriage, unless they labour under some particular disabilities and incapacities. What those are we shall therefore inquire.

These disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court: but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract, consanguinity, or relation by blood; affinity, or relation by marriage; and some particular corporeal infirmities. These canonical disabilities are either grounded upon the express words of the divine laws, or are consequences plainly deducible from thence; it therefore being sinful in the persons who labour under them to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrates' coercion, in order to separate the offenders and inflict penance for the offence, *pro salute animarum*. But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For after the death of either of them the courts of common law will not suffer the spiritual

court to declare such marriages to have been void; because that declaration cannot now tend to the reformation of the parties. 1 *Inst.* 33; 2 *Inst.* 614. Therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage, and bastardize the issue, the Court of King's Bench granted a prohibition *quod hoc*; but permitted them to proceed to punish the husband for incest. 1 *Salk.* 548.

These canonical disabilities being entirely within the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes which serve as directories to those courts, of which it will be proper to take notice. By 32 *Hen.* 8. c. 38, it is declared that all persons may lawfully marry but such as are prohibited by God's law: and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might, however, be bought off for money,) it is declared by the same statute, that nothing, God's law except, shall impeach any marriage, but within the Levitical degrees, the furthest of which is, that between uncle and niece. *Gillb. Rep.* 158.

By the same statute all impediments, arising from pre-contracts to other persons, were abolished, and declared of none effect, unless they had been consummated with bodily knowledge; in which case the common law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by 2 & 3 *Edw.* 6. c. 23. A contract *per verba de presenti tempore* used to be considered in the ecclesiastical courts *ipsum matrimonium*; and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See as instance, 4 *Co.* 29. But as this pre-engagement can no longer be carried into effect as a marriage, it seems undoubted that it will never more be an impediment to a subsequent marriage actually solemnized and consummated. 1 *Comm.* 435, *in n.*

In the above stat. 32 *Hen.* 8. c. 38, the prohibitions by God's law are not specified; but in 25 *Hen.* 8. c. 22; 18 *Hen.* 8. c. 7, the prohibited degrees are particularized. It is doubtful whether these two last statutes are in force. 2 *Burr. Eccl. L.* 405. But so far they seem to be only declaratory of the Levitical law. The former declared null and void the marriage between Henry VIII. and Catherine of Arragon, widow of his eldest brother, Prince Arthur, for which a dispensation had been obtained from the Pope. 1 *Comm.* 435, *in n.*

The prohibited degrees are all which are under the fourth degree of the civil law, except in the ascending and descending line; and by the course of nature it is scarcely a possible case, that any one should ever marry his issue in the fourth degree; but between collaterals it is universally true, that all who are in the fourth

or any higher degree are permitted to marry; as, first cousins are in the fourth degree, and therefore may marry; a nephew and great aunt, or niece and great uncle are also in the fourth degree, and may intermarry; and though a man may not marry his grandmother, it is certainly true he may marry her sister. *Gibbs. Cod.* 413. The same degrees by affinity are prohibited. Affinity always arises by the marriage of one of the parties so related; as a husband is related by affinity to all the *consanguinei* of his wife, and *vice versa* the wife to the husband's *consanguinei*: for the husband and wife being considered one flesh, those who are related to the one by blood are related to the other by affinity. *Gibbs. Cod.* 412. Therefore a man after his wife's death cannot marry her sister, aunt, or niece. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter. If a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry; for though I am related to my wife's brother by affinity, I am not so to my wife's brother's wife, whom if circumstances would admit, it would not be unlawful for me to marry. 1 *Comm.* 435, *in n.* See 1 *Inst.* 235, *a. in n.*

The son of a father by another wife, and daughter of a mother by another husband, cousins-german, &c. may marry with each other; a man may not marry his brother's wife, or wife's sister, an uncle his niece, an aunt her nephew, &c. But if a man take his sister to wife, they are baron and feme, and the issue are not bastards till a divorce. *Levit. c.* 18. 20; 2 *Inst.* 683; 1 *Roll. Abr.* 340, 357; 5 *Mod.* 448.

A person may not marry his sister's daughter; and a sister's bastard daughter is said to be within the Levitical law of affinity; it being morally as unlawful to marry a bastard as one born in wedlock, and it is so in nature; and if a bastard doth not fall under the prohibition *ad proximum sanguinis non accedas*, a mother may marry her bastard son. 5 *Mod.* 168; 2 *Nels. Abr.* 1161.

There are persons within the reason of the prohibition of marriage, though not mentioned, and must be prohibited; as the father from marrying his daughter, the grandson from marrying the grandmother, &c. *Vaugh.* 321.

The other sorts of disabilities are those which are created, or at least enforced by the municipal laws. And though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. And if any per



sons under these legal incapacities come together, it is a meretricious, and not a matrimonial union. 1 *Comm.* 436.

The first of these legal disabilities is a *prior marriage*, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void. *Br. Ab. tit. Bastard, pl. 8. See Bigamy.*

The next legal disability is *want of age*. If a boy under fourteen or girl under twelve years of age marries, this marriage is only inchoate and imperfect; and when either of them comes to that age, which is for this purpose termed their age of consent, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the common law pays a greater regard to the constitution than the age of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in law it is so far a marriage, that if at the age of consent they agree to continue together, they need not be married again. *Co. Lit. 79.* If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; for in contracts the obligation must be mutual, both must be bound or neither; and so it is *vice versa*, when the wife is of years of discretion, and the husband under. *Co. Lit. 79.*

If persons are married before the age of consent, they may at that age disagree and marry again, without any divorce, though if they once give consent when at age, they cannot afterwards disagree; and when they are married before, there needs not a new marriage, if they agree at that age. 1 *Inst. 33; 2 Inst. 182.* A woman cannot disagree within her age of twelve years, till which her marriage continues; and before that time her disagreement is void. 1 *Danv. 699.* Though if a man marries a woman under that age, and afterwards she, within her age of consent, disagrees to the marriage, and at her age of twelve years marries another; now the first marriage is absolutely dissolved, so that he may take another wife; for although the disagreement within the age of consent was not sufficient, yet her taking another husband at the age of consent and cohabiting with him, affirms the disagreement, and so the first marriage is avoided. *Moor, 575, 764.* If, after disagreement of the parties, at the age of consent they agree to the marriage, and live together as man and wife, the marriage hath continuance, notwithstanding the former disagreement; but if the disagreement had been before the ordinary, they could not afterwards agree again to make it a good marriage. 1 *Danv. Abr. 699.*

If either party be under seven years of age, contracts of marriage are absolutely void: but marriages of princes made by the state in their behalf, at any age, are held good; though many of those contracts have been broken through. *Swinb. Matrimon. Contr. See Ward's Law of Nations.*

The above proposition "that in contracts the obligation must be mutual," has been censured as too generally expressed; for there are various contracts between a person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive, that it is true with regard to the contract of marriage, referred to the ages of fourteen and twelve; but it has also long been clearly settled, that it is not true with regard to contracts of marriage, referred to the minority under twenty-one. For where there are mutual promises to marry between two persons, one of the age of twenty-one, and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action, and recover damages; but no action can be maintained for a similar breach of the contract on the side of the minor. *Stra. 937; Fitzgib. 175, 275.*

Another incapacity arises from *want of consent of parents and guardians*. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid; and this was agreeable to the canon law; but by several statutes, viz. 6 & 7 *Will. 3, c. 6; 7 & 8 Will. 3, c. 35.* penalties of 100*l.* are laid on every clergyman who marries a couple either without publications of banns (which may give notice to parents or guardians,) or without a licence, to obtain which the consent of parents or guardians must be sworn to; and the man so married forfeits 10*l.*, and the parish clerk, &c. assisting, 5*l.* These statutes are confirmed by 10 *Ann. c. 19* and extended to privileged places; so that if a person so offending be a prisoner in any place, on conviction he shall be removed to the county gaol, there to remain in execution charged with the said penalty of 100*l.*, &c. Before these statutes an information was exhibited against certain persons for combination in procuring a clandestine marriage in the night, without banns or licence, between a maid servant and a young gentleman who was heir to an estate, the person being in liquor; and they were fined 100 marks, and ordered to be committed till paid; but it doth not appear that the marriage could be made void. *Cro. Car. 557.*

But the evil of clandestine and improper marriages was more fully restrained by the 26 *Geo. 2. c. 33.* which enacted that all marriages were to be either in pursuance of banns published, of a licence, or of a special licence; and declared that all marriages by licence, where either of the parties, not being a widower or widow, should be under the age of twenty-one years, which shall be had without the consent of his or her father, if living, or if dead, of his or her guardian, and if no guardian, of his or her mother, if living and unmarried, and if no mother living and unmarried, then of the guardian appointed by the Court of Chancery, should be void. If guardian or mother, or any of them, where consent was made necessary,

were *non compos mentis*, beyond sea, or refused to consent, and the Lord Chancellor should declare it to be a proper marriage, that should be effectual as if the guardian or mother had consented.

By the 3 *Geo. 4. c. 75.* marriages which had been solemnized by licence obtained without the proper consent, and which were therefore void under the above statute, were rendered valid where the parties had continued to cohabit until the death of one of them, or until the passing of the act, or where they had discontinued the cohabitation for the purpose of or during the pendency of any proceedings touching the validity of such marriage; the act excepted cases where the invalidity of the marriage had been declared by any court of competent jurisdiction, or established upon the trial of any issue, or acted upon by any judgments, decrees, or orders of court, or where either of the parties had during the life of the other lawfully intermarried with another person; and it provided that where any property, either real or personal, had been possessed, or any title of honour enjoyed on the ground of the invalidity of any such marriage, the right and interest in such property or title of honour should not be affected. These retrospective provisions did not include marriages by banns, and therefore marriages invalid under the former law, from the banns not having been duly published, are still void. See 1 *Addams*, 93.

The 3 *Geo. 4. c. 75.* also contained provisions with respect to future marriages. These, together with the old marriage act, 26 *Geo. 3. c. 33.* were repealed by the 4 *Geo. 1. c. 76.* which comprises the enactments whereby marriages are now regulated in this country.

The 2d section of this statute prescribes the mode of publishing banns, and of performing the ceremony, nearly in the same terms as the old act. § 3, 4, 5, and 6, enable the bishop of the diocese, with the consent of the patron and incumbent, to authorize the publication of banns and the solemnization of marriage in other chapels; and the laws respecting registers are extended to such chapels. The next two sections are borrowed from the old act: § 7 provides that seven days' notice of the names of the parties, their places of abode, and the time of their residence, shall be given to the minister before publication of banns; and § 8 exempts the minister from punishment for marrying minors without the consent of parents or guardians, unless with notice of their dissent; by § 9, if the marriage be not had within three months after the complete publication of banns, they must be republished in the same manner; by § 10, licences are only to be granted for marrying where one of the parties has resided for fifteen days; by § 11, if a caveat be entered against the grant of a licence, it is not to be granted until the matter has been examined by the judge out of whose office it is to issue; § 12 enacts that parishes not having any church or chapel, and extra parochial places not having chapels in which banns may be published shall be deemed to belong to any adjoining

parish or chapel: § 13 provides that when a church or chapel is disused from being under repair, or from being taken down to be rebuilt, the banns may be published in any place within the parish or chapelry licenced by the bishop for the performance of divine service, or in the church or chapel of any adjoining parish or chapelry where no place is so licenced, the marriage may be solemnized in such adjoining church or chapel; and marriages heretofore solemnized in other places within parishes or chapelries, on account of the church or chapel being under repair, or taken down to be rebuilt, are not on that account to be questioned; see 5 *Geo. 4. c. 32, &c. post.*

§ 14 enacts, that previous to the grant of a licence, one of the parties shall swear to his or her belief that there is no lawful impediment, and to their residence; and also where either of the parties, not being a widow or widower is under the age of twenty-one, that the consent of the persons whose consent is required by the act has been obtained; but if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such licence, the licence may be granted notwithstanding the want of any such consent.

By § 15 no bond or other security is to be required on granting licences.

§ 16 declares, that the father if living, of any minor, not being a widower or widow, or if the father shall be dead, the guardian or guardians of the person of the party lawfully appointed, or one of them; and if none then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage; and such consent is thereby required, unless there shall be no person authorized to give such consent.

§ 17 provides, that where the father is *non compos mentis*, or where the guardian or mother whose consent is requisite, is *non compos mentis*, or beyond the seas, or unreasonably refuses to consent, the Court of Chancery may authorize the marriage. This clause corresponds with that in the old act, but it is extended to the case of the father being lunatic.

§ 18 provides for the oath of office to be taken, and the security to be given by the surrogates deputed to grant licences: by § 19 licences are to be in force for three months only; and by § 20 the power of the Archbishop of Canterbury to grant special licences is preserved.

§ 21 makes it felony, punishable by fourteen years' transportation knowingly and wilfully to solemnize matrimony in any other place than a church or chapel wherein banns may be lawfully published, or at any other time than between hours of eight and twelve in the forenoon (unless by special licence,) or without due publication of banns or licence; and the same punishment is enacted for persons falsely pretending to be in holy orders, who shall solemnize

matrimony according to the rites of the Church of England; prosecutions on this clause are to be commenced within three years.

§ 22 declares that if any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published (unless by special licence,) or shall knowingly and wilfully intermarry without due publication of banns or licence from a person having authority to grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such person shall be null and void to all intents and purposes whatsoever.

By § 23 it is enacted, that where any valid marriage of a minor, by licence, shall be procured by the false oath of either party, as to the matters required to be sworn to, such party wilfully and knowingly so swearing, or if any valid marriage of a minor by banns shall be procured by a party hereto, knowing that the minor had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published, and having knowingly caused or procured the undue publication of banns, the attorney or solicitor-general may file an information in the Court of Chancery or Exchequer, at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, and who shall be responsible for the costs, to sue for a forfeiture of all estate, right, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, &c. in any property as shall then have accrued, or shall thereafter accrue, to such offending party, by such marriage, shall be secured under the direction of such court, for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage; and if both the parties so contracting marriage shall, in the judgment of the court, be guilty of any such offence as aforesaid, the court may settle and secure such property or any part thereof, immediately for the benefit of the issue of the marriage, subject to provisions for the offending parties, by way of maintenance or otherwise, as the said court, under the particular circumstances of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves in case either of them should survive the other; before filing such information, affidavit must be made of the circumstances, and that the relator had not discovered the marriage more than three months before his appli-

cation to the attorney or solicitor-general: by § 24 all agreements, settlements, or deeds, upon such marriages, are made void so far as they may be inconsistent with the directions given by such courts: and by § 25 such information must be filed within a year from the solemnization of the marriage.

By § 26 proof of the residence of the parties is not required after the marriage, and evidence to prove non-residence shall not be received in any suit touching the validity of the marriage: § 27 repeats the clause in the old act, providing that no suit shall be had to compel celebration *in facie ecclesiæ*, by reason of any contract, whether *per verba de præsentī* or *per verba de futuro*.

§ 28 provides that marriages shall be had in the presence of two witnesses, and the register attested by them and by the minister: and § 29 makes it felony to insert in the register-book any false entry relating to a marriage, or to make, alter, forge, or counterfeit any such entry, or any licence of marriage, or to utter them as true, or to destroy any register-book, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of the act.

§ 30 excepts the marriages of the royal family: and § 31 excepts the marriages of Quakers and Jews: by the last section the act is only to extend to England.

The consent required to the marriage of a minor, by this act, is the same as under the old Marriage Act, except in cases where the minor is without a legal parent or guardian, and where there is therefore no person having authority to consent. In such cases the ecclesiastical judge, or the surrogate, has power to grant the licence of his own authority. But a guardian may nevertheless still be appointed by the Court of Chancery, for the purpose of consenting; and this has been done in some cases which have occurred since the act.

The guardian "lawfully appointed" is considered to mean only a guardian appointed by the father under the 12 Car. 2. c. 24. (see 1 Hagg. 353); and consent to a marriage can therefore not be given by a guardian of any of the other kinds known to the law, excepting a guardian appointed by the Court of Chancery; and although the latter would in general supersede the authority of the mother, yet by the act his power with respect to marriage, does not arise so long as the mother is living and unmarried.

The most important alteration in the law by the above statute, is the repeal of the clause in the 26 Geo. 2. c. 33. declaring null and void marriages not solemnized in the mode therein prescribed. By § 22 of the former act, the nullity is confined to marriages where the parties are privy to the irregularity; and it appears, as well by the language of this as of § 23, that in order to render it void, both parties must be affected with the fraud. If the marriage, though not conformable to the mode prescribed, be *bona fide* on the part of one or both of the parties, it will be good if solemnized so that



it would have been valid before the old Marriage Act. See 4 B. & Ad. 640.

The first cause of nullity is marrying, knowingly and wilfully, in a place not a church or chapel, qualified for the publication of banns.

The law with respect to the place of solemnization has been extended by three subsequent acts. The 5 Geo. 4. c. 32. enacts, that marriages which had been or should be solemnized in any place within the limits of any parish or chapelry licenced by the bishop for the performance of divine service during the repair or rebuilding of the church or chapel in which marriages had been usually solemnized; or if no such place should be licenced, then in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by licence lawfully granted, should not on that account be questioned.

The 6 Geo. 4. c. 92, confirms all marriages which had been solemnized in any church or public chapel erected and consecrated since the 26 Geo. 2. c. 33. and enacts, that in future marriages may be solemnized in all churches and chapels erected and consecrated since that time, in which it had been customary and usual, before the passing of the act (July 5th, 1825,) to solemnize marriages.

The 11 Geo. 4. and 1 Wm. 4. c. 18. declares valid all marriages, the banns whereof have been published in any place used for divine service within any parish or chapelry during the repairs or rebuilding of the church or chapel thereof, which marriages have been solemnized either in the place so used, or in the church or chapel of the same or some adjoining parish or chapelry.

§ 2. during the time any church, &c. is under repair, &c. the bishop may direct the banns to be published in any consecrated chapel in the parish.

By § 3 all marriages then or thereafter to be solemnized in churches built in pursuance of the 58 Geo. 3. c. 45, and 59 Geo. 3. c. 134, are declared good.

§ 4 confirms marriages then had in chapels duly consecrated, but wherein banns and marriages cannot legally be published and solemnized. This clause is to have no prospective operation.

By § 5 the validity of marriages is not to be questioned on account of the uncertainty respecting the consecration of the chapels where they take place. This section seems to be retrospective.

A fourth legal incapacity of contracting marriage is *want of reason*, without a competent share of which, as no other, so neither can the matrimonial contract be valid. 1 Rol. Abr. 257. See 15 Geo. 2. c. 80, for preventing the marriage of lunatics, under tit. *Idiots and Lunatics*, V.

A marriage solemnized clandestinely between a person of a weak and deranged mind, and the daughter of his trustee and solicitor (by whom

he was treated as of unsound mind,) was declared null and void. 1 Hagg. Ec. Rep. 355.

Lastly. The parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made *per verba de presenti*, or in words of the present tense, and in case of cohabitation, *per verba de futuro* also, between persons able to contract, was, before the marriage acts, deemed a valid marriage to many purposes, and the parties might be compelled in the spiritual courts to celebrate it in *facie ecclesiæ*. But these verbal contracts are now of no force to compel a future marriage (see 4 Geo. 4. c. 76. § 27. *ante*.)

It is also essential to a marriage, that it be performed by a person in orders. *Salk.* 119. See *Burr. Ses. Cas.* 232. 1 *Wils.* 74. Though the intervention of a priest to solemnize this contract, is merely *juris positivi*, and not *juris naturalis aut divini*; it being said that the Pope Innocent III. was the first who ordained the celebration of marriage in the church, before which it was totally a civil contract. *Moor*, 170. And in the times of the grand rebellion, all marriages were performed by the justices of the peace; and those marriages were declared valid without any fresh solemnization, by 12 Car. 2. c. 33; 1 *Comm.* 440.

But under the 4 Geo. 4. c. 76. § 22, a marriage will be valid although celebrated by a person not in holy orders, provided one or both of the parties believed him to be a clergyman. See also 2 Hagg. 280, 288, from which it would appear that by the law of England, previous to the statutory enactments, a marriage by a person ostensibly in holy orders, and not known to the parties to be otherwise, was considered valid.

No marriage is voidable by the ecclesiastical law after the death of either of the parties, nor during their lives, unless for the canonical impediments of pre-contract (if that indeed still exists,) of consanguinity, and of affinity, or corporeal imbecility subsisting previous to the marriage. 1 *Comm.* 440.

By 4 Geo. 4. c. 91. marriages solemnized by any minister of the Church of England in the chapel or house of any British ambassador abroad, or in the chapel of any British factor abroad, or in the house of any British subject resident in such factory, or solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid as if solemnized within his majesty's dominions according to forms of law; but the act is not to affect any other marriages solemnized abroad.

Previous to this act the supposed privilege of ambassadors' chapels was considered to extend only to cases where both parties were subjects of the country of the ambassador. 1 Hagg. 136. But the enacting part of the above statute is applicable, whether the parties are or are not British subjects. Marriages in factories and ambassadors' chapels, not performed by cler-

gymen of the Church of England, are left in the same situation as before. See 4 *Geo.* 4. c. 67. as to marriages solemnized at St. Petersburg.

British subjects residing in British settlements abroad, are governed by the laws of England, except where alterations have been introduced by express enactment: consequently their marriages beyond the seas is the same as before the 26 *Geo.* 2. c. 33.

By the 58 *Geo.* 3. c. 84. marriages solemnized in the British territories in India, by ministers of the Church of Scotland, are declared equally valid with those solemnized by clergy of the Church of England.

By the 3 & 4 *Wm.* 4. c. 45. marriages of parties, subjects, or one of them a subject of this realm, which have been solemnized at Hamburg since the abolition of the British factory there, by the chaplain appointed by the Bishop of London, or by any ministers of the Church of England officiating instead of such chaplain in the episcopal chapel of the said city, or in any other place, before witnesses, according to the rites of the Church of England, are declared valid. The act is merely retrospective, and contains no provisions for future marriages at that place.

The law regulating marriages in Ireland, with certain exceptions introduced by several statutes hereafter noticed, is the same as that which prevailed in England previous to the passing of the 26 *Geo.* 2. c. 33.

By the 9 *Geo.* 2. c. 11. marriages or matrimonial contracts of minors, entered into without due consent, may be annulled by the ecclesiastical courts in any case where either of the parties is entitled to real estate of 100*l.* per annum, or to personal estate worth 500*l.*; or where the father or mother of the minor is in possession of real estate of 100*l.* per annum, or of personal estate worth 2000*l.*

The 19 *Geo.* 2. c. 13. declares null marriages performed by Popish priests, if the parties, or either of them, be Protestant.

A marriage, however, solemnized by a Roman Catholic priest, is valid in Ireland, if both parties be Roman Catholic. See 2 *Addams*, 471.

By the 58 *Geo.* 3. c. 33. the provision in the 26 *Geo.* 2. c. 33. (repeated in the 4 *Geo.* 4. c. 76) prohibiting suits in the ecclesiastical courts to compel the celebration of marriages by reason of any contracts, was extended to Ireland.

By the 3 & 4 *Wm.* 4. c. 102. so much of several Irish acts as made it felony for Roman Catholic Clergymen to celebrate marriages between Protestants, or between a Protestant and a Roman Catholic, or as subjected them to a penalty of 500*l.* for marrying such parties, unless first married by a Protestant clergyman, was repealed. By § 3. the act is not to give validity to any marriage ceremony in Ireland, not now valid, or to repeal any enactments in force for preventing the performance of the marriage ceremony by degraded clergymen.

See the Irish statutes 11 *Geo.* 2. c. 10. § 3. and 21 & 22 *Geo.* 3. c. 25. relating to matri-

monial contracts by Protestant dissenters, entered into in their own congregations.

In Scotland (although clandestine marriages made without due publication of banns, are punishable by act 1661, c. 34. by banishment of the clergyman, and fine and imprisonment of the parties,) yet consent and *copulatio*, or cohabitation united, constitute a valid marriage without any ceremony. In no case is the consent of parents or guardians required. The evidence of consent admitted is very general, such as an acknowledgment to the clergyman christening a child, or the like. By the act 1503, c. 77. where parties have lived together at bed and board, the reputed wife is entitled to her terce or dower.

The subject of the Scotch law of marriage was fully discussed and investigated in the celebrated case of *Dalrymple v. Dalrymple*, in which the evidence of many learned Scotch lawyers was produced before the court; and Sir *William Scott*, in a profound and luminous judgment, stated the law on the subject as applicable to the facts of the case. He said that the rule of the Scotch law was, that a contract of marriage *per verba de presenti* did not require consummation in order to become "very matrimony," and therefore that the marriage in that case was good, although personal intercourse was unproved; but that assuming the law to be otherwise, and that the *copula* was necessary to render a contract *per verba de presenti* a marriage, he still thought that fact established by the evidence, and that in this view of the case, according to the current of all legal authorities, the marriage was undoubtedly valid. This judgment was affirmed on appeal by the Court of Delegates. See 2 *Hagg. C. R.* 59.

Scotland being expressly excepted out of the marriage acts, so much of them as is calculated to defeat the marriages of minors without the consent of parents or guardians, has been frequently evaded, by going into Scotland to be married there, and returning to England immediately afterwards. Indeed the validity of such marriages was once questioned; and though, in general, marriages are governed by the laws of the country in which they are celebrated, yet it was doubted whether the *lex loci* ought to be applied to a case, accompanied with circumstances so strongly marking the intent to evade the law of England. See the observations of Lord *Mansfield* on this subject, 2 *Burr.* 1079. But in *Bull. N. P.* 113. there is a short note of a case, wherein this point was afterwards determined, upon an appeal to the Delegates, viz. *Crompton v. Bearcroft*, Dec. 1, 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good. See this case stated 2 *Hagg. C. R.* 444. And the same was decided in Chancery, on certificates of Scotch law, in *Grierson v. Grierson*, *Lib. Reg. A.* 1780. *F.* 552; Sir *W. Scott's* judg-

ment in *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 99. If Gretna Green marriages were invalid according to English law, and depended for validity solely on the Scotch law, there would seem ground to doubt the soundness of the decisions holding them valid; for it is apprehended, that when parties merely pass into Scotland to make the contract of marriage, and immediately return to England, the law of England properly governs the contract, according to Lord Mansfield's observations in *Robinson v. Bland*, *supra*, and according to the rational principles laid down by Huber, *de conf. Legum*, l. 1 tit. 3. s. 10. "*Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit homines in Frisia, indigenas; aut incolas ducere uxoris in Hollandia, quas inde statim in Frisiam deducunt. Jus Frisiae in hoc casu est jus loci contractus.*" And see another passage to the same effect, *ibid* p. 538, and 1 *Ld* 79 a. note 1; and 2 *Adams* R. 23. But by the law of England, unaffected by the Marriage Act, a marriage in the form used at Gretna Green is a good marriage, and the provisions of the Marriage Act cannot affect such marriage, since they are expressly confined to England; and this according to Sir *Geor* 1 *III* was the ground of decision in *Cronin v. Barrington*, in which nothing appears to have been laid before the court to show that the marriage was valid in Scotland. *Vol* 2 Hagg. C. R. 430. Sir W. Wylde, however (2 Hagg. 413) states that the case was determined by the Delegates on the ground that the marriage was good by the law of Scotland. In *Hartley v. Hartley*, 2 H. Bl. a marriage celebrated in Scotland was held to entitle the woman to dower in England. This was not the case of a marriage by parties going to Scotland to evade the English law. However, the objection to the validity of marriages celebrated according to the laws of a foreign state, to which parties have resorted to avoid the restrictions existing in their own country, has not prevailed either with respect to marriages in Scotland, or in other places out of England (2 Hagg. 423); and there does not appear to be any exception to the rule "that a foreign marriage valid according to the law of the place where celebrated, is good every where else." 2 Hagg. 390.

By the 4 & 5 Wm. 4. c. 28 so much of two acts passed in the parliament of Scotland (1 *Parl. Car.* 2. sess. 1. c. 34. an. 1661; 1 *Parl. Wm.* sess. 7. c. 6. an. 1698,) as prohibited the celebration of marriages in Scotland by Roman Catholic priests in Scotland, is repealed.

§ 2 enacts, that persons in Scotland, after due proclamation of banns there, may be married by priests or ministers not of the established church of Scotland.

*Of the Effect of Marriage by operation of law, &c.*—With respect to the interest which the husband takes in the real and personal estates of the wife, see *Baron and Feme*, IV.

The wife doth partake of the name, so of

the nature and condition of the husband by the marriage; for if she be an earl's wife, she is a countess; if a knight's wife, a lady; and if he be an alien and made a denizen, the wife is so likewise. 39 H. 6. 45; 4 H. 7. 31; *Bro.* 199.

Matrimonial causes, or injuries respecting the rights of marriage, are one branch of the ecclesiastical jurisdiction; though if marriages are considered in the light of a mere civil contract, they do not seem to be very properly of spiritual cognizance. This, however, was effected by the usurpation of the church under the Catholic system; and causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases; as, if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue, who cannot so well defend the marriage as the parties themselves, when both of them living, might have done.

Of matrimonial causes one of the first and principal is, *causa facilitationis matrimonii*; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may arise. On this ground the party injured may sue the other in the spiritual court, and unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence on that head; which is the only remedy ecclesiastical courts can give for this injury. Another species of matrimonial causes was when a party, contracted to another, brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the marriage act above stated. The suit for restitution of conjugal rights is also another species of matrimonial causes; which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it contrary to the inclination of the other. See 3 *Comm.* c. 7. p. 93, 94. Divorces and suits for alimony are also subjects of ecclesiastical jurisdiction, as to which see *Baron and Feme*, II.; *Divorce*.

The temporal courts by the 28 Hen. 8. c. 7. are to determine what marriages are within or without the Levitical degrees; and prohibit the spiritual courts if they impeach any persons from marrying within these degrees. And it is said, were it not for that statute, we should be under no obligation to observe the Levitical degrees. *Vaugh.* 206; 2 *Vent.* 9.

Although matrimonial causes have been for a long time determinable in the ecclesiastical courts, they were not so from the beginning; for as well causes of matrimony as testamentary were civil causes, and appertained to the jurisdiction of the civil magistrate, until kings al-



lowed the clergy cognizance of them. *Davie's Rep.* 51. If persons married are *infra annos nubiles*, the ecclesiastical judges are to judge as well of the assent, whether sufficient, &c. as of the first contract; and where they have cognizance the common law judges ought to give credit to their sentences, as they do to our judgments. *7 Rep.* 23. See the *Duchess of Kingston's Ca.* 11 *St. Tr.* 198.

Loyalty or lawfulness of marriage is always to be tried by the bishop's certificate; or inquisition taken before him, on examining of witnesses, &c. *Dyer*, 303. If the right of marriage comes naturally in question, as in dower, &c. the lawfulness of marriage is to be tried by the bishop's certificate; but in a personal action, where the right of marriage is not in question, it is triable by a jury at common law. *1 Lev.* 41. Whether a woman is married, or she is the wife of such a person, is triable by a jury; and in personal actions it is right to lay the matter upon the fact of the marriage, to make it issuable and triable by a jury, and not upon the right of the marriage, as in real actions and appeals. *1 Inst.* 112; *3 Salk.* 64. If the marriage of the husband is in question, marriage in right ought to be, and that shall be tried by certificate. *1 Leon.* 53. But if on covenant to do such a thing to another upon the marriage of a man's daughter, the party alleges that he did marry her, &c. this shall be tried *per pais*; for the marriage is only in issue, and not whether he was lawfully espoused. *Cro. Car.* 102.

Conditions against marrying generally are void in law; and if a condition is annexed to a legacy, as where money is given to a woman, on condition that she marries with consent of such a person, &c. such a condition is void by the ecclesiastical law, because the marriage ought to be free without coercion; yet it is said it is not so at the common law. *2 Nels. Abr.* 1162; *Poph.* 58, 59; *2 Litt.* 192. See *Condition, Legacy*.

There being divers advantages by marriage to the man and the woman; therefore, on promise of marriage, damages may be recovered, if either party refuse to marry; but the promise must be mutual on both sides, to ground the action. *1 Salk.* 24. And if there be reciprocal promises of marriage, as the woman's promise to the man is a good consideration to make his obligatory; so his promise to her is a sufficient consideration to make hers binding; and though no time for marriage be agreed on, if the plaintiff prove tender, and offer to marry defendant, and refusal by defendant, or if defendant marry another, whereby performance of the promise is, in law, rendered impossible, action lies, and damages are recoverable. *Carthew*, 467. These promises are not affected by the provisions of the Marriage Act, as relate to actions brought for their non-performance.

If a man and a woman make mutual promises of intermarriage, and the man gives the woman 100*l.* which she accepts in satisfaction of his promise of marriage, it is a good discharge of the contract, *Mod. Cas.* 156. By

the Statute of Frauds, *29 Car. 2. c. 3.* no action shall be brought upon any agreement on consideration of marriage, except it be put in writing, and signed by the party to be charged, &c. And where an agreement relating to marriage must be in writing after a year, and when it need not, *vide Skinn.* 353. Observe the words, they are upon an agreement on consideration of marriage, which is essentially different from mutual promises of the parties to marry each other. And which latter are not within the statute. See *Assumpsit*, II.

An administrator cannot maintain an action for a breach of promise of marriage to the intestate, where no special damage is alleged. *2 Mau. & Slew.* 408.

An ancient statute, *31 Hen. 6. c. 9.* still appears on our statute books to invalidate bonds and securities taken from women under duress of imprisonment by threats of forcible marriage, &c.

Contracts and bonds for money to procure marriage between others are usually called marriage-brocage agreements or bonds. Concerning these see the *Treatise of Equity* (8vo.) p. 219 - 251.

Wherever a parent or guardian insist upon a private gain or security for it, and obtain it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be made use of to such purposes. And it is now a settled rule that if the father, on the marriage of his son, takes a bond of the son to pay him so much, &c. it is void, being done by coercion while he is under the awe of his father. Nor will the court only decree a marriage-brocage bond to be delivered up, but also a gratuity actually paid to be refunded (*2 Vern.* 292); for such bond or contract is in no case to be countenanced. A bond to procure marriage, though between persons of equal rank and fortune, is void as being of dangerous consequence. See *3 Lev.* 41; *1 Salk.* 156.

From the case of *Grisley v. Lother*, *Hob.* 10. it should seem that though the procuring of a marriage is not a consideration in equity, it is a sufficient consideration in law, and of that opinion *Holt C. J.* appears to have been in *Hale v. Potter*, *3 Lev.* 411; and the circumstance of the bond in that case having been ultimately cancelled by a decree of the House of Lords, does not affect the rule of law; as that decision was upon an appeal from the decree in equity which had declared the bond to be good; as courts of equity do not in such cases interpose for the benefit of the party, so much as on considerations of public policy. See *Law v. Law*, *Forrest.* 142; but query whether the vice of such consideration could now be pleaded at law. *2 Wils.* 247, *Collins v. Blantern*.

That equity will relieve against bonds to strangers, for procuring of marriage, see *1 Chan. Rep.* 47; *3 Ch. Rep.* 18; *2 Ch. Ca.* 176; *1 Vern.* 412; *1 Vez.* 503; *3 Atk.* 566; and as these contracts are avoided on reasons of public inconvenience, the Court of Exchequer, in *Shirley v. Martin*, *14 Nov.* 1779, held that they would not admit of subsequent con-

firmation by the party. See also *Booth v. Warrington*, (E) *Cases in Parl* 8vo. *Fraud* Ca. 6

An obligation procured from an infant by the father of his intended wife, in fraud of marriage articles agreed to by the infant and his friends, is absolutely void. *Morison v. Arbuthnot* (Ld.), *Parl. Ca.* 8vo. viii. pa. 247. *Appendix*, II. Ca. 1.

If a man before marriage gives bond and judgment to the wife, to leave her worth 1000*l.* at his death, in consideration of a marriage portion, this shall be made good out of the husband's estate, and satisfied before any debts; provided a judgment be not obtained against him with her consent. An intended husband, in consideration of a marriage, covenanted with the intended wife, that if she would marry him, and she should happen to survive him, he would leave her worth 500*l.* The marriage took effect, and the wife survived, and he did not leave her worth that money; she married a second husband, and he brought an action of debt against the administrator of the first husband for the 500*l.* To which it was objected, that this being a personal action, it was suspended by the marriage which was a release in law, and so extinct; but the plaintiff had judgment, for the action is not suspended, because during the coverture there was no action; nothing in this case is due whilst the coverture takes place, and the debt arises by the death of the husband. *Palm.* 99; 2 *Sid.* 58.

A bond was given by a man, reciting, he was to marry A. S. and that if the marriage took effect, and he did survive her, then, within three months after her decease, he would pay to the obligee 300*l.* for such uses as the said A. S. by any writing under her hand and seal, subscribed and published in the presence of two witnesses, should direct and appoint; this marriage bond was adjudged good. 3 *Cro.* 376; *Yelv.* 226, 227.

In case articles are entered into before marriage, and afterwards a settlement is made different therefrom, the Court of Chancery will set up the articles against it; but where both are finished before the marriage had, at a time when all parties are at liberty, such settlement will be taken as a new agreement between them; this is the general rule, unless the deed of settlement is expressly mentioned to be made in pursuance of the marriage articles, &c. whereby the intent may still appear to be the same. *Talb.* 20. Articles of marriage were made for settling lands on the husband and wife, and the heirs male and female of the body of the husband by the wife, &c. and a settlement was drawn contrary to these articles, long after which the husband suffered a recovery, and devised the land to others; it was here held to be no bar to the heirs female, who were decreed to have the land. 2 *P. Williams*, 349, 355. Yet it is said, where relief is to be given in equity on a settlement, it must be only to the persons who claim as purchasers, as the first and other sons and all remainders after to the husband's heirs of his body, or his right

heirs, are voluntary, and not to be aided. *Abr. Cas. Eq.* 385

Though a term to raise daughters' portions, payable at the age of eighteen, or day of marriage, in a marriage settlement, is limited in remainder, to commence after the death of the father generally; or if it be in case he die without issue male of his wife, and she dies first without such issue, leaving a daughter, &c. In equity the term is saleable during the lifetime of the father, when the daughter is eighteen years old or married; because every thing hath happened and is past which is contingent, for it is impossible there should be issue made of the wife when she is dead; and as to the father's death that is not contingent, but certain, by reason, all men must die; but if there is a contingency not yet happened, as if the daughters are to be unmarried, or not provided for at the time of the father's death, &c. it is otherwise. 1 *Salk.* 159.

Upon marriages, the settlements generally made of the estate of the husband, &c. are to the husband for life, after his death to the wife for life for her jointure, and to their issue in remainder, with limitations to trustees to support contingent uses, leases to trustees for terms of years, to raise daughters' portions, &c. And they are made several ways, by lease and release, covenant to stand seised to uses, &c.

These settlements the law is ever careful to preserve, especially that part of them which relates to the wife, of which she may not be divested, but by her own fine, (but now she must convey by deed properly acknowledged, see *Feme*); and if a woman about to marry, to prevent her husband's disposal of her land, conveys it to friends in trust, and they with the husband, after marriage, make sale of the same, the Court of Chancery will decree the purchaser to reconvey to her. *Tothil.* 43.

Where a woman on marriage, by the man's consent, makes over her estate, to be at her own disposal, the product or increase thereof she can also dispose of; and if the wife has a separate maintenance settled on her by the husband, she may, by writing in the nature of a will, give away what she saves, if she dies before the husband; and shall have the same herself, in case she outlives him, and it shall not be liable to his debts. *Preced. Canc.* 255, 44. But where a settlement is made on the wife, in consideration of her whole fortune and equivalent to it; here the wife's portion, though it be out on bonds, &c. which upon the death of the husband by law survives to the wife, shall in equity be subject to the husband's bond-debts, after his decease, to ease the real estate of the heir. *Ibid.* 63. And it has been likewise held, that if after the wife's death, debts of her's appear, the husband shall be answerable for the debts of the wife, so far as he had any money or estate of hers. *Ibid.* 252.

If a man in mean circumstances marry a woman of fortune, upon suggestion and proof of lunacy in the wife by her friends, the court will order her estate to be so settled, that she may not be wrought on by her husband to give

it to him from her children, by him or any other husband, &c. *Skinn.* 110.

As to the forcible carrying off and marrying of women for the sake of their fortunes, see *Abduction*. See further *Baron and Feme*, *Chancery*, *Bankrupt*, *Dower*, *Jointure*, &c.

**MARROW.** Was a lawyer of great account in Henry VIIIth's days, whose learned readings are extant, but not in print. *Lamb. Eirenarch*, lib. 1. cap. 10.

**MARSHAL**, *Marescallus*, Fr. *Mareschal*.] It seems to signify as much as *tribunus militum*, with the ancient Romans; it has also been derived from the German *marshalk*, i. e. *equitum magister*, which *Hotoman* in his *Feuds*, under *verb. marchalcus*, derives from the old word *march*, which signifies a horse; others make it of the Sax. *mar*, i. e. *equus*, et *scalch*, *prefectus*.

With us there are several officers of this name; the chief whereof is the earl marshal of England, mentioned in 1 *Hen.* 4. c. 24; 8 *Rich.* 2. c. 5; 12 *Rich.* 2. st. 1. c. 2. &c. whose office consists especially in matter of war and arms, as well in this kingdom as in other countries. This office is very ancient, having formerly greater power annexed to it than now; it has been long hereditary in the family of the Duke of Norfolk. *Vide Lupanus de Magistratibus Franciæ*, lib. 1. c. *Marishallus*; and *Tilius*, lib. 2. c. *De Constabili Mariscallo*, &c.; see also *tits. Constable*, *Court of Chivalry*, *Court Martial*.

The next is the marshal of the king's house, otherwise called knight marshal; his authority is exercised in the king's palace, in hearing and determining all pleas of the crown, and suits between those of the king's house and other persons within the verge, and punishing faults committed there, &c. See 28 *Edw.* 1. st. 3. c. 3; 18 *Edw.* 3. c. 7; 27 *Edw.* 3. st. 2. c. 6; 8 *Rich.* 2. c. 5; 2 *Hen.* 4. c. 13; *Crompt. Jurisd.* 192.

*Fleta* mentions a marshal of the king's hall, to whom it belongs, when the tables are prepared, to call out those of the household and strangers, according to their rank and quality, and properly place them. *Fleta*, lib. 2. cap.

There are other inferior officers called marshals, as marshal of the justice in Eyre, anno 13 *Edw.* 1. c. 19.

**MARSHAL OF THE KING'S BENCH.** See 5 *Edw.* 3. cap. 8. who hath the custody of the King's Bench prison in Southwark. This officer gives attendance upon the court, and takes into his custody all prisoners committed by the court; he is fineable for his absence: and non-attendance is a forfeiture of his office *Hil.* 21 & 22 *Car.* 2. By 8 & 9 *Will.* 3. c. 27. grants of the King's Bench and Fleet prisons are to be inrolled; and the office of marshal and warden of the King's Bench and Fleet, is to be executed by those who have the inheritance of those prisons. The power of appointing the marshal of the King's Bench, which had been granted in fee by King James I. was revested in the crown by 27 *Geo.* 2. c. 17. and the office

subjected to the control of the Court of King's Bench.

There is a deputy marshal of the King's Bench appointed by the marshal, who must reside within the prison or its rules, (4 *T. R.* 716; 5 *T. R.* 511); as indeed ought also the marshal by R. M. 2 *Geo.* 4. and according to the fifth section of the above act and his patent.

There is also a marshal of the Exchequer, to whom that court commits the custody of the king's debtors for securing the debts; he likewise formerly assigned to sheriffs, customers, and collectors, their auditors, before whom they should account. 51 *Hen.* 3. st. 5.

There is likewise a marshal or provost marshal of the admiralty, whose duty it is to act ministerially, under the orders of the Court of Admiralty in securing prizes, executing warrants for these and other purposes, arresting and attending the execution of criminals, &c. See 45 *Geo.* 3. c. 72. § 117; and other *Prize Acts*.

**MARSHAL AND STEWARD OF THE KING'S HOUSEHOLD AND MARSHALSEA.** Of what things they should hold plea. *Art. super Cartas*, 28 *Edw.* 1. st. 3. c. 3; 8 *Rich.* 2. c. 5.

**MARSHALSEA**, *Marescallia*.] The court or seat of the marshal; of whom see *Crompt. Jur.* 120. It is also used for the prison in Southwark; the reason whereof may be, because the marshal of the king's house was wont perhaps to sit there in judgment, or keep his prison. See 9 *Rich.* 2. c. 5; 2 *Hen.* 4. c. 23. King Charles the First erected a court by letters patent under the great seal, by the name of *curia hospitii domini regis*, &c. which takes cognizance more at large of all causes than the Marshalsea could; of which the knight marshal or his deputy are judges. *Cowell*. See *Court of Marshalsea*, *King's Bench Prison*.

**MART.** A great fair for buying and selling goods, holden every year. 2 *Inst.* 221. See *Fair*, *Market*.

**MARTIAL LAW.** The law of war, that depends upon the just but arbitrary power and pleasure of the king, or his lieutenant; for though the king doth not make any laws but by common consent in parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power, so that his word is a law. *Smith de Repub. Angl.* lib. 2. c. 4. This power, however, is now regulated by act of parliament. See *Court Martial*.

**MARTYROLOGY**, *Martyrologium*.] A book of martyrs, containing the lives, &c. of those men who died for their religion. Also a calendar or register kept in religious houses, wherein were set down the names and donations of their benefactors, and the days of their death, that upon every anniversary they might commemorate and pray for them: such benefactors usually made it a condition of their benefice to be inserted in the martyrology. *Paroch. Antiq.* 189.

**MASAGIUM.** Anciently used for *messuagium*, a messuage. *Pat.* 16 *Rich.* 2.



**MASKS.** The penalty of selling or keeping visor masks, see the ancient stat. 3 Hen. 3. c. 9.

**MASONS.** To plot confederacies amongst masons, was, by an obsolete stat. 3 Hen. 6. c. 1. declared felony. *Vide tit. Conspiracy.*

**MASS-PRIEST.** In former times secular priests, to distinguish them from the regulars, were called mass-priests, and they were to officiate at the mass, or in the ordinary service of the church; hence *messe preost*, in many of our Saxon canons, for the parochial minister; who was likewise sometimes called *messe thegne*, because the dignity of a priest in many cases was thought equal to that of a *thein*, or lay lord. But afterwards the word mass-priest was restrained to stipendiaries retained in chantries, or at particular altars, to say many masses for the souls of the dead.

**MAST, Glans Personæ.]** The acorns and nuts of the oak, or other large tree.—*Glandi, nomine continentur glans, castanea, fagina, ficus et nuxes, et alia queque quæ edi et pasci poterunt præter herbam. Bract. lib. 4. Tempus personæ* often occurs for mast-time, or the season when mast is ripe; which in Norfolk they call shacking-time.—*Quod habeat decem porcos in tempore de person in bosco meo. Mon. Angl. ii. 113, 231.*

**MASTER, Magister.]** Signifies in general a governor, teacher, &c. and also in many cases an officer. See *Servant*.

**MASTER AND SERVANT.** The relation between a master and a servant, from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were, allegiance on the other, is in many instances applicable to other relations, which are in a superior and a subordinate degree; such as lord and bailiff, principal and attorney, owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders, from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. See *Apprentice, Labourer, Servant*.

**MASTER OF THE ARMORY, Magister Armorum et Armaturæ Regis.]** An officer who hath the care of his majesty's arms and armory, mentioned in the ancient stat. 39 Eliz. c. 7.

**MASTER OF THE CEREMONIES, Magister Admissionum.]** One who receives and conducts ambassadors and other great persons to audience of the king, &c. This office was instituted by King James I. for the more magnificent reception of ambassadors and strangers of the greatest quality.

**MASTER OF, OR IN CHANCERY, Magister Cancellariæ.]** In the chancery there are masters, who are assistants to the lord chancellor or lord keeper, and master of the rolls; of these there are some ordinary, and some extraordinary. The masters in ordinary are twelve in number, of whom the master of the rolls is chief; and some sit in court every day during term, and have referred to them interlocutory orders for stating accounts, compu-

ting damages, and the like; they also administer oaths, take affidavits, and acknowledgments of deeds and recognizances; they also examine on reference the propriety of bills in chancery, which if they report to be scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs. The extraordinary masters are appointed to act in the country, in the several counties of England, beyond twenty miles' distance from London, by taking affidavits, recognizances, acknowledgments of deeds, &c. for the ease of the suitors of the court.

The masters in ordinary have also the custody of such title deeds and original instruments as the court thinks fit to place under their care, for the security and benefit of the parties interested therein.

They attend the lord chancellor and master of the rolls at the sitting of the court, according to an ascertained rotation, take their seats upon the bench and remain there until they are permitted to retire, which is usually soon after the sitting, that they may attend to the business of their respective offices.

In order to provide for the indisposition or unavoidable absence of the chancellor or the master of the rolls, there is a commission addressed to the then puisne judges and the then masters, authorizing any three of them, of whom a judge is to be one, to transact the business of the court. When the business of the court is despatched under the authority of this commission, it has been done by one judge and two masters, who sit with the judge, join in making the orders, and constitute a necessary part of the court.

Two masters attend the House of Peers every day it sits, and are employed by that House in carrying their messages to the House of Commons, except such as relate to the royal family, which are usually carried by the judges; such masters as are members of the House of Commons do not join in executing this duty. On the trial of a peer, or of any person impeached by the Commons, all the masters attend every day. The masters also attend coronations and processions of state.

By the 13 Car. 2. st. 1, in the Appendix, a public office was ordained to be kept near the rolls for the masters in chancery; in which they, or some of them, are constantly to attend for administering oaths, caption of deeds, and despatch of other business; and their fees for taking affidavits, acknowledgment of deeds, exemplifications, reports of certificates, &c. are ascertained by that act; and to take more incurs disability for such master to execute his office, and a forfeiture of 100*l.* &c.

The practice now is for one master to attend every day at the public office established by the above act. When any person is unable, from sickness or any other cause, to go to the public office, the master waits upon him at any distance not exceeding twenty miles from London.

By the 3 & 4 Wm. 4. c. 94. § 16, the appointment of all masters in ordinary of the

Court of Chancery, other than the accountant-general, is vested in the crown, and such masters are to be appointed by letters-patent under the great seal, and to take the usual oaths before the lord chancellor in like manner as such oaths have been heretofore administered.

The above act contains various provisions relating to the duties of the masters in chancery.

There are attached to each master's office two clerks, one is the chief clerk and the other a copying clerk.

By the 3 & 4 Wm. 4 c. 91 § 18 the chief clerk of any master must have been admitted on the roll of solicitors or attorneys in one of the courts of Westminster Hall five years, or have been a junior clerk in a master's office for ten years.

See further *Chancellor, Chancery*.

**MASTER OF THE COURT OF WARDS AND LIVERIES.** The chief officer of that court, assigned by the king; to whose custody the seal of the court was delivered, &c. as appears by the 33 Hen. 8. c. 33. But as this court was abolished by 12 Car. 2. c. 21 this office of course dropped with it.

**MASTER OF THE FACULTIES,** *Magister facultatum.* An officer under the Archbishop of Canterbury, who grants licenses and dispensations, &c.

**MASTER OF THE HORSE.** He who hath the ordering and government of the king's stables; and of all horses racers, and breeds of horses belonging to his majesty; he has the charge of all revenues appropriated for defraying the expense of the king's breed of horses, of the stable, litters, sumpter-horses, coaches, &c. and has power over the equestrics and pages, grooms, coachmen, farriers, smiths saddlers, and all other artificers working for the king's stables to whom he administers an oath to be true and faithful; but the accounts of the stables, of liverys, wages &c. are kept by the averner; and by him brought to be passed and allowed by the court of green cloth.

The office of master of the horse is of high account, and always bestowed upon some great nobleman; and this officer only has the privilege of making use of any horses footmen or pages belonging to the king's stables at any solemn cavalcade he rides next to the king, with a led horse of state. He is the third great officer of the king's household, being next to the lord steward and lord chamberlain, and is mentioned in 39 Eliz. c. 7.

**MASTER OF THE JEWEL OFFICE.** An officer of the king's household having the charge of all plate used for the king or queen's table, or by any great officer at court: and also of the royal plate remaining in the Tower of London, and of chains and jewels not fixed to any garment. See 39 Eliz. c. 7.

**MASTER OF THE HOUSEHOLD,** *Magister Hospitalis Regis.* Otherwise called grand master of the king's household, now styled lord steward of the household, which title this officer hath borne ever since ann. 32 H. 8. But under him there is a principal offi-

cer still called master of the household, who surveys the accounts, and has great authority.

**MASTER OF THE KING'S MUSTERS.** A martial officer in the king's armies to see that the forces are complete, well-armed, and trained, and to prevent frauds, which would otherwise waste the prince's treasure, and weaken the forces, &c.

**MASTER OF THE MINT.** An officer who receives the silver of the goldsmiths, and pays them for it, and oversees every thing belonging to the mint; he is at this day called warden of the mint. See further *Mint*.

**MASTER OF THE ORDINANCE.** A great officer to whose care all the king's ordinance and artillery is committed. See 39 Eliz. c. 7.

**MASTER OF THE POSTS.** Was an officer of the king's court, who had the appointing, placing, and displacing of all such thorough England as provided post-horses for the speedy passing of the king's messages, letters, packets, and other business; and was to see that they kept a certain number of good horses of their own, upon occasion that they provided others for furnishing those persons who had a warrant from him to take and use post horses, either from or to the seas, or other places within the realm; he likewise paid their wages, settled their allowances, &c. See 2 Eliz. 6 c. 3.

This office is now superseded by the establishment of a regular Post office; see that title.

**MASTER OF THE REVELS.** An officer to regulate the diversions of dancing and masking, used in the palaces of the king, mns of courts &c. and in the king's court, is under the lord chamberlain. His power is very much abridged since the time of Charles II. when patents were granted for public theatres in London, &c.

**MASTER OF THE ROLLS,** *Magister Rotulorum.* An assistant to the lord chancellor in the high court of chancery, who, in his absence, hears causes there, and also at the chapel of the rolls, and makes orders and decrees. *Cromp. Jurisd.* 41. His title in his patent is, *Clericus parvus, Custos Rotulorum, &c.* And he has the keeping of the rolls of all patents and grants which pass the great seal, and the records of the chancery. He is called clerk of the rolls, 12 Rich. 2 c. 2, and in *Fortescue*, c. 24, and nowhere master of the rolls, until the 11 Hen. 7 c. 18. In which respect, Sir Thomas Smith says, he may not unfitly be styled *Custos Archivorum*. In his disposition are the offices of the six clerks, and the clerks of the petty bag, examiners of the court, and clerks of the chapel.

The office of the master of the rolls is as ancient as the court itself. 2 Con. Dig. 208.

Unlike that of the vice chancellor it partakes in its nature of a distinct jurisdiction, and the suitor may elect whether he will have his cause heard and decided before the lord chancellor or the master of the rolls.

The master of the rolls hears and makes de-

decrees and orders in all causes and matters belonging to the jurisdiction of the court of chancery, which the suitors think proper to bring before him, with the exception (specified in the 3 *Geo.* 2. c. 30.) of "orders and decrees of such nature and kind as, according to the course of the said court, ought only to be made by the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being."

Previous to the 4 & 5 *Wm.* 4. c. 94. the master of the rolls did not hear motions, pleas, or demurrers in his court, and whatever was presented for his decision other than the hearing of causes, was brought before him by petition. Now by § 24 of that statute, he is required "to hear and determine all such motions arising in causes depending in the high court of chancery, as shall be duly made before him according to the usage and practice of making motions in causes before the lord chancellor, and to hear and determine all such pleas and demurrers filed in causes depending in the high court of chancery as shall be duly set down for hearing before him." All orders so made are declared valid, subject nevertheless to be discharged, reversed, or altered by the lord chancellor.

By the 1 *Geo.* 4. c. 107. the rents, issues, and profits of the Rolls' estate (see 12 *Car.* 2. c. 26; 3 *Geo.* 2. c. 33.) are granted to the master of the rolls for the time being, and the dividends of 4031l. 4s. 4d., (remaining as a fund for repairing the above estate,) are directed to be paid to him by the accountant-general as they accrue, subject nevertheless to any order of the court. See further *Chancery*.

**MASTER OF A SHIP.** See *Insurance*.

**MASTER OF THE TEMPLE.** The founder of the order of knight templars, and his successors, were called *Magni Templi Magistri*; and probably from hence he was the spiritual guide and director of the Temple. The master of the Temple here was summoned to parliament *anno* 49 *Hen.* 3. The chief minister of the Temple church in London is now called master of the Temple. *Dugd. War.* 706.

**MASTER OF THE WARDROBE,** *Magister Garderobe*.] A considerable officer at court, who has the charge and custody of all former kings' and queens' ancient robes remaining in the Tower of London; and all hangings, bedding, &c. for the king's houses; he hath also the charge and delivery out of all velvet or scarlet cloth allowed for liveries, &c. Of this officer mention is made in 39 *Eliz.* c. 7. The lord chamberlain has the oversight of the officers of the wardrobe.

**MASTIVUS.** A great dog; a mastiff. *Knight, lib.* 2. c. 15.

**MASURA.** An old decayed house. *Domesd.*

**MASURA TERRÆ,** *Fr. mesure de terre*.] A quantity of ground, containing about four oxgangs. *Domicilium cum fundo*; or *fundus cum domicilio competentis*. See *Domesday*.

**MATRICULA.** A register; as in the ancient church there was *matricula clericorum*, which was a catalogue of the officiating clergy; and *matricula pauperum*, a list of the poor to be relieved; hence to be entered in the register of the universities, is to be matriculated, &c.

**MATRIMONIAL CAUSES.** Or injuries respecting the rights of marriage, are a branch of the ecclesiastical jurisdiction. See *Marriage*.

**MATRIMONIUM.** Is sometimes taken for the inheritance descending to a man *ex parti matris*. *Blount*.

**MATRIX ECCLESIA.** The mother church; and is either a cathedral, in respect of the parochial churches within the same diocese; or a parochial church, with respect to the chapels depending on it, and to which the people resort for sacraments and burials. *Leg. H.* 1 c. 19.

**MATRONS, Jury of.** When a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended, then upon the writ *de ventre inspiciendo*, a jury of women is to be impannelled to try the question, whether with child or not. *Cro. Eliz.* 566. So if a woman is convicted of a capital offence, and being condemned to suffer death, pleads in stay of execution, that she is pregnant, a jury of matrons is impannelled to inquire into the truth of the allegation; and if they find it true, the convict is respited until after her delivery. See *Ventre inspiciendo, Execution of Criminals*.

**MATTER IN DEED, AND MATTER OF RECORD.** Are often mentioned in law proceedings, and differ thus: the first seems to be nothing else but some truth or matter of fact to be proved by some specialty, and not by any record; and the latter is that which may be proved by some record. For example, if a man be sued to an exigent during the time he was abroad in the service of the king, &c. this is matter in deed, and he that will allege it for himself, must come before the *scire facias* for execution be awarded against him; but after that, nothing will serve but matter of record, that is, some error in the process appearing upon the record. There is also a difference between matter of record and matter in deed, and nude matter; the last being a naked allegation of a thing done, to be proved only by witnesses, and not either by record or specialty. *Old. Nat. Br.* 19; *Kitch.* 216.

**MAUGRE,** from the *Fr. mal* and *gre, i. e. animo iniquo*.] Signifies as much as to say with an unwilling mind, or in despite of another; as where it is said, that the wife shall be remitted, *maugre* the husband, that is, whether the husband will or not. *Lit.* § 672; see *Malo Grato*.

**MAUM.** A soft brittle stone in some parts of Oxfordshire; and in Northumberland they use the word *maum* for soft and mellow. *Plot's Nat. Hist. Oxfordsh.* p. 63.

**MAUND.** A kind of great basket or hamper, containing eight bales, or two fats; it is



commonly a quantity of eight bales of unbound books, each bale having one thousand pounds' weight. *Old Book of Rates*, p. 3.

**MAUNDY THURSDAY.** The Thursday before Easter. See *Mandati Dies*.

**MAUPIGYRNUM.** An old sort of broth or pottage. *Covent*.

**MAXIMS IN LAW** Positions and theses, being conclusions of reason, and universal propositions, so perfect, that they may not be impugned or disputed. *Covent; Co Lit.* 313.

A maxim in law is said to be a proposition of all men confessed and granted, without argument or discourse. Maxims of the law are holden for law; and all other cases that may be applied to them shall be taken for granted. 1 *Inst.* 11, 67; 4 *Rep.* See 1 *Comm.* c. 68.

A maxim is a sure foundation or ground of art, and a conclusion of reason; so called *quia maxima est ejus dignitas et certissima auctoritas, atque quid, maximè probetur*, so sure and uncontrollable as that it ought not to be questioned; and what is elsewhere called a principle, and is all one with a rule, a common ground, *postulatum* or *axiom.* *Co Lit.* 10. b; 11. a.

Maxims are the foundations of the law, and conclusions of reason; therefore ought not to be impugned, but always to be admitted; but they may by reason be conferred and compared the one with the other, though they do not vary; or it may be discussed by reason, which thing is nearest the maxim, and the mean between the maxims, and which is not; but the maxims can never be impeached or impugned, but ought always to be observed, and held as firm principles and authorities of themselves. *Plowd.* 27. b.

Maxims are principles and authorities, and part of the general customs of common law of the land; and are of the same strength as acts of parliament, when the judges have determined what is a maxim; which belongs to the judges, and not a jury. *Terms de Ley; Doct. & Stud. Dial.* 1. c. 8.

The alterations of any of the maxims of the common law are dangerous. 2 *Inst.* 210.

The maxims in our books, which are many and various, are such as the following, *viz.*, it is a maxim, that freehold land shall descend from the father to the eldest son, &c. It is a maxim, that as no estate can be vested in the king without matter of record, so none can be divested out of him but by matter of record; for things are dissolved as they are contracted. *Rep.* 1, *Cholmeys*' case. Another, that an obligation, or other matter in writing, cannot be discharged by an agreement by word. *Co Lit.* 141.

The maxim that allegiance is due more by reason of the crown than of the person of the king, condemned. *Exil. Hug. le Despenser*, 15 *Edw.* 2. st. 3.

It was also a maxim, that if a man have issue two sons by divers venters, and the one of them purchase lands in fee, and die without issue, the other brother shall never be his heir, &c.; but this is now altered. See *Descent*.

**MAYHEM.** See *Maihem*.

**MAYOR** *Præfectus urbis*, anciently *meyr*; comes from the Brit. *miret*, i. e. *custodire*; or from the old English word *maier*, *viz. potestas*; and not from the Lat. *major*.] The chief governor or magistrate of a city or town-corporate, as the mayor of London, the mayor of Southampton, &c. King Richard I. anno 1189, changed the bailiffs of London into a mayor; and from that example king John made the bailiff of King's Lynn a mayor, anno 1201. Though the famous city of Norwich obtained not this title for its chief magistrate, till the seventh year of king Henry V. anno 1419, since which there are few towns of note, but have had a mayor appointed for government. *Spelm. Gloss.*

Mayors of corporations are justices of the peace *pro tempore*, and they are mentioned in several statutes. By the 13 *Car.* 2. st. 1. c. 1. no person should bear any office or magistracy concerning the government of any town, corporation, &c. who had not received the sacrament according to the church of England within one year before his election, and who should not take the oaths of supremacy, &c. But by the 9 *Geo.* 4. c. 17. a declaration is now to be made in lieu of the sacramental test. See *Dis-senters, Oaths*.

If any one intrudes into, and thereupon executes, the office of mayor, a *quo warranto* information may be brought against him; and he shall be ousted and fined, &c. See *Quo Warranto*.

A distinction is made in cases relative to corporations between a mere usurper and an officer *de facto*, though not *de jure*. An usurper is a man who, without any colour of election, gets possession of the office, and acts in it; and the mere circumstance of being sworn into the office makes no difference; but to make an officer *de facto*, at least the form of an election is necessary, though on legal objections it may afterwards be overturned. Notwithstanding this distinction, however, if in point of form, it is doubtful whether there be any in the effect. Some acts, it is admitted, may be good if done by a mayor *de facto*, or under his authority; but it does not appear whether the same acts would be good if done by a mere usurper; some acts are certainly void if done by an usurper; and probably so, if done by a mayor *de facto*. Those acts which are good if done by a mayor *de facto*, or under his authority, are such as he may be compelled to do in favour of a person who has a precedent right to have done them. All voluntary acts not necessary to carry on the business of the corporation seem to be void, whether done by an usurper, or a mayor *de facto*, or under the authority of either; some necessary acts are also void in both cases. See *Andr.* 116, 117, 163, 388; *Hardw.* 147—152; *Lutw.* 519; 2 *Stra.* 1090, 1109; 5 *Burr.* 2601, and *Kyd's Law of Corporations*, c. 3. s. 7. But the above does not apply to acts in which strangers are interested. See *Kyd*.

Where an infant is actually mayor, or other

chief officer of a corporation, this shall not void the acts of the corporation with respect to strangers, because these acts are not the acts of the particular persons, but of the body-corporate. But it seems that where neither the provisions of the charter, nor the usage of the corporation, expressly authorize the election of an infant into this or any other corporate office, an infant is not capable of being elected; because, as Lord *Hardwicke* observed, "if an infant is not fit to manage for himself, he is improper to be a mayor for the public." See *Hardw.* 8; *Cowp.* 220.

The powers and duties of a mayor, or other head officer of a corporation, depend in general on the provisions of the charters, or prescriptive usage of the corporation, or the express provisions of an act of parliament. It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies; but whether in a corporation by charter this be necessarily incident to his office, where no express provision is made for that purpose, has been made a question, but never solemnly decided; and indeed all cases of such nature must chiefly depend on their own particular circumstances. See 3 *Mod.* 14; 2 *Ld. Raym.* 1237; 2 *Burr.* 370. In the case of a corporation by prescription, this question can hardly ever arise; because there must necessarily be some usage one way or the other, to show what is the power and duty of the mayor in this respect, in every such particular corporation, independently of any general principle. In every other respect it may be safely asserted, that the mayor as well as the aldermen, and other select bodies, have no other powers, authorities, or privileges, than those which they possess by charter, prescription, or act of parliament.

Where the mayor's presence is necessary at a corporate assembly, his departure before a business regularly begun be concluded, will not invalidate that particular business; but the assembly cannot proceed to any thing else. 1 *Barnard.* 385. And on the death of the mayor, or during the vacation of the office, the corporation can do no corporate act, but that of choosing a new mayor. 21 *Edw.* 4. 58. n.

The office of the mayor or other head officer is annual, and expires on the determination of the year next after the annual charter-day on which he ought to be elected. The effect of which is, that if a mayor be chosen but a few months before the charter-day, his office only endures for that interval; and though where a mayor is improperly removed, he may be restored at any time previous to the next charter-day, yet his office then ceases and is not prolonged by reason of his removal; and if he be not restored before such day he cannot be reinstated afterwards.

But by the provisions of some charters, the mayor or other chief officer is elected for a year, and till another be chosen, in which case, if no successor be chosen at the end of the year, the mayor of the preceding year is said to hold over. Where, however, a particular day is appointed for the election of a successor, which is

generally the case, and a power of holding over is not expressly given, it does not exist by implication. *Stra.* 394. And the preamble of the 11 *Geo.* 1. c. 4. (see *post.*) manifestly shows, that the legislature thought it was not implied; for it proceeds on the supposition, that, for want of an election of a new mayor on the charter-day, the corporation was dissolved; which could not have been the case if the mayor of the preceding year had a right of holding over.

Where there was a clause of holding over, it had become a practice with the mayor and other head officers of the corporations to avoid holding an election on the charter-day; by which means they continued in office for several years together. In order to put an end to this practice, the 9 *Ann.* c. 20. § 8. after reciting the inconvenience which had arisen from head officers of corporations, to whom it belonged to preside at the election, and make return of members to serve in parliament, being elected for two years successively, enacted, "that no person or persons who had been, or should be in such annual office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing; and that where any such annual officer or officers was or were to continue for a year, and until some other person or persons should be chosen and sworn into such office, if any such officer or officers should voluntarily and unlawfully obstruct and prevent the choosing of another person to succeed into such office, and the time appointed for making another choice, he should forfeit 100*l.*" See 8 *Mod.* 111, 127, 132.

By the 11 *Geo.* 1. c. 4. if no mayor or other chief officer be elected in a corporation on the day appointed by charter, by the proper officers, or such election being made, it shall afterwards become void; the next in place is to hold a court, and elect one the day following, &c. or, in default thereof, the Court of King's Bench may compel the electors to choose one, &c. by writ of mandamus, requiring the members, who have a right to vote, to assemble themselves on a day prefixed, and proceed to election, or show cause to the contrary; and mayors, &c. voluntarily absenting on the day of election, shall be imprisoned six months, and be disabled to hold any office in the corporation.

By the 3 & 4 *Will.* 4. c. 31. to avoid the profanation of the Lord's day, elections of officers of corporations and other public companies required to be held on that day, shall take place on the Saturday preceding or the Monday following. When the elections are not made on the Saturday, persons in office are to continue until the Monday.

By § 2. elections not held on the Saturday or Monday as above prescribed, or becoming void, are declared to be within the provisions of the 11 *Geo.* 1. See further *Mandamus, Quo Warranto.*

The authority of mayors, as to matters not relating to their corporation, extends (among others) to the following particulars.—The 2 *Edw.* 3. c. 3, gives power to mayors to arrest persons carrying offensive weapons in fairs,

markets, &c. to make affrays, and the disturbance of the peace.

Mayors, bailiffs, and lords of leets, are to regulate the assise of bread, and examine into the goodness thereof; and if bakers make unlawful bread, they may give it to the poor, and pillory (now abolished) the offenders, &c. 5 *Hen. 3. st. 6.* See *Bread, Beer.*

Head officers and justices of peace in corporations may inquire of forcible entries, commit the offenders, and cause the tenements to be seized, &c. within their franchises, in like manner as justices of peace in the county. 8 *Hen. 6. c. 9.* See *Forcible Entry, II.*

Mayors, &c. shall inquire into unlawful gaming, against the 33 *Hen. 8. c. 9.* They are to search places suspected to be gaming-houses, and levy penalties, &c. and they have power to commit persons playing at unlawful games. See *Gaming.*

Mayors, &c. are empowered to make inquiry into offences committed against 1 *Eliz. c. 2.*, which requires that the common prayer be read in churches; and that the church wardens do their duty in presenting the names of such persons as absent themselves from church on Sunday, &c.

Horses stolen, found in a corporation, may be redeemed by the owner making proof before the head officer of the corporation of the property, &c. 31 *Eliz. c. 12.* See *Horses.*

Mayors may determine whether coin offered in payment be counterfeited or not; and tender an oath to determine any question relating to it. 9 & 10 *Wm. 3. c. 21.*

Under various statutes, mayor and head officers of corporations are to punish drunkenness. See *Drunkenness.*

Mayors, &c. on receipt of precepts from sheriffs, (when writs are issued for elections,) requiring them to choose burgesses or members of parliament, by the citizens, &c. are to proceed to election, and make returns by indenture between them and the electors; and making a false return shall forfeit 40*l.* to the king, and the like sum to the party chosen, not returned, &c. 23 *Hen. 6. c. 14.* See 2 *Geo. 2. c. 24.* and tit. *Parliament.*

In time of sickness, a tax may be laid on inhabitants of corporations, for relieving such persons as have the plague, by mayors, &c. who are to appoint searchers and buriers of the dead; and if any infected persons shall go abroad with sores upon them, after an head officer hath commanded them to keep at home, it is felony; and if they have no sores about them, they are punishable as vagrants. 1 *Jac. 1. c. 31.* See *Plague.*

The 43 *Eliz. c. 2.* which directs that the father, grandfather, mother, grandmother, and children of every poor person shall be assessed towards their relief by justices, and which empowers justices of peace to order a poor's rate or tax, and overseers of the poor, &c. to place forth apprentices, and sets forth the office of overseers, gives the like authority to the head officers in corporate towns, as justices of peace have in their counties; which said justices are

not to intermeddle in corporations for the execution of this law. See *Poor, Justices of the Peace.*

Mayors, bailiffs, and other head officers of corporate towns, &c. are to make proclamation for rioters to disperse as follows: *Our sovereign lord the king charges and commands all persons assembled immediately to disperse themselves, and peaceably depart to their habitations, upon pain of imprisonment, &c.* And if the rioters, being twelve in number, do not disperse within an hour after, it is felony without benefit of clergy, &c. 1 *Geo. 1. st. 2. c. 5.* See *Riots.*

Matters relating to servants and apprentices may be determined by mayors, who have power to compel persons to go to service, &c. 5 *Eliz. c. 4.* See *Apprentices, Labourers, Servants.* Mayors may arrest soldiers departing without licence; and they are to be present at musters; quarter and billet soldiers, &c. See *Soldiers;* 18 *Hen. 6. c. 18;* 1 *Geo. 1. c. 47.* &c. Persons using games on a Sunday forfeit three shillings and fourpence to the use of the poor; carriers, &c. travelling on that day twenty shillings; and persons doing any worldly labour thereon five shillings; all leviable by warrant from mayors and head officers of corporations, as well as other justices. See 1 *Car. 1. c. 1;* 3 *Car. 1. c. 2;* 29 *Car. 2. c. 7.* and tit. *Sundays.*

And mayors, &c. are to provide a mark for the sealing of weights and measures, being allowed one penny for sealing every bushel and hundred weight; and a halfpenny for every other measure and half-hundred weight, &c. Mayors and head officers of corporations, &c. shall view all weights and measures once a year, and punish offenders using false weights; and they may break or burn such weights and measures, and inflict penalties, &c. If they permit persons to sell by measures not sealed, they shall forfeit five pounds. Sealing weights not agreeable to the standard, is liable to the same penalty; and refusing to seal weights and measures subjects them to a forfeiture of forty shillings. See 31 *Geo. 2. c. 17. s. 9;* and further tit. *Measure.*

For the various offences which mayors, justices, &c. have jurisdiction to punish, part of which are above enumerated, see the titles of the offences in this Dictionary, *passim.* See also tits. *Corporation, Justices of Peace, Officers, Oaths, Mandamus, Quo Warranto, &c.*

**MEAL RENTS.** Certain rents heretofore paid in meal by the tenants of the honour of Clun, to make meat for the lord's hounds; they are now payable in money.

**MEALS.** The shelves of land or banks on the sea coasts of Norfolk, are called the meals and the males. *Cowell.*

**MEAN, or MESNE, medius.]** The middle between two extremes; and that either in time or dignity. In time it is the interim betwixt one act and another, and is applied to mean profits of lands between a disseisin and recovery, &c. See *Ejectment.* As to dignity, there is a lord mean or mesne, that holds of another lord, and mean tenant, &c. All the



land in the kingdom is, by a fiction arising from the feudal origin of the English tenures, supposed to be holden mediately or immediately of the king, who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and thus partaking of a middle nature were called mesne, or middle lords. So that if the king granted a manor to A., and he granted a portion of the lands to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A. and mediately of the king. The king was therefore styled lord paramount. A. was both tenant and lord, or was a mesne lord, and B. was called tenant paravail, or the lowest tenant, being he who was supposed to make avail or profit of the land. 1 *Inst.* 296; 2 *Comm.* c. 5. p. 39. See *Tenures*.

The writ of mesne was in the nature of a writ of right, and lay when, upon any subinfeudation, the mean or middle lord suffered his under-tenant, or tenant paravail, to be distrained upon by the lord paramount, (whether the king or another,) for the rent due to him from the mesne lord. *Booth*, 136; *F. N. B.* 135.

In such case the tenant should have judgment to be acquitted or indemnified by the mesne lord; and if he made default therein, or did not appear originally to the tenant's writ, he should be forejudged of his mesnality, and the tenant should hold immediately of the lord paramount himself. 2 *Inst.* 374.

#### FORM OF A WRIT OF MESNE.

*WILLIAM the Fourth, &c. To the Sheriff of S. Command A. B. that justly, &c. he acquit C. D. of the service which E. F. exacts from him of his freehold that he holds of the said A. B. in W. whereof the said A. who is mesne betwixt the said E. and C. ought to acquit him; and whereupon he complains, that for his default he is distrained; and unless, &c.*

If a man brought a writ of mesne where he was not distrained, yet it was maintainable, but then he should not have damages; for it was brought only to be acquitted, &c. And tenant for life, where the remainder was over in fee, should have this writ against the mesne. 7 *Hen.* 4. c. 12; 15 *Hen.* 6; *New. Nat. Br.* 330. One brought a writ of mesne against a man, because he did not acquit the plaintiff of a rent-charge demanded, &c. when he by his deed bound himself and his heirs to warrant and acquit him, and it was held good; and if a man had judgment to recover in this writ, if he were not afterwards acquitted, he might have had a *distringas ad acquietandum* against the mesne; and *scire facias* against the lord. *Westm.* 2. 13 *Edw.* 1. c. 9; 14 *Edw.* 3.

The writ of mesne is among the real actions abolished by the 3 & 4 *Will.* 4. c. 27. See *Limitations of Actions*, II. 1.

MEAN PROCESS. See *Mesne Process*.

MEASE, *messuagium*.] A messuage or dwelling-house. *Kitchen*, 139; *F. N. B.* 2; *Stat. Hibernie*, 14 *Hen.* 3; 21 *Hen.* 8. c. 13. Also a measure of herrings, containing five hundred; the half of a thousand is called *mease* or *mece*. *Merch. Dict.*

MEASON-DUE, in Fr. *Maison de Dieu*, *Domus Dei*.] A house of God, a monastery, religious house, or hospital; the word is mentioned in 39 *Eliz.* c. 5. See *Hospital*.

MEASURE, *mensura*.] A certain quantity or proportion of any thing sold; and in many parts of England it is synonymous with a bushel.

The regulation of weights and measures, for the advantage of the public, ought to be universally the same throughout the kingdom, as they are the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is expedient that they be reduced to some fixed rule or standard; which standard it is impossible to fix by any written law, or oral proclamation; for no man can by words only give another an adequate idea of a foot rule or a pound weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which all weights and measures may be reduced to one uniform size; and the prerogative of fixing this standard our ancient law vested in the crown; as in Normandy it belonged to the duke. This standard was originally kept at Winchester; and we find in the laws of King Edgar, c. 8. near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ulna, (or arm ell,) the pace, and the fathom. But as these are of different dimensions in men of different proportions, our ancient historians inform us, that a new standard of longitudinal measure was ascertained by King Henry the First, who commanded that the ulna, or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum*, five yards and a half made a perch; and the yard was subdivided into three feet, and each foot into twelve inches; each inch being of the length of three grains of barley.

Superficial measures are derived by squaring those of length; and measures of capacity by cubing them.

The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which were directed, by

the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were formed; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under King Richard I. in his parliament holden at Westminster, A. D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough, from whence the ancient office of the king's *aulnager* seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the 11 & 12 Will. 3. c. 20.

In King John's time this ordinance of King Richard was frequently dispensed with for money, which occasioned a provision to be made for enforcing it in the great charters of King John and his son. 9 Hen. 3. c. 25. These original standards were called *pandus regis*, and *mensura domini regis*; and were directed by a variety of subsequent statutes to be kept in the Exchequer, and all weights and measures to be conformable thereto. But, as Sir Edward Coke observed, though this had so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude. 1 Comm. 274, &c.

*Magna Carta*, c. 25. ordains, "that there shall be but one measure throughout England, according to the standard in the Exchequer;" which standard was formerly kept in the king's palace, and in all cities, market towns, and villages, it was kept in the churches. 4 Inst. 273.

Selling by false measures, being an offence by the common law, may be punished by fine, &c. upon an indictment at common law, as well as by statute. The easier and more usual way of punishment is, by levying on a summary conviction by distress and sale, the forfeiture imposed by the several acts of parliament adapted to particular frauds.

By the 5 Geo. 4. c. 74. entitled "An act for ascertaining and establishing uniformity of weights and measures," all former statutes and ordinances on the subject were repealed, and the various standard weights and measures to be used throughout the united kingdom defined.

By § 1. it is enacted, that from and after the 1st of May, 1825, the straight line or distance between the centres of the two points in the gold studs in the straight brass rod, now in the custody of the clerk of the House of Commons, whereon the words and figures "standard yard, 1760," are engraved, shall be the original and genuine standard of that measure of length or lineal extension called a yard; and the same straight line or distance between the centres of the said two points in the said gold studs in the said brass rod, the brass being at the temperature of sixty-two degrees by Fahrenheit's thermometer, shall be denominated the "imperial standard yard," and shall be the unit or only

'standard measure of extension,' wherefrom or whereby all other measures of extension whatsoever, whether the same be lineal, superficial or solid, shall be derived, computed, and ascertained; and all measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and one-third part of the said standard yard shall be a foot: and the twelfth part of such foot shall be an inch; and the pole or perch in length shall contain five such yards and a half, the furlong two hundred and twenty such yards, and the mile one thousand seven hundred and sixty such yards.

§ 2. That all superficial measures shall be computed and ascertained by the said standard yard, or by certain parts, multiples, or proportion thereof: and the rood of land shall contain one thousand two hundred and ten square yards, according to the said standard yard; and the acre of land shall contain four thousand eight hundred and forty such square yards, being one hundred and sixty square perches, poles, or rods.

§ 3. Provides for the restoration of the yard in case of its being lost or injured.

§ 4. From and after the first of May, 1825, the standard brass weight of one pound troy weight, made in the year 1758, now in the custody of the clerk of the House of Commons, shall be the original and genuine standard measure of weight, and that such brass weight shall be denominated the imperial standard troy pound, and shall be the unit or only standard measure of weight from which all other weights shall be derived, computed, and ascertained; and one-twentieth part of the said troy pound shall be an ounce; and one-twentieth part of such ounce shall be a pennyweight; and one-twentyfourth part of such pennyweight shall be a grain; so that five thousand seven hundred and sixty such grains shall be a troy pound; and seven thousand such grains shall be and they are hereby declared to be a pound avoirdupois, and one-sixteenth part of the said pound avoirdupois shall be an ounce avoirdupois, and one-sixteenth part of such ounce shall be a dram.

§ 5. The pound, if lost, &c. may be restored in the manner therein mentioned.

§ 6. The standard measure of capacity, as well for liquids as for dry goods not measured by heaped measure, shall be the gallon, containing ten pounds avoirdupois weight of distilled water weighed in air at the temperature of sixty-two degrees of Fahrenheit's thermometer, the barometer being at thirty inches; and a measure shall be forthwith made of brass, of such contents as aforesaid, under the directions of the lord high treasurer, or the commissioners of his majesty's treasury of the united kingdom, or any three or more of them for the time being; and such brass measure shall be the imperial standard gallon, and shall be the unit and only standard measure of capacity, from which all other measures of capacity to be used, as well for wine, beer, ale, spirits, and all sorts of liquids, as for dry goods not measured by heap measure, shall be derived, computed,

and ascertained; and all measures shall be taken in parts or multiples, or certain proportions of the said imperial standard gallon; and the quart shall be the fourth part of such standard gallon, and the pint shall be one-eighth of such standard gallon, and two such gallons shall be a peck, and eight such gallons a bushel, and eight such bushels a quarter of corn or other dry goods, not measured by heaped measure.

§ 7. The standard measure of capacity for coals, culm, lime, fish, potatoes, or fruit, and all other goods and things commonly sold by heaped measure, shall be the aforesaid bushel, containing eighty pounds avoirdupois of water as aforesaid, the same being made round with a plain and even bottom, and being nineteen inches and a half from outside to outside of such standard measure as aforesaid.

§ 8. In making use of such bushel, all coals and other goods and things commonly sold by heaped measure, shall be duly heaped up in such bushel, in the form of a cone, such cone to be of the height of at least six inches, and the outside of the bushel to be the extremity of the base of such cone; and three bushels shall be a sack, and twelve such sacks shall be a chaldron.

§ 9. Contracts, bargains, sales, and dealings, made with respect to any coals, culm, lime, fish, potatoes, or fruit, and all other goods and things commonly sold by heaped measure, sold, and delivered, done or agreed for, or to be sold, delivered, done, or agreed for by weight or measure, may be either according to the said standard of weight, or the said standard for heaped measure; but all contracts, &c. made or had for any other goods, wares, or merchandize, or other thing done or agreed for, or to be sold, delivered, done, or agreed for by weight or measure, shall be made and had according to the said standard of weight, or to the said gallon, or the parts, multiples, or proportions thereof; and in using the same the measures shall not be heaped, but shall be stricken with a round stick or roller, straight, and of the same diameter from end to end. But see 6 Geo. 4. c. 12. and 4 & 5 Will. 4. c. 49. § 4. *post*, by which latter act the heaped measure is abolished.

§ 10. Nothing herein contained shall authorize the selling in Ireland, by measure, of any articles, matters, or things which by any law in force in Ireland are required to be sold by weight only.

§ 11. Copies and models of each of the said standard yard, the said standard pound, the said standard gallon, and the said standard for heaped measure, and of such parts and multiples thereof respectively, as the lord high treasurer of the united kingdom of Great Britain and Ireland, or the said commissioners of his majesty's treasury, or any three of them for the time being, shall judge expedient, shall within three calendar months after the passing of the act be made and verified under the direction of the treasury, and be deposited in the office of the chamberlains of the exchequer at West-

minster, and copies thereof, verified as aforesaid, shall be sent to the lord mayor of London and the chief magistrate of Edinburgh and Dublin, and of such other cities and places, and to such other places and persons in his majesty's dominions or elsewhere, as the lord high treasurer or commissioners of the treasury may from time to time direct. See 4 & 5 Will. 4. c. 49. *post*.

§ 12. His majesty's justices of the peace in every county, riding, or division in England or Ireland, or shire or stewartry in Scotland, and the magistrate in every city, town, or place (being a county within itself) in England or Ireland, and in every city or royal burgh in Scotland, shall, within six calendar months after the passing of the act, purchase for their respective counties, &c. a model and copy of each of the aforesaid standards of length, weight, measure, and of each of the parts and multiples thereof; which models and copies, when so purchased, shall be compared and verified with the models and copies deposited with the chamberlains of the exchequer as aforesaid, in such manner as aforesaid, and upon payment of such fees as are at present payable to the said chamberlains upon the comparison and verification of weights and measures with the standards thereof; and such models and copies, when so compared and verified, shall be placed for custody and inspection with such person or persons, and in such place or places, as the said justices and magistrates, in their respective counties, &c. shall appoint, and the same shall be produced by the keeper or keepers thereof upon reasonable notice, at such time or times, and place or places, within each such county, &c. as any person or persons shall by writing under his or their hand or hands require; the person requiring such production paying the reasonable charges of the same.

§ 14. In all cases of dispute respecting the correctness of any measure of capacity, arising in a place where recourse cannot be conveniently had to any of the aforesaid verified copies or models of the standard measures of capacity, or parts or multiples of the same, any justice of the peace may ascertain the content of such measure of capacity by direct reference to the weight of pure or rain water which such measure is capable of containing; ten pounds avoirdupois weight of such water, at the temperature of sixty-two degrees by Fahrenheit's thermometer, being the standard gallon ascertained by the act, the same being in bulk equal to two hundred and seventy-seven cubic inches, and two hundred and seventy-four one thousandth parts of a cubic inch, and so in proportion for all parts or multiples of a gallon.

§ 15. From and after the first of May, 1825, all contracts, bargains, sales, and dealings, which shall be made or had within any part of the united kingdom of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandize, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be



made according to the standard weights and measures ascertained by the act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be void. But see now 4 & 5 *Will. 4. c. 49. post.*

§ 16. Persons may buy and sell goods and merchandize by any weights or measures established either by local custom, or founded on special agreement: Provided that in order that the ratio or proportion which all such measures and weights shall bear to the standard weights and measures established by the act, shall be a matter of common notoriety, the ratio or proportion which all such customary measures and weights shall bear to the said standard weights and measures, shall be painted or marked upon all such customary weights and measures respectively; and nothing herein contained shall extend to permit any weight or measure to be made after the 1st of May, 1825, except in conformity with the standard weights and measures established under the provisions of the act. But see 4 & 5 *Will. 4. c. 49. post.*

§ 17. For the purpose of ascertaining and fixing the payments to be made in consequence of all existing contracts or rents in England and Ireland, payable in grain or malt, or in any other commodity or thing, and in consequence of any toll or rate heretofore payable according to the weights and measures heretofore in use, enacts, that at the general or quarter sessions of the peace to be holden in every county, riding, or division, and in every city, town, or place, (being a county of itself,) in England or Ireland, next after the expiration of six calendar months after the passing of the act, or at any general quarter sessions of the peace to be holden thereafter, an inquisition shall be taken before the justices assembled at such sessions, by the oaths of twelve substantial freeholders of the said respective counties, &c. having lands or tenements to the value of one hundred pounds per annum or upwards, to be summoned by the sheriff or proper officer of every such county, &c. to inquire into and ascertain the amount, according to the standard of weight or measure by the act established, of all contracts or rents payable in grain or malt, or any other commodity or thing, or with reference to the measure or weight of any such grain, malt, or other commodity or thing, and the amount of any toll or rate heretofore payable according to any weights and measures heretofore in use within such counties, &c. respectively; and such inquisitions, when taken, shall be transmitted by the respective clerks of the peace of the same counties respectively, or by the mayor, bailiff, or other head officer of every such city, town, or place, (being a county of itself,) into his majesty's Courts of Exchequer at Westminster and Dublin respectively, and shall

there be inrolled of record, and shall and may be given in evidence in any action or suit at law or in equity; and the amount so to be ascertained shall be the rule of payment in regard to all such contracts, rents, tolls, or rates, in all time coming.

§ 18. For the purpose of ascertaining and fixing the payments to be made of all stipends, feu duties, rents, tolls, customs, casualties, and other demands whatsoever, payable in grain, malt, or meal, or any other commodity or thing, in that part of the united kingdom called Scotland, or in any place or district of the same; it is enacted, that the sheriff depute or sheriff substitute in each shire, and the stewart depute, or stewart substitute in each stewartry, within Scotland, shall, as soon as conveniently may be after the expiration of six calendar months from the passing of the act, summon and impanel a jury of the same number, and with the same qualifications required in the jury who strike the fair prices of grain within the same shire or stewartry, which jury shall inquire into and ascertain the amount, according to the standards by the act established, of all such stipends, feu duties, rents, tolls, customs, casualties, and other demands whatsoever, payable in grain, malt, meal, or any other commodity or thing, according to the weights and measures heretofore in use within the same shires or stewartries; and such inquisitions, when taken, shall be transmitted by the respective sheriff clerks or stewart clerks of such shires or stewartries, into his majesty's Court of Exchequer at Edinburgh, and there inrolled of record, and may be given in evidence in any action or suit at law or in equity; and the amount so to be ascertained shall, when converted into the standard weights and measures, be the rule of payment in regard to all such stipends, &c. And see 4 & 5 *Wm. 4. c. 49. § 15. post.*

§ 19. After such inquisitions shall have been made and inrolled in England, Ireland, and Scotland respectively, accurate tables shall be prepared and published under the authority of the said commissioners of his majesty's treasury, showing the proportions between the weights and measures heretofore in use, as mentioned in such inquisitions, and the weights and measures hereby established, with such other conversions of weights or measures as the said commissioners of his majesty's treasury may deem to be necessary; and after the publication of such tables, all future payments to be made shall be regulated according to such tables.

By § 20. Tables are to be constructed for the collection of the customs and excise, &c.

§ 21. The regulations and penalties contained in the 29 *Geo. 2. c. 25*; 31 *Geo. 2. c. 17*; 35 *Geo. 3. c. 102.* and 55 *Geo. 3. c. 43.* for the ascertaining, examining, seizing, breaking, and destroying of any weights, balances, or measures, shall be applied and put in execution in Great Britain for the ascertaining and examining, and for the seizing, &c. of any weights or

measures not conformable to the standard weights and measures ascertained and authorized by the act.

§ 22. The regulations and penalties of the following Irish acts, viz. 1 *Ann* (1); 11 *G.* 2. (1.); 25 *Geo.* 2. (1.); 27 *Geo.* 3. (1.). 28 *Geo.* 3. (1.) shall be applied to the act.

By § 23. All former statutes, ordinances, or acts relating to weights or measures, are repealed.

§ 24. Act not to extend to repeal 31 *Geo.* 2. c. 17, which empowers the dean and high steward of Westminster, &c. to appoint a proper officer to size and seal weights and measures.

§ 25. Tuns, pipes, or other vessels of wine, oil, honey, and other gaugeable liquors imported into London shall be liable to be gauged as heretofore by the lord mayor or his deputies, but the contents shall be ascertained by the standard measure directed by the act.

§ 26. Act not to effect the privileges of the city of London, as to the office of gauger of wine, &c.

By the 6 *Geo.* 4. c. 74. the above act is not to take effect before the 1st Jan. 1826.

§ 2. After reciting that by such act the figure of the standard bushel measure for the sale of coals, culm, fish, potatoes, and fruit was fixed, and that it was expedient that the figure of all other measures used for the sale of coals, and all other goods and things commonly sold by heaped measure, should also be determined, enacts, that after the 1st Jan. 1826, all such measures shall be made cylindrical, and the diameter of such measures shall be at least double the depth thereof, and the height of the cone or heap shall be equal to three-fourths of the depth of the said measure, the outside of the measure being the extremity or base of such cone.

By the 4 & 5 *W.* 4. c. 49. so much of the 5 *G.* 4. c. 74. and 6 *G.* 4. c. 12. as require that all weights and measures shall be models and copies in shape or form of the standards deposited in the Exchequer, and also so much of the said recited acts as allow the use of weights and measures not in conformity with the imperial standard weights and measures established by the said acts, or allow goods or merchandize to be bought or sold by any weights or measures established by local custom or founded on special agreement, are repealed.

§ 2. All weights and measures which have been verified and stamped at the Exchequer as copies of the standard weights and measures, corresponding in weight and capacity with those established by the said recited acts, shall be deemed and taken to be legal weights and measures, and may be legally used for comparison as copies of the imperial standard weights and measures, although not similar in shape to those required under the provisions of the said recited acts.

§ 3. Superintending officer of Exchequer may verify and stamp weights and measures of other form than those prescribed by the act 5 *Geo.* 4. c. 74.

§ 4. After reciting that the heaped measure is liable to considerable variation, and the use of weights made of soft materials affords facilities to fraud, enacts, that after 1st January, 1835, so much of the said recited acts as relate to the heaped measure shall be repealed, and the use of the heaped measure abolished, and all bargains, sales, and contracts made by the heaped measure shall be void, and thereafter no weight made of lead or pewter shall be stamped or used.

§ 5, 6, 7, 8, 9, 10, and 11, contain additional regulations for providing copies of the standards for counties, &c.

By § 12. After reciting that "by local customs in the markets, towns, and other places throughout the united kingdom, the denomination of the stone weight varies, being in the country generally deemed to contain fourteen pounds avoirdupois, and in London commonly eight of such pounds, or otherwise, as may be," it is enacted, that from and after the 1st January, 1835, the weight denominated a stone shall in all cases consist of fourteen standard pounds avoirdupois, and the weight denominated an hundred weight shall consist of eight such stones, and the weight denominated a ton shall consist of twenty such hundred weight; and all contracts made by any other stone, hundred weight, or ton, shall be void.

§ 13. From and after the 1st January, 1835, all articles sold by weight shall be sold by avoirdupois weight, excepting gold, silver, platina, diamonds, or other precious stones, and drugs when sold by retail; and that such excepted articles, and none others, may be sold by troy weight.

§ 14. In England and Wales the magistrates at quarter sessions assembled, and in Scotland the justices of the peace at a meeting called by the sheriff, and in Ireland the grand jury of each county and county of a city or town, shall procure for the use of the inspectors good and sufficient stamps for the stamping or sealing all weights and measures used or to be used in such county, which stamp, so procured, shall be taken to be the stamp for such county, and none others shall be considered legal stamps; and all weights and measures used for buying and selling, or for the collecting of any tolls or duties, or for making of any charges on the conveyance of any goods or merchandize, shall be examined and compared with one of the copies of the imperial standard weights and measures provided under the authority of the act for the purpose of comparison by such inspectors appointed as aforesaid, who shall stamp, in such manner as best to prevent fraud, such weights and measures when so examined and compared as aforesaid, if found to correspond with the said copy, the fees for which examination, comparison, and stamping shall be according to the scale contained in the schedule to the act annexed; and all persons who, after the 1st January, 1835, in England and Wales and in Scotland; or after the 1st July, 1835, in Ireland, shall make any weights or measures other than those authorized by the act, or

shall sell, expose to sale, or use any weights or measures which have not been so stamped as aforesaid, or which shall be found light or otherwise unjust, shall on conviction forfeit not exceeding five pounds; and any contract, bargain, or sale made by any such weights or measures shall be wholly void, and all such light or unjust weights and measures so used shall be seized, forfeited, and condemned.

§ 15. In Scotland, after the 1st Jan. 1835, the fair prices of all grain in every county shall be struck by the imperial quarter, and all other returns of the prices of grain shall be set forth by the same, without any reference to any other measure whatsoever; and any sheriff clerk, clerk of a market, or other person, who shall offend against this provision, shall forfeit not exceeding five pounds or less than twenty shillings.

§ 16. Inspectors to enter into recognizances for the discharge of their duties.

§ 17. Any two or more magistrates of any county, or of any city or town being a county within itself, or for any sheriff or magistrates of any burgh or town corporate in Scotland, within their respective districts, may enter any shop, store, warehouse, stall, yard, or place whatsoever, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and examine all weights and measures, beams and scales, or other weighing machines, and compare and try the same with the copies of the imperial standard weights and measures required to be provided under the act, and cause the same to be detained until they shall have been examined by the nearest inspector; and if upon such examination the said weights, &c. are light or otherwise unjust, the same shall be forfeited and destroyed, and the person or persons in whose possession the same were found shall be liable in a penalty not exceeding five pounds: Provided that any person who shall neglect or refuse to produce for the inspection of such magistrates, when thereto required, all weights, &c. in his possession, or shall otherwise obstruct or hinder such magistrates, shall be liable to a like penalty, and also that no such pecuniary penalty shall be incurred if he, she, or they shall prove to the satisfaction of such magistrates that such weights, &c. found in his possession, have not been in use since the passing of the act.

§ 18. If any person or persons shall make, forge, or counterfeit, or cause or procure to be made, &c. or knowingly act or assist in making, &c. any stamp or mark now used or which may hereafter from time to time be used for the stamping or marking of any weights or measures, to denote that any such weight or measure has been compared, adjusted, and approved to be of the due weight or measure required by law, he shall for every such offence forfeit not exceeding fifty pounds or less than ten pounds; and if any person shall knowingly sell, utter, dispose of, or expose, to sale any weight or measure with such forged or counterfeit stamp or mark thereon, every person so offending shall for every such offence forfeit

not exceeding ten pounds or less than forty shillings, to be recovered in a summary way as after provided; and all weights and measures with such forged or counterfeited marks shall be seized, forfeited, and condemned.

§ 19. All copies of the imperial standard weights and measures which may have been worn by time, and mended in consequence of any wear or accident, shall forthwith be sent to the Exchequer for the purpose of being again compared and verified, and shall be stamped as mended copies of the imperial standard weights and measures.

§ 20. Officer at Exchequer to keep a register of copies verified.

§ 22. Gives a form of conviction for offences under the act.

§ 23. Any person convicted of any penalty under this act in England and in Wales or in Ireland may appeal to the next general quarter sessions of the peace for the county, or city or town being a county within itself, against such conviction, on giving security in double the amount of such penalty within forty-eight hours after the conviction shall have been made; and the decision thereupon made shall be final.

By § 25 an appeal is given in Scotland to commissioners of judiciary at circuit court.

By § 26, 4 *Ann.* (Irish act) and 5 *Geo.* 4. c. 110. relating to Ireland, repealed, except so far as relates to duties, &c. of weigh-masters.

§ 27. Nothing in the act contained shall interfere with the powers of the ward inquests in respect to weights and measures within the city of London and liberties thereof and the borough of Southwark, nor to prohibit, defeat, injure, or lessen the right of the mayor and commonalty and citizens of the city of London, or of the lord mayor of the said city for the time being, with respect to the stamping or sealing weights and measures, or concerning the office of gauger of wines, oils, honey, and other gaugeable liquors imported and landed within the city of London and liberties thereof.

§ 28. Nothing in the act contained shall extend to prohibit, defeat, injure, or lessen the rights granted by charter to the master, wardens, and commonalty of the mystery of founders of the city of London.

§ 29. In all actions brought against any magistrate for any thing he shall do under this act, such magistrate may plead the general issue, and to give the special matter in evidence; and if a verdict shall be given for the defendant therein he shall have double costs.

MEASURER or METER of woollen cloth, and of coals, &c. An officer in the city of London: the latter of great account. *Chart. Jac.* 2. See *Alnager, Coals.*

MEASURING-MONEY. The letters patent, whereby some persons exacted for every cloth made certain money, besides alnage, called measuring-money, revoked. *Rot. Parl.* 11 *Hen.* 4.

MEDERIA. A mead house, or place where mead or metheglin is made. *Cartular. Abb. Glasc.* MS. 29.

MEDFEE. A bribe or reward: and used



for a compensation where things exchanged are not of equal value. It is said to come from the word *meed*, merit. *Cowell*.

**MEDIE ET INFIMÆ MANUS HOMINES.** Men of a mean and base condition, of the lower sort. *Blount*.

**MEDIANUS.** Middle size; *medianus homo*, a man of middle fortune.

**MEDIATORS OF QUESTIONS.** Were six persons authorized by statute, who, upon any question arising among merchants, relating to unmerchantable wool, or undue packing, &c. might before the mayor and officers of the staple upon their oath certify and settle the same; to whose order and determination therein, the parties concerned were to give entire credence, and submit. *Stat. Antiq. 27 Edw. 3. st. 2. c. 24.*

**MEDICINES.** Various statutes have been passed from time to time subjecting what are generally called patent medicines and other preparations and compositions to certain duties, and requiring a license to be taken out for vending the same. The acts are the 25 *Geo. 3. c. 79*; 42 *Geo. 3. c. 56*; 43 *Geo. 3. c. 73*; 44 *Geo. 3. c. 98*; and the 52 *Geo. 3. c. 150*. The articles subjected to such duties are enumerated in the schedule appended to the last-mentioned statute.

**MEDIETAS LINGUÆ.** A jury *de medietate linguæ*, signifies a jury or inquest impaneled, whereof the one half consists of natives, and the other of foreigners. This manner of trial was first given by the 28 *Edw. 3. c. 13*; before which it was obtained by the king's grant. *Staundf. P. C. lib. 3. c. 7.*

It was formerly used in pleas wherein the one party was a foreigner, the other a denizen. We read that Solomon de Standford, a Jew, had a cause tried before the sheriff of Norwich, by a jury which were *sex probos et legales homines, et sex legales Judæos de civitate Norwici, &c.* *Pasch. 9 Edw. 1.*

In petit treason (now abolished), murder and felony, *medietas linguæ* is allowed; but for high treason, an alien shall be tried by the common law, and not *per medietatem linguæ*, *H. P. C. 261*. And a grand jury ought not to be *de medietate linguæ* in any case. *Wood's Inst. 263*. It was thought necessary to exclude Egyptians expressly by statute from the benefit of this trial. See 22 *Hn 8. c. 10*, 1 & 2 *P. & M. c. 4* (repealed); and tit. *Egyptians*.

The 6 *Geo. 4. c. 50*, by which all former acts relating to juries were repealed, and the law consolidated, provides (§ 47), for the trial of aliens by a jury *de medietate linguæ*, in cases of felonies or misdemeanors; but it contains no re-enactment of the old statutes, which allowed such a jury in civil cases between an alien and a British subject.

He that will have the advantage of trial *per medietatem linguæ* must pray it; for it is said he cannot have the benefit of it by way of challenge. *S. P. C. 158*; 3 *Inst. 127*.

A jury *de medietate* is also allowed in some other cases by analogy to this rule *de medietate linguæ*. As on a *jus patronatus*, the jury

must be of six clergymen and six laymen. See that title. So on a criminal trial in the university courts, the jury must be half freeholders of the county, and half matriculated laymen of the university. See 4 *Comm. 278*. See further, *Jury, 11*. So also under the (repealed) statute of the 8 *Hen. 6. c. 12*, against embezzling records, the jury were to consist of six persons officers of any of the superior courts, and six common jurors. See *Records*.

**MEDIO ACQUJETANDO** A judicial writ to distrain a lord for the acquitting of a mean lord from a rent, which he formerly acknowledged in court not to belong to him. *Reg. Juric. 129*. See *Mean*.

**MEDITATIO FUGÆ.** In Scotland, where arrest for debt does not take place as in England, where there is real ground to apprehend that a debtor means to withdraw himself, the creditor appears before a judge, and swears that he believes his debtor to be *in meditatione fugæ*; on which a warrant for imprisoning the debtor is granted, which is taken off on his finding caution or bail, *judicio xsti*. In practice this is equivalent to the arrest and bail in the English law.

**MEDITERRANEAN.** Passing through the midst of the earth: applied to the sea which stretcheth itself from West to East, dividing Europe, Asia, and Africa, which is hence called the Mediterranean sea. The counterfeiting of Mediterranean passes for ships to the coast of Barbary, &c. or the seal of the admiralty office to such passes, is a capital felony (now punishable with transportation for life, &c.) 4 *Geo. 2. c. 18*. See *Navigation Acts*.

**MEDLEFE, MEDLETA, MEDLETUM,** *Fr. Mesler*, to meddle] A sudden scolding at and beating one another. *Bract. l. 3. c. 35*.

**MEDSYPP.** A harvest supper or entertainment given to labourers at harvest home. *Plac. 9 Edw. 1. Cov.*

**MEDWAY RIVER,** called *Vaga* by the Britons; the Saxons added *Med*.] Pilots thereon, how to be licensed, 5 *Geo. 2. c. 20*. See also 3 *Geo. 1. c. 13*; and 7 *Geo. 1. c. 21*.

**MEER, merus.** though an adjective, is used as a substantive to signify Meer right. *Old Nat. Brev. 2*. In these words, "this writ hath but two issues, viz. joining mise upon the meere, and that is to put himself in the assise of our sovereign lord the king, or to join battle." *Cowell*. See *Mise*.

**MEINY, French Mesnie.** As the king's meiny, the king's family or household servants. See 1 *Rich. 2. c. 4*.

**MELDFEON,** from Saxon *meld*, *indictum delaturæ*; and *feoh*, *præmium pecuniæ. Spelm.*] Was the recompense due and given to him who made discovery of any breach of penal laws committed by another person, called the promoter's or informer's fee. *Leg. Inæ. c. 20*.

**MELIUS INQUIRENDUM.** A writ that lieth for a second inquiry, where partial dealing is suspected; and particularly of what lands or tenements a man died seised on find-

ing an office for the king. *F. N. B.* 225. It has been held, that where an office is found against the king, and a *melius inquirendum* is awarded, and upon that *melius*, &c. it is found for the king; if the writ be void for repugnancy, or otherwise, a new *melius inquirendum* shall be had; but if upon the first *melius* it had been found against the king, in such case he could not have a new *melius*, &c., for then there would be no end of these writs; and if an office be found for the king, the party grieved may traverse it; and if the traverse be found against him, there is an end of that cause; and if for him it is conclusive. 8 *Rep.* 169; 2 *Nels.* 1008. If there is any defect in the points which are found in an inquisition, there may not be a *melius inquirendum*; but if the inquisition finds some parts well, and nothing is found as to others, that may be supplied by *melius inquirendum*. 2 *Salk.* 169. A *melius inquirendum* shall be awarded out of B. R., where a coroner is guilty of corrupt practices, directed to special commissioners. 1 *Vent.* 181. See 15 *Vin. Abr.* tit. *Melius Inquirendum*; and *ante*, tit. *Inquest*.

**MEMBERS OF PARLIAMENT.** The members of the House of Commons are usually so styled though in fact the peers are, strictly speaking, members of parliament, which consists of king, lords, and commons. See *Parliament*.

**MEMORIES.** Some kind of remembrances or obsequies for the dead, mentioned in injunctions to the clergy, *anno* 1 *Edw.* 6.

**MEMORY, TIME OF.** Ascertained by the law to commence from the reign of Richard the First: and until recently any custom might have been destroyed by evidence of its non-existence in any part of the long period from his days to the present. 2 *Com.* 31, and *note*.

The law with respect to the commencement of prescriptions and customs has been materially altered by the 2 & 3 *Wm.* 4. c. 71. for which see *Prescription*.

**MENACES.** By menaces or force demanding any chattel, money, or valuable security, with intent to steal the same, is felony by the 7 & 8 *Geo.* 4. c. 29. § 6. and the offender transportable for life, &c.; by § 8, sending or delivering any letter demanding, with menaces, any chattel, &c., or accusing, or threatening to accuse any crime, is also felony, and punishable in like manner. See further *Threats*.

**MENAGIUM.** A family. *Trixet's Chronicle*, 677; *Walsingham*, 66.

**MENDLEFE.** Mentioned in *Crompt. Justice of Peace*, 193, is that which *Bracton* calleth *medletum*; quarrels, scuffling, or brawling. *Cowell*. See *Medlefe*.

**MENIALS**, from *menae*, the walls of a castle, house, or other place.] Household servants who live under their lord or master's roof; mentioned in the ancient stat. 2 *Hen.* 4. c. 21.

**MENSA.** Comprehends all patrimony, or goods and necessities of livelihood.

**MENSALIA.** Such parsonages or spiritual livings as were united to the tables of religious houses, and called *mensal benefices* among the

Canonists; and in this sense it is taken where mention is made of appropriations *ad mensam suam*. *Blount*.

**MENSURA REGALIS.** Was the king's standard measure, kept in the Exchequer, according to which all others were to be made. See 16 *Car.* L. c. 19 (repealed). The standard measure is now in the custody of the clerk of the House of Commons. See *Measure*.

**MER OR MERE.** Words which begin or end with those syllables, signify fenny places. *Cowell*. See *Mara* or *Mere*, a lake or great pond.

**MERA NOCTIS.** Midnight. *Cowell*.

**MERCENARIUS.** A hireling or servant. *Cartular Abbat, Glaston.* 115.

**MERCENLAGE.** See *Merchenlage*.

**MERCHANT, Mercator.** One who buys and trades in any thing; and as merchandize includes all goods and wares exposed to sale in fairs or markets, so the word merchant formerly extended to all sorts of traders, buyers, and sellers. But every one who buys and sells is not at this day under the denomination of a merchant, only those who traffic in the way of commerce, by importation or exportation, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell, by a continued assiduity, or frequent negotiation, in the mystery of merchandizing, are esteemed merchants. Those who buy goods, to reduce them by their own art or industry into other forms, and then to sell them, are artificers, not merchants. Bankers and such as deal by exchange, are properly called merchants. *Lex Mercat.* 23.

Merchants are always particularly regarded by the common law; though the municipal laws of England, or indeed of any one realm, are not sufficient for the ordering and determining the affairs of traffic and matters relating to commerce; merchandize being so universal and extensive, that it is impossible; therefore of the law merchant (so called from its universal concern) all nations take special knowledge; and the common and statute laws of this kingdom leave the causes of merchants in many cases to their own peculiar law. *Lex Mercat.* See 1 *Comm.* 75; see *Bill of Exchange*, *Custom of Merchants*, *Insurance*.

The custom of merchants is part of the common law of this kingdom, of which the judge ought to take notice; and if any doubt arise about the custom, they may send for merchants to know the custom. *Per Hobart, C. J.*; *Winch*, 24.

The *lex mercatoria* is allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim of law, that "*cuiuslibet in sua arte credendum est*." See 1 *Comm.* 75.

For various instances in which the custom of merchants has been proved at Nisi Prius, see *Willes*, 559; *Dougl.* 653; 10 *B. & C.* 4.

The law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. By *Mog-*

*na Carta*, c. 30, it is provided, that all merchants (unless publicly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through, England, for the exercise of merchandize, without any unreasonable imposts, except in time of war; and if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; but it is somewhat extraordinary, that it should have found a place in *Magna Carta*, a mere interior treaty between the king and his natural born subjects, which occasions the learned *Montesquieu* to remark, with a degree of admiration, "that the English have made the protection of foreign merchants one of the articles of their national liberty." But indeed it well justifies another observation which he has made, that the English know better than any other people upon earth, how to value at the same time these three great advantages, *religion, liberty, and commerce*. 1 *Comm.* 260. See also 2 *Edw.* 3. c. 9; 25 *Edw.* 3. st. 4. c. 2; 27 *Edw.* 3. st. 2. c. 13, 17, 19, 20; 28 *Edw.* 3. c. 13; 36 *Edw.* 3. c. 7; 2 *Rich.* 2. c. 1; 11 *Rich.* 2. c. 7; 14 *Rich.* 2. c. 9; 5 *Hen.* 4. c. 9; 7 *Hen.* 4. c. 9; in all which provisions were contained for the accommodation of merchants strangers, which by long use became the known law of the land, allowing for the variations inevitably introduced by time and commerce. Many of these regulations, however, are now repealed by the 3 *Geo.* 4. c. 41. and other acts.

In the reign of King Edward IV. a merchant stranger made suit before the king's privy council for several bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but was answered by the Lord Chancellor, that as this suit was brought by a merchant, he was not bound to sue according to the law of the land. 13 *Edw.* 4. In former times it was conceived, that those laws that were prohibitory against foreign goods, did not bind a merchant stranger; but it has been a long time since ruled otherwise; for in the leagues that are now established between nation and nation, the laws of either kingdom are excepted; so that as the English in France, or any other foreign country in amity, are subject to the laws of that country where they reside, so must the people of France, or any other kingdom, be subject to the laws of England, when resident here. 19 *Hen.* 7.

English merchants are not restrained to depart the kingdom without license, as all other subjects are; they may depart and live out of the realm, and the king's obedience; and the same is no contempt, they being excepted out of the statute 5 *Rich.* 2. st. 2. And by the common law they might pass the seas without license, though not to merchandize. *Dyer*, 206.

If a difference arise between the king and any foreign state, alien merchants are to have forty days' notice, or longer time, to sell their effects and leave the kingdom. 2 *Edw.* 3. st. 2. c. 17.

If a person who is otherwise no merchant, being beyond sea, takes up money, and draws a bill upon a merchant, he cannot, in an action brought upon this bill against him as the drawer thereof, plead that he was no merchant; for the very taking up the money and drawing the bill, makes him a merchant to this purpose. *Comb.* 152. See *Bill of Exchange*.

Merchant includes all sorts of traders as well and as properly as merchant adventurers. *Dyer*, 279 b, cites *Spelm. Guilda*. A merchant tailor is a common term. *Per Holt*, C. J., 2 *Salk.* 445.

There are companies of merchants in London for carrying on considerable joint trades to foreign parts, viz. the Merchant Adventurers (see *Hamburgh Company*); the company established in England for the improvement of commerce, which was erected by patent by King Edward I. merely for the exportation of wool, &c. before we knew the value of that commodity, and at a time when we were in a great measure strangers to trade. The next company was that of the Barbary Merchants, incorporated in the reign of King Henry VII. A company of merchants trading to the North, called the Muscovy or Russia Company, was established by King Edward VI., and encouraged, with additional privileges, by Queen Mary, Queen Elizabeth, &c. See *Russia Company*. The Barbary Merchants decaying towards the latter end of Queen Elizabeth's reign, out of their ruins arose the Levant or Turkey Company, who, first trading with Venice and then with Turkey, furnished England that way with the East India commodities; this company had very considerable factories at Constantinople, Smyrna, Aleppo, &c. See *Turkey Company*. From the flourishing state of the Levant or Turkey Company, in the reign likewise of Queen Elizabeth, sprung the old East India Company, who having fitted out ships of force, brought from thence, at the best hand, the Indian commodities formerly sold to England by distant Europeans; and they, having obtained many charters and grants from the crown in their favour, were sole masters of that advantageous traffic; until at last a new company was incorporated by King William, anno 9 *Wm.* 3. on their lending government two millions of money; and both these companies, after the expiration of a certain term, were by articles united. For the recent act, suspending the trading of this important company, see *East India Company*.

In the 21st year of Queen Elizabeth, the Eastland Company of Merchants was erected, and in King Charles the Second's time, that company was confirmed, with full power to trade in Norway, Sweden, Poland, and other Eastland countries. See *Eastland Company*. The Royal African Company had their charter granted to them in the 14th year of King Charles



II. And by 9 & 10 Wm. 3. c. 26. they were to maintain all forts, &c.; but by the 1 & 2 Geo. 4. c. 28. the company was abolished, and their forts and possessions vested in the crown. See *African Company*. King Charles II. also, by commission under the great seal of England, constituted his royal highness James Duke of York (afterwards King James II.) Edward Earl of Clarendon, and others, to be a council for the royal fishery of England, and declared himself to be the protector of it; and in the 29th year of his reign he incorporated them into a company. King William III. in the fourth year of his reign, established a Greenland Company. See that title.

By 9 Ann. c. 21. to pay the debts of the army, navy, &c. amounting to near ten millions, the South Sea Company of Merchants was erected, who having advanced that money, the duties upon wines, vinegar, tobacco, &c. were appropriated as a fund for payment of the interest, after the rate of 6l. per cent., &c. The company was granted the sole trade to the South Seas; but by the 47 Geo. 3. st. 1. c. 23. and the 55 Geo. 3. c. 57. § 141. so much of the above act as gave it the exclusive privilege of trading within the limits of its charter was repealed.

This company had their capital stock very much enlarged in the reign of King George I.; and to raise money lent, were empowered to make calls or take in subscriptions, &c. as they thought fit; and on this foundation the South Sea scheme was executed in 1720; but to retrieve credit afterwards, part of the stock of the South Sea Company was ingrafted into the capital stock of the East India Company and the Bank of England; and after that, half the stock was converted into annuities at 4l. per cent., since which, a farther reduction thereof has been made. See *National Debt*, *South Sea Company*.

The West India Dock Company (established under the 39 Geo. 3. c. lxxix), and the London Dock Company (under 39 & 40 Geo. 3. c. xlvii), are among the most extensive of the modern associations of this nature.

The short history of some of our companies of merchants, which have ever had many and great privileges, and are at length become of double use to enlarge commerce and supply the necessities of the state, in some measure shows the progress and increase of our trade, and the wealth of the nation, though it must nevertheless be observed that they are a kind of monopolies erected by law, which, if they become prejudicial, are generally restrained by parliament, as has been the case with many of the companies already specified; and if the power granted them is abused, it becomes of fatal consequence; for which we need only instance the ever memorable year 1720, when the sub-governor and directors of the South Sea Company incurred a forfeiture of their estates by statute, and were disabled to hold any offices, &c. for their vile conduct, which tended to the ruin of the public. Over and above these companies, there are the Dutch Merchants; those who trade to the West Indies; the Canary Merchants;

Italian Merchants, who trade to Leghorn, Venice, Sicily, &c.; the French and Spanish Merchants, &c. For the regulations relating to the importation and exportation of commodities by merchants, see *Navigation Acts*.

By the 7 & 8 Geo. 4. c. 29. § 49. merchants, bankers, and other agents, converting to their use money or securities entrusted to them, are guilty of a misdemeanor, and may be transported for fourteen years, &c. See further, *Agent*, *Attorney*, *Banker*, *Broker*, *Factor*.

MERCHENLAGE, *Merciorum Lex*.] The law of the ancient kingdom of Mercia. *Cambden*, in his *Britannia*, says, that in the year 1016, this kingdom was divided into three parts, whereof the West Saxons had one, governing it by the laws called West Saxon-lage, which contained Kent, Sussex, Surrey, Berks, Hampshire, Wilts, Somerset, Dorset and Devon. The Danes had the second, containing York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge, and Huntingdon, which was governed by the laws called Dane-lage. And the third part was in the possession of the Mercians, whose law was called Merchenlage; and contained Gloucester, Worcester, Hereford, Warwick, Oxford, Chester, Salop, and Stafford; from which three, King William I. chose the best, and with other laws ordained them to be the laws of the kingdom. *Camb. Brit.* 94. See *Motmutian Laws*.

MERCHET, *merchetum*, *mercheta*, *mulierum*.] A fine or composition paid by inferior tenants to the lord, for liberty to dispose of their daughters in marriage. No baron or military tenant could marry his sole daughter and heir, without such leave purchased from the king, *pro maritandâ filiâ*. And many of our servile tenants could neither send their sons to school, nor give their daughters in marriage, without express license from the superior lord. See *Kennel's Glossary* in *Maritagium*; and see *Marchet*, *Borough English*.

MERCIA. Used in the *Monasticon* for amerciamment.

MERCIMONIATUS ANGLIÆ. Was of old time used for the impost of England upon merchandize.

MERCURIES, or vendors of printed books or papers.

MERGER, is where a greater estate and a less coincide and meet in one and the same persons, without any intermediate estate, in which case the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sunk or drowned in the greater; as, if the fee comes to tenant for years or life, the particular estates are merged in the fee. 2 *Rep.* 60, 61; 3 *Lev.* 437.

The two estates must be held in the same right, otherwise there will be no merger.

Thus if a lessor who hath the fee, marries with the lessee for years, this is no merger, because he hath the inheritance in his own, and the lease in right of his wife. 2 *Plowd.* 418. And where a man hath a term in his own right,

and the inheritance descends to his wife, as he hath a freehold in her right, the term is not merged or drowned. *Cro. Car.* 275. So if tenant for years dies and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in right of the testator, and subject to his debts and legacies. See *Plowd.* 418; *Cro. Jac.* 275; *Co. Lit.* 338.

In these cases the accession of the one estate to the other is the act of the law; but where the two estates meet in the same party by his own act, merger will take place, even although they are held in different rights.

Therefore where a husband, possessed of a term in right of his wife, purchases the reversion or remainder (*Moor.* 171,) or where an executor having a term in right of his testator, buys the reversion (see 4 *Leon.* 38), there will be a merger.

An estate-tail is an exception to the rule, for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee. 2 *Rep.* 61; 8 *Rep.* 74. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words of the statute *de donis*; which operation and construction have probably arisen upon this consideration, that in the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. *Cro. Eliz.* 302. But in an estate-tail the case is otherwise: the tenant for a long time had no power to bar or destroy it, and now can only do so by a certain special mode. It would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee. 2 *Comm. c.* 11. p. 178.

When, however, an estate-tail was barred by means of a fine, the base fee thereby created would, previous to the 3 & 4 *Wm.* 4. c. 74. have merged in the reversion, so as to let in the incumbrances charged upon the latter; but by that statute (§ 39) base fees, when united with the immediate reversions, are to be enlarged instead of merged. See further, *Tail.*

There is also another exception to the doctrine of merger, arising out of the saving in the Statute of Uses (27 *Hen.* 8. c. 10.) of the rights of feoffees of uses where they are seised of lands to their own proper use. See 3 *Pres. on Conv.* 368.

The doctrine of merger is not confined to estates of freehold, or to an estate of freehold and one of leasehold; for where two terms for years meet in the same individual, the same right

there will be a merger of the older in the more recent term, although the former may be a term for a thousand years, and the latter for a single year.

To effect a merger, there must be no intervening estate; for if there be such an estate, whether for life or years, vested in another party, merger will not take place.

An *interesse termini* is not such an interest as will prevent a merger (4 *Mod.* 1,) for it gives no actual vested estate, as it is not a term, but merely a contract for a term.

When the legal and equitable estate meet in the same person or persons, the trust or equitable estate is merged in the legal estate; as if a wife should have the legal estate, and a husband the equitable, and they have an only child to whom these estates descend, who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to the heir on the part of the mother. *Dougl.* 771.

One of the means adopted by the common law for promoting the simplicity of the different interests existing at the same time in an estate, was the rule of merger, which provides that when an estate in remainder or reversion, and the preceding estate upon which it depends, become vested in the same person, the two interests shall unite without any reference to the wishes of the owner of them. The mode of union is of a singular description, and frequently occasions great injustice. The person entitled to the two estates does not acquire an interest equal to their aggregate extent, but the preceding estate is supposed to have been surrendered by law, and to be merged or drowned in the remainder or reversion, and consequently all powers and privileges belonging to it are lost. The remainder becomes the estate in possession, in the same manner as if the time of the expiration of the preceding estate had arrived, and the rights of strangers who may have charges upon the remainder or reversion are accelerated and rendered more valuable. Terms of one thousand or more years are frequently created as mere securities, mortgages, or for raising charges upon the estate; and the person entitled to the remainder or reversion remains in possession, and every variety of interest is carved out of the remainder or reversion. The first interest in remainder or reversion is therefore frequently of shorter duration than the term to which it is subject, and yet the larger term will merge in the lesser interest. If a person be entitled for the residue of a term of one thousand years (which not unfrequently happens by the foreclosure of a mortgage), and the first interest in the remainder or reversion, subject to the term, is an estate for life or a term of one year, or even a shorter term, and such life estate or short term become vested in the owner of the longer term, the long term being the preceding estate, is merged, and the owner of it is entitled only to the estate for life or short term. If a tenant for life, with valuable powers appendant, acquires the next estate in remainder or reversion, although it might

determine before his death, his life estate, and all powers belonging to it, are extinguished. If the owner of a building lease, subject to several under-leases at improved rents, purchases the freehold or the first estate in remainder or reversion, subject to the building lease, or if the owner of such estate in remainder or reversion, acquires the building lease, the building lease is merged, and all the remedies for the improved rents, and the benefit of the covenants in the under-leases, which were carved out of and are dependant upon the estate created by the building lease, are entirely lost.

The rule of extinguishment differs only from that of merger, in being applicable to a charge or right instead of a preceding estate, and it is in many cases equally unjust; for instance, if the owner of a rent purchase a small part of the land upon which it is charged, the whole rent is extinguished notwithstanding its value may greatly exceed that of the land included in the purchase. See *Rent*.

The same rules are followed in several cases in equity. If an estate be mortgaged, and the purchaser take his conveyance from both the mortgagee and the person entitled to the equity of redemption, the mortgage is extinguished in the equity of redemption: and if there be a second mortgage, of which the purchaser or his agent have notice (and it is difficult to ascertain what slight circumstances may be considered to amount to notice) the purchaser notwithstanding he may have paid the value of the estate to the first mortgagee, may be obliged to give up the estate to the second mortgagee, because the mortgage which he paid off has been extinguished.

The inconveniences occasioned by the principles of merger and extinguishment, are usually prevented upon a purchase by the manumery of a conveyance to a trustee of the estate or charge which would otherwise be destroyed, for the purpose of preserving its existence, but when this precaution is neglected, or the second estate or right is acquired otherwise than by purchase, the law occasions a manifest injustice. There are several exceptions to the rules of merger and extinguishment, and few branches of the law abound with more intricate or technical distinction. *Tyrrel's Suggestions*, 61.

**MERSCUM.** A lake; from the Saxon *mere*, *lacus*. "*Maneria, molendina, mersca, et merisca*." *Ingulph*. p. 861.

**MERSE-WARE**, Saxon, *Incola paludum*.] The inhabitants of Romney Marsh, in Kent, were anciently so called. *Cowell*.

**MERTLAGE.** Seems to be a corruption of or a law French word for martyrology. See *Hil. 9 Hen. 7. 14 b.* where it seems to mean a church calendar or rubric. *Cowell*.

**MERTON**, Statutes made there, 20 *Hen. 3.*

**MESNALTY**, *medietas*.] The right of the mesne, as "the mesnalty is extinct." *Old Nat. Brev. 44.*

**MESNE**, *medius*.] He who is lord of a manor, and so hath tenants holding of him, yet himself holds of a superior lord. *Cowell*. See *Mean*.

**MESNE PROCESS.** Such process as issues pending the suit upon some collateral interlocutory matter, as to summon juries, witnesses, and the like, distinguished from original process, which is founded on the writ. *Finch. L. 346*.—Mesne process is, however, more commonly put in contradistinction to final process or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit. 3 *Comm. c. 19. p. 279*.

**MESNE PROFITS, ACTION OF.** See *Ejectment*, 1.

**MESSARIUS**, from *messis*.] The chief servant in husbandry or harvest-time, now called a bailiff in some places. *Mon. Angl. tom. 2. p. 832*. This word is also used for a mower or reaper; one that works harvest-work. *Fleta lib. 2. c. 75*.

**MESSENGER.** Is a carrier of messages, particularly employed by the secretaries of state, &c. and to these commitments may be made of state prisoners; for though regularly no one can justify the detaining a person in custody out of the common gaol, unless there be some particular reason for it; as if the party be so dangerously sick that it would hazard his life to send him thither, &c. yet it is the constant practice to make commitments to messengers; but it is said it shall be intended only in order to carrying the offenders to gaol. 1 *Salk. 347*; 2 *Hawk. P. C. c. 16. § 9*. An offender may be committed to a messenger, in order to be examined before he is committed to prison: and though such commitment to a messenger is irregular, it is not void; and a person charged with treason, escaping from the messenger, is guilty of treason, &c. *Skin. 599*. See *Arrest, Bankrupt, Commitment, Treason*.

**MESSENGERS OF THE EXCHEQUER.** Officers attending that court; they are four in number, and in nature of pursuivants to the lord treasurer.

**MESSE THANE.** Signifies a priest. The Saxons called every man thane who was above the common rank; so *messe thane* was he who said mass; and *woorles thane* was a secular man of quality. *Cowell*.

**MESSINA.** Reaping time; harvest. *Cowell*.

**MESSIS SEMENTEM SEQUITUR.** A maxim in Scotch laws; the crop belongs to the sower, is a principle received in regard to *bonâ fide* possession. See *Emblements, Executor, &c.*

**MESSUAGE**, *messuagium*.] Properly a dwelling-house, with some adjacent land assigned to the use thereof. *West. Symb. tit. Fines, § 26*; *Bract. lib. 5. c. 28*. See *Plowd. 169, 170*. where it is said, that by the name of a messuage may pass also a curtilage, a garden and orchard, a dove-house, a shop, a mill, a cottage, a toft, a chamber, a cellar, &c. yet they may be demanded by their single names. *Messuagium*, in Scotland, signifies the principal place or dwelling-house within a barony, which we call a manor-house. *Skene de verborum signif. verb. messuagium*. In some places it is called the site of a manor.



**MESTILO**, *mesline*, or rather *misellane*; that is, wheat and rye mingled together. *Pat. 1 Edw. 3. p. 1. m. 6.*

**METAL**. The exportation of iron, brass, copper, latten, bell, and other metal, was restrained by the ancient statutes 28 *Edw. 3. c. 5*; 33 *Hen. 8. c. 7*; 2 & 3 *Edw. 6. c. 37*; but was permitted by 5 *W. & M. c. 17*.

With respect to the stealing of metal, see *Larceny*.

**METECORN**. A measure or portion of corn, given out by the lord to customary tenants, as a reward and encouragement for their duties of labour. *Stipendia ei metecorn ac cetera debita servitia in monasterio predicto solvantur. Rylcy's Plac. Parl. 391.*

**METEGAVEL**. Saxon, *cibi gablum, seu vectigal*.] A tribute or rent paid in victuals, which was a thing usual in this kingdom, as well with the king's tenants as others, till the reign of King Henry I.

**METER** of coals in London, &c., from *metior*, to mete or measure a thing. See *Measurer*.

**METHEGLIN**, Brit. *Meddiglin*.] An old British drink made of honey, &c.; it is mentioned in the 15 *Car. 2. c. 9*. See *Mead*.

**METTESHEP**, **METTENSCHEP**. Was an acknowledgment paid in a certain measure of corn; or a fine or penalty imposed on tenants, for their defaults in not doing their customary services, of cutting the lord's corn. *Paroch. Ant. 495.*

**MEYA**. A mey or mow of corn, as anciently used; and in some parts of England they still say *mey* the corn, *i. e.* put it on an heap in the barn. *Blount. Ten. 130.*

**MICEL-GEMOTES**, **MICEL-SYNODS**. The great councils in the Saxon times of king and noblemen, were called *Wittenagemotes*, and afterwards *Micel-synods* or *Michel-synoth*, and *Micel-gemotes*, *i. e.* great and general assemblies. *Concell. See 1 Comm. 147; and tit. Parliament.*

**MICHAELMAS HEAD COURT**. A meeting of the heritors in Scotland, when the roll of freeholders is revised; anciently the presence of all freeholders was required there under a fine; but by 20 *Geo. 2. c. 50* abolishing heritable jurisdictions, no such fine is incurred, except when the heritor is specially summoned as a jurymen, &c.

**MIDDLESEX**. But one county rate to be made for Middlesex, 12 *Geo. 2. c. 29. § 15*. A registry of deeds and wills in that county established. 7 *Ann. c. 20*. See *Deeds, Enrolment, Register*.

**MILDERNIX**. A kind of canvass, of which sailcloths of ships were made. See 1 *Jac. c. 11*.

**MILE**, *Millaire*.] In the measure of England, is the distance or length of a thousand paces; otherwise described to contain eight furlongs, every furlong being forty poles, and every pole sixteen feet and a half. See 35 *Eliz. c. 6*; and *tit. Measure*. It is 1760 yards, or 5280 feet.

**MILES**. A knight. *Mgt. Vest. p. 118.*

**MILITARE**. To be knighted, viz. *Rex per Angliam fecit proclamari, &c. ut qui haberent unde militarent adessent apud Westmonasterium, &c. Mat. West. p. 118.*

**MILITARY CAUSES**. Are, by 13 *Rich. 2. c. 2*, declared to be such as relate to contracts touching deeds of arms and of war, as well out of the realm as within it, which cannot be determined or discussed by the common law; together with other usages and customs to the same appertaining.

The only military court known to, and established by, the permanent laws of the land, is the court of chivalry, formerly held before the lord high constable, and earl marshal of England jointly; but since the attainder of Stafford, duke of Buckingham, under Henry VIII. and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been holden before the earl marshal only. See *Court of Chivalry*.

**MILITARY EVOLUTIONS AND EXERCISE**. The 60 *Geo. 3. c. 1* punishes the unlawful assemblies of persons for the purposes of being trained to, or of practising, military exercise, movements, and evolutions, with transportation for seven years.

**MILITARY FEUDS**. See *Tenures, I.*

**MILITARY OFFENCES**. Independent of the annual acts for punishment of mutiny, &c., desertion from the king's armies in time of war, whether by land or sea, in England, or in parts beyond the seas, by the standing laws of the land, and particularly by 18 *Hen. 6. c. 19*, (extended by 5 *Eliz. c. 5. § 27*.) was made felony, but with benefit of clergy. But by the 2 & 3 *Edw. 6. c. 2*, clergy was taken away from soldiers deserting, and the offence made triable by the justices of every shire. (See also 1 *M. sess. 1. c. 1*. and 4 *P. & M. c. 3. § 9*.) The same statutes punished inferior military offences with fines, imprisonment, and other penalties. See further, *Courts Martial, Soldiers*.

**MILITARY POWER OF THE CROWN**. See *King, V. 3*.

**MILITARY STATE**, or Military Force of the Kingdom. Includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm. See *King, V. 3; Soldiers*.

**MILITARY TENURES**. See *Tenures, I.*

**MILITARY TESTAMENT**. By the exception in the statute of frauds 29 *Car. c. 3. § 23*, and 5 *Wm. 3. c. 21. § 6*, soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases. See *Wills*.

## MILITIA.

The NATIONAL SOLDIERY.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline

made all the subjects of his dominions soldiers; but we are unfortunately left in the dark as to the particulars of this celebrated regulation.

The feudal military tenures were established for the purpose of protection, and sometimes of attack against foreign enemies; (see *Tenures*.) For the further defence in cases of domestic insurrections or foreign invasions, various other plans have been adopted, all of them tending to unite the character of a citizen and soldier in one. First, the assise of arms, enacted 27 *Hen. 2*, and afterwards the statute of Winchester, 13 *Edw. 1. c. 6*, obliged every man, according to his state and degree, to provide a certain quantity of such arms as were then in use; and it was part of the duty of constables under the latter statute to see such arms provided. These weapons were changed by 4 & 5 *P. & M. c. 2*, into more modern ones; but both these provisions were repealed by 1 *Jac. 1. c. 25*; 21 *Jac. 1. c. 28*. While these continued in force, it was usual, from time to time, for our princes to issue commissions of array; and send into every county officers in whom they could confide, to muster and array (or to set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament, anno 5 *Hen. 4*, so as to prevent the insertion therein of any new penal clauses. *Rushw. pt. 3. p. 662, 7*. See 8 *Rep. 375*, &c. But it was also provided by 1 *Edw. 3. st. 2. c. 5, 7*; 25 *Edw. 3. st. 5. c. 8*, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire, but in cases of urgent necessity; nor should provide soldiers, unless by consent of parliament. About the reign of king Henry VIII., or his children, lieutenants began to be introduced, as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the 4 & 5 *P. & M. c. 3*, though they had then not been long in use, for *Cambden* speaks of them in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state, things continued till the repeal of the statutes of armour in the reign of king James I.; after which, when king Charles I. had, during his northern expeditions, issued commissions of lieutenancy, and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament; the two houses not only denying this prerogative of the crown, the legality of which might, perhaps, be somewhat doubtful; but also

seizing into their own hands the entire power of the militia; the illegality of which step could never be any doubt at all.

Soon after the restoration of king Charles II., when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognise the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination. And the order in which the militia now stands by law, is principally built upon the 13 *Car. 2. c. 6*; 14 *Car. 2. c. 3*; 15 *Car. 2. c. 4*, which were then enacted. It is true, the two last of them are apparently repealed; but many of their provisions are re-enacted with the addition of some new regulations by subsequent militia laws; the general scheme of which is to discipline a certain number of the inhabitants of every county chosen by lot formerly for three, but now for five years, (liable to be prolonged by the circumstance of the militia being called out and embodied,) and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties unless in case of invasion or actual rebellion within the realm, (or any of his majesty's dominions or territories, 16 *Geo. 3. c. 3*;) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence. See 1 *Comm. 410*, &c.

The last general acts passed for reducing into one all the laws relating to the militia are, 42 *Geo. 3. c. 90*, for England, and *c. 91* for Scotland; these ascertain the particular quota to be raised in each county and district; but which has from time to time been augmented and altered by subsequent acts. It is provided, that in all cases of actual invasion or imminent danger thereof, and in cases of rebellion and insurrection, his majesty may embody and increase the militia; and if parliament is not then sitting, they are to meet by proclamation in fourteen days.

The militia of Ireland is regulated on principles nearly similar, by 49 *Geo. 3. c. 120*, amended by 53 *Geo. 3. c. 48*; 54 *Geo. 3. c. 179*, &c.

The interchange of the British and Irish militia, so that each may serve in any part of the united kingdom, is allowed and regulated under 51 *Geo. 3. c. 118, 128*; 54 *Geo. 3. c. 10*, (a temporary act).

The wives and families of militia men are provided for, when requiring parish relief, under the 43 *Geo. 3. c. 47*, for England; 43 *Geo. 3. c. 89*, for Scotland; and 51 *Geo. 3. c. 78*; 52 *Geo. 3. c. 28*, for Ireland.

The pay and clothing of all the militia is provided for by acts which pass annually.

The militia having, under various temporary acts, volunteered into the regular army, from time to time, and being at length considered as peculiarly applicable to that purpose, it was found expedient "that a local militia should be established, trained, and permanently maintained, to be called forth and employed in case of invasion in aid of the regular forces for the defence of the realm." This was accordingly effected, first as to England by 48 Geo. 3. c. 111, and afterwards for Scotland by 48 Geo. 3. c. 150. These statutes were amended by several subsequent acts; but the system has never been extended to Ireland.

The rank of officers of the corps of Fencibles in Scotland, and of those in the English militia, where serving together, is settled by 33 Geo. 3. c. 36. § 2.

The militia of the city of London is regulated by the 1 Geo. 4. c. 100; and that of the Tower Hamlets, by 37 Geo. 3. c. 25, 75; 42 Geo. 3. c. 90. § 153, 53 Geo. 3. c. 132. See *Trophy-money*.

As to the militia of the cinque ports, see 42 Geo. 3. c. 90. § 155, referring to 13 & 14 Car. 2. c. 3; and 15 Car. 2. c. 4. See also 43 Geo. 3. c. 100. For raising a body of miners in Cornwall and Devon, see 42 Geo. 3. c. 72. See *Addenda* at the end of this vol.

**MILL, Molendinum.]** A house or engine to grind corn, and is either a water-mill, wind-mill, hand-mill, &c. And besides corn and grist-mills, there are paper-mills, fulling or tucking-mills, iron-mills, oil-mills, &c. 2 *Inst.* 621.

The toll shall be taken according to the strength of the water, *Ordin. pro pistor. inserti temp.* Prohibition shall not go in suit for tithe of a new mill. *Art. cler. 9 Edw. 2. st. 1. c. 5.*

With respect to actions against individuals for not grinding their corn at particular mills, &c. see *Secta ad Molendinum*.

See further *Malicious Injuries and Mil-lers*.

**MILL-BANK PENITENTIARY.** The acts for the establishment and regulation of this prison are the 52 Geo. 3. c. 44; 56 Geo. 3. c. 63; 59 Geo. 3. c. 136; 4 Geo. 4. c. 82; 5 Geo. 4. c. 19; and 7 & 8 Geo. 4. c. 33.

The 4 & 5 Wm. 4. c. 36, instituting the new central criminal court for the metropolis and the adjacent parts, provides, (§ 6.) that the Penitentiary at Mill-bank shall be one of the prisons under the act.

**MILLEATE, or MILL-LEAT.** (Mentioned in 7 Jac. 1. c. 19.) A trench to convey water to or from a mill; the word is most peculiar to Devonshire. *Cowell*.

**MILLERS.** Ought not to be common buyers of any corn, to sell the same again either in corn or meal, but ought only to serve for the grinding of corn that is brought to their mills. *Dalt.* 259.

A miller is indictable for changing corn delivered to him to be ground, and giving bad corn instead of it. 1 *Sess. Ca.* 217. But the indictment should allege, either that the meal or

corn delivered back by the miller was an article for the food of man, or that the miller was the owner or occupier of a soke mill, to which the inhabitants of the parish or manor were bound to come to have their corn ground. 4 *M. & S.* 244.

By 31 Geo. 2. c. 29. § 29. On information given on oath to any magistrate, that there is reasonable cause to suspect any miller, or other person who manufactures meal or flour for sale, or mixing up with the same any ingredient, not the genuine produce of the grain such meal or flour shall import and ought to be, or whereby the purity of any meal or flour shall be in anywise adulterated; such magistrate, or any peace officer authorised by a warrant, may at all seasonable times in the day enter into any house, mill, or other place of the party suspected, to search whether the fact be so.

Meal or flour deemed on such search to have been adulterated, and all ingredients used for such adulteration, may be seized; and such as shall be seized by any officer shall be forthwith carried to a magistrate. If the magistrate shall adjudge, that ingredients, not the genuine produce of the grain, have been put in such meal or flour, or that the purity of it was thereby adulterated, he may dispose of the same as he thinks proper.

§ 30. Every miller, mealman, or other person, on whose premises any mixture or ingredient shall be found, which shall be adjudged by any magistrate to have been lodged there with intent to adulterate the purity of any meal or flour, shall on conviction before a justice forfeit not exceeding 10*l.* nor less than 10*s.*, unless he shall make it appear that the mixture was there for some lawful purpose; and the convicting magistrate may, out of the money forfeited, cause the offender's name, place of abode, and offence to be published in a newspaper.

By § 31. wilfully obstructing or opposing such search, or carrying away the mixture or ingredients, renders the party liable to a penalty not exceeding 5*l.* or less than 20*s.*

§ 32. Prohibits a miller from acting as a magistrate, under the penalty of 50*l.*

§ 34. provides for the proceeding by summons, warrant, distress, and commitment, and directs all penalties to go to the informer.

By 36 Geo. 3. c. 85. § 1. every miller must have in his mill a true and equal balance with proper weights, under the penalty of 20*s.* And if any weights not according to the legal standard, or any false balance, shall be found in his mill, he is liable to the penalties imposed by the 35 Geo. 3. c. 102.

By § 2. millers must weigh the corn brought to them to grind, both before and after it is ground, if required, under the penalty of 40*s.* And by § 3. they are required to deliver the whole produce of the corn when ground, allowing for waste and toll, under the penalty of 1*s.* per bushel for the deficiency, and treble the value. And see *Measure*.

§ 5. No corn is to be taken for toll, but only money, under the penalty of 5*l.* except where the party has no money. The act does not



extend to soke mills where a right to take exits by custom and law.

§ 6 Every miller must put up in some conspicuous part of his mill a table of his prices, or amount of toll, under 20s. penalty.

MILLET, *Milium*.] A small grain; so termed from its multitude. *Lit. Dict.*

MINA. A corn measure of different quantity, according to the things measured by it; and minage was a toll or duty paid for selling corn by this measure. *Cowell*. According to *Littleton*, it is a measure of ground, containing one hundred and twenty feet in length, and as many in breadth. Also it is taken both for a coin and a weight. *Lit. Dict.*

MINARE. To mine or dig mines. *Minator*, a miner. *Record*, 16 Edw. 1.

MINATOR CARUCÆ. A ploughman. *Currell*.

MINE-ADVENTURERS. A company established by 9 Ann. c. 24.

MINERAL. Any thing that grows in mines, and contains metals. *Shep. Epil.* See *Metals*, *Mines*.

MINERAL COURTS, *Curia minerales*.] Are peculiar courts for regulating the concerns of lead mines; as stannary courts are for tin. See *Berghmote*.

MINES, *Mineræ*.] Quarries or places whereout any thing is dug; this term is likewise applied to hidden treasure dug out of the earth.

The king by his prerogative hath all mines of gold and silver to make money; and where in mines the gold and silver is of the greater value, they are called royal mines. *Plowd.* 336 But by the 1 W. & M. c. 30, no mine of copper or tin shall be adjudged a royal mine, though silver be extracted. And by the 5 W. 4. M. c. 6, persons having mines of copper, tin, lead, &c. shall enjoy the same, although claimed to be royal mines; but the king may have the ore, (except in Devon and Cornwall,) paying to the owners of the mines within thirty days after it shall be raised, and before removed, 16*l.* per ton for copper ore washed and made merchantable; for lead ore, 9*l.* per ton (increased to 25*l.* by 55 Geo. 3. c. 134); tin or iron, 40*s.* &c. See 1 *Comm.* 295.

Alum mines belong of course to the persons in whose grounds they are; and, therefore, no privilege concerning them can be granted but in the king's own ground. 3 *Inst.* 185; see 21 Jac. 1. c. 3. § 11, 12.

Where the crown has only a bare reservation of royal mines without any right of entry, it cannot by prerogative grant a license to dig up the soil and search for mines; but if the mines are open, it can restrain the owner of the soil from working them, and either work them itself or grant a license to others to do so. *Per Lord Hardwicke*, 2 *Atk.* 20

To dig mines is waste, where lessees are not authorised by their leases; though a mine is not properly so called, till it is opened; being but a vein of iron or coals, &c. before. See *Waste*.

If a man hath lands where there are some

mines open and others not, and he lets the land with the mines therein for life or years, the lessee may dig in the open mines only, which is sufficient to satisfy the words in the lease; and hath no power to dig the mines unopened; but if there be no open mines, and the lease is made of the lands, together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof; otherwise those words would be void. 1 *Inst.* 54; 2 *Lev.* 184.

So if a man demises lands for life or years, in which there is a coal mine open, the lessee may dig in it; for the mine being open, it shall be intended, by his demising all the land, that his intent is as general as his demise; but if the mine was not opened at the time of the demise, the lessee by lease of the land is not empowered to make new mines; but in such case, if he leases his land and all mines therein, the lessee may dig for mines there. *Resolved* 5 *Rep.* 12.

But if mines are merely inserted as general words, it is otherwise; and, accordingly, where a settlement was made of lands, and all mines, waters, trees, &c. both Lord *Macclesfield* and Lord *King* were of opinion, that the meaning of inserting those words was, that the whole of the inheritance should pass, and they restrained a tenant for life under the settlement from opening mines. 2 *P. Wms.* 240. Yet, although a tenant for life may not open new mines, in working the old he may open new pits and shafts in pursuit of the vein of ore. 2 *P. Wms.* 378; *Sel. Ca. Ch.* 79.

A question was, if a copyholder of inheritance may dig mines in the land? The court seemed to think he might; for that otherwise, mines there would never be opened; as in the case of a glebe of a parson. *Sid.* 152.

However, it has been decided, that the lord of a manor, as such, has no right, without a custom, to enter upon copyhold lands in his manor, under which there are mines and veins of coal, to bore for or work the same; and the copyholder may maintain trespass against the lord for so doing. *Bourne v. Taylor*, 10 *East*, 189. And he may obtain an injunction against the lord to restrain him. 13 *Ves.* 236; 17 *Ves.* 281.

If a man opens a mine in his land, and digs till he digs under the soil of another, he may follow his mine there; but if the owner digs there also he may stop his farther progress; and said to be the use in Cornwall. 2 *Vent.* 342. *per Wilde, J.* on a case referred to him by Lord *Bridgman*. 22 *Car.* 2.

But in a modern case an injunction was granted where a defendant having begun to work a mine in his own land continued it into plaintiff's. 6 *Ves.* 147.

If a person breaks up, or even attempts or threatens to break up, mines which he ought not to do, that is a reason for coming into chancery to have an injunction; *per lord chancellor Barn.* *Chan. Rep.* 497.

But a court of equity, considering the peculiar nature of mining concerns, in which an immense expenditure is required to renew

operations which have once been stopped, will rarely interpose by injunction, till the right has been established at law. 17 *Ves.* 281. And where the plaintiff has been guilty of laches (18 *Ves.* 515); or stands by, while a great expenditure is incurred, to see whether the speculation is likely to turn out profitable, and then sets up a claim (19 *Ves.* 159; 1 *Swanst.* 208), it will refuse to interfere.

As to tenant in tail working mines, see 2 *P. Wms.* 388.

For offences committed in respect of mines, see *Larceny, Malicious Injuries*, 3.

MINES, in another signification, are caves or trenches dug under ground, whereby to undermine the walls of a city or fortification.

MINIMENTS. See *Muniments*.

MINISTERS. If a minister is disturbed in the execution of his office in the church, the punishment on conviction is a fine of 10*l.* and, upon non-payment, three months' imprisonment, &c. 2 & 3 *Edw.* 6. c. 1. And disturbing any licensed dissenting minister incurs a forfeiture of 20*l.* by 1 *W. & M. st.* 1. c. 18. See *Dissenters, Parson*.

MINISTRI REGIS. Extend to judges of the realm, as well as those who have ministerial offices in the government. 2 *Inst.* 208.

MINOR. One under age; more properly an heir male or female, before they come to the age of twenty-one years; during which minority they are generally incapable to act for themselves. See *Infant*.

MINORES. Friars Minorites, of the order of St. Francis, that had no prior; they washed each other's feet; and increased very much in the year 1207. *Mat. West.*

MINORITY. The period of being under age. See *Infant*. Also the inferior numbers in any court, corporation, assembly, &c. See *Majority*.

MINSTREL, *Minstrellus et menestrallus*, from the Fr. *menestrier*.] A musician, fidler, or piper; mentioned in 4 *Hen.* 4. c. 27. *Quod et mariscalli et minstrelli predicti per se forant et esse deberunt unum corpus et una communitas perpetua*, &c. Upon a *quo warranto*, 14 *Hen.* 7, *Laurentius Dominus de Dutton clamat, quod omnes minstrelli infra civitatem Cestrie et infra Cestriam manentes, vel officia ibidem exercentes, debent continere coram ipso vel Senescallo suo apud Cestriam, ad festum Nativitatis St. Johannis Baptistae annuatim, et dabunt sibi ad dictum festum quatuor lagenas vini et unam lanceam; et insuper quilibet eorum dabit ei quatuor denarios et unum obolum ad dictum festum, et habere de quolibet meretrice infra comitatum Cestrie, et infra Cestriam manente, et officium suum exercente, quatuor denarios per annum ad festum predictum*, &c. *Pat.* 24 *Ap.* 9 *Edw.* 4. And where, by the 39 *Eliz.* c. 4, fiddlers were declared to be rogues, yet there a proviso was contained therein, exempting those in Cheshire licensed by Dutton of Dutton. See *Rot. Claus.* 9 *Edw.* 2. m. 26. *dorso*, an ordinance *super mensuratione ferculorum et menestrallorum*. It was usual for these minstrels,

not only to divert princes and the nobility with sports, but also with musical instruments, and with flattering songs, in praise of them and their ancestors. The office and power of the king of minstrels is mentioned in the *Monastic*, 1 *tom.* p. 355. *Cowell*. See *Vagrants*.

MINT, *Officina monetaria; monetarium*.] The place where the king's money is coined; which is at present and long hath been in the Tower of London, though it appears by divers statutes, that in ancient times the mint has also been at Calais, and other places. 2 *Rich.* 2. c. 16: 9 *Hen.* 5. c. 5. The mint-master is to keep his assay, and receive silver at the true value, &c. 2 *Hen.* 6. c. 12. Gold and silver delivered into the mint is to be assayed, coined, and given out, according to the order and time of bringing in; and persons shall receive the same weight of coin, or so much as shall be finer or coarser than the standard, &c. 18 *Car.* 2. c. 5. All silver and gold extracted by melting and refining of metals, shall be employed for the increase of monies, and be sent to the mint, where the value is to be paid. 1 *W. & M.* c. 30. See *Mines*.

The officers belonging to the mint have not always been alike; they are or were the following, viz. the warden (but see 57 *Geo.* 3. *post*), who is the chief of the rest, and is by his office to receive the silver and bullion of the goldsmiths to be coined, and take care thereof, and he hath the overseeing of all the other officers. The master-worker receives the silver from the warden, and causes it to be melted, when he delivers it to the moneyers, and taketh it from them again after made into money. The comptroller, who is to see that the money be made to the just assize, and control the officers if the money be not made as it ought. The master of the assay, who weigheth the silver, and examineth whether it be according to the standard. The auditor takes account of the silver, &c. The surveyor of the melting, who is to see the silver cast out, and that it be not altered after the assay master hath made trial of it, and it is delivered to the melters. The clerk of the irons, who seeth that the irons be clean and fit for working. The graver, whose office is to engrave the stamps for the money. The melters, who melt the bullion, &c. The blanchers to anneal and cleanse the money. The moneyers, who are some to shear the money, others to forge and beat it broad, some to round, and some to stamp or coin it. The provost, to provide for all the moneyers, and oversee them, &c. See *Money*.

As to the duties of the warden and master-worker of the mint, &c. see 18 *Car.* 2. c. 5; 14 *Geo.* 3. c. 92.

By 57 *Geo.* 3. c. 67. reciting that the duties of the office of warden of his majesty's mint in England have been usually exercised by deputy; and that several of those duties had, under an order in council, and the indentures of the mint, been transferred to the master and other officers, it is enacted that the said office of warden (on the termination of the interest of the existing warden) be abolished; and that, after

the passing of the act, all the duties required to be performed by the warren, under the act 11 *Geo. 3. c. 92* shall be performed by his majesty's master and worker of the said mint, or his deputy, and all the powers of the warren are vested in the master for that purpose, but without any additional salary or emolument. By the same act it is provided that the office of comptroller of the mint shall, in future, be exercised in person, and not by deputy. By the same act the salary of 250*l.* a year given to the stamper of weights, is abolished; and that officer is allowed only to take the fees for stamping such weights (1*d.* per dozen) allowed by 15 *Geo. 3. c. 30*. By the same act it is enacted that (after the termination of the interest of the existing officer) the office of governor of the mint in Scotland shall vest in and be held by the master and worker of the mint in England, without any special appointment and without any additional salary or emolument; and that all other offices in the mint of Scotland shall in future be held by corresponding officers in England, and that the coinage of the mint in Scotland may be sold under the orders of the Treasury.

By the 1 & 2 *Wm. 4. c. 10* the salary of the master and worker of the mint was reduced from 3000*l.* to 2000*l.* a year.

By the recent act consolidating the law relative to offences against the coin (2 *Wm. 4. c. 31*) it is provided (§ 14) that all counterfeit coin and instruments used for coining shall, after having been seized and used in evidence (if necessary), be delivered up to the officers of his majesty's mint.

And by § 17 it is not necessary to prove coin to be counterfeit by the evidence of any moneyer or other officer of his majesty's mint, but this may be done by other testimony.

Not only those who have no authority whatever to coin money, but likewise the moneyers and other officers of the mint, may be guilty of felony under the above act; as if for their own benefit they make the money of baser alloy or lighter than by their indentures, they are bound to do, for as they can only justify their coining at all under the king's authority if they have not pursued that authority, it is the same as if they had none. 1 *East, P. C.* 166; 1 *Hale*, 213.

**MINT.** Formerly a pretended place of privilege in Southwark, near the King's Bench.

"Then from the mint, walks forth the man of rhyme,

Happy to catch one just at dinner time."—*Pope*.

If any persons within the limits of the mint shall obstruct any officer in the serving of any writ or process, &c. or assault any person therein, so as he receives any bodily hurt, the offender shall be guilty of felony, and transported to the plantations, &c. 9 *Geo. 1. c. 25*. See *Prisons, Privileged Places*.

**MINUERE.** To let blood; *minutio*, blood-letting. This was a common old practice among the regulars, and the secular priests or canons, who were the most confined and se-

dentary men. In the register of statutes and castles belonging to the cathedral church of St. Paul's in London collected by Ralph Baldock, dean about the year 1300, there is one express chapter *De minutione*. *Cowell*.

**MINUTE TITHES**, *minutivæ sive minores decimæ*. Small tithes such as usually belong to the vicar, as of wool, lambs, pigs, butter, cheese, herbs, seeds, eggs, honey, wax &c. See *Tithes*.

**MIRACULA.** A superstitious sport or play practised by the popish clergy for gain and deceit; prohibited by bishop Grotthead in the diocese of Lincoln. *Cowell*.

**MIS.** This syllable added to another word signifies some fault or defect; as, *misprision*; *misduere* to scandalize any one; *misdocere*, i. e. to teach amiss. *Cowell*.

**MISA.** A compact or agreement; a form of peace, or compromise. *Cowell*.

**MISADVENTURE**, *Fr. misadventure*, *Lat. v. futuam*. The killing a man, partly by negligence and partly by chance. 8 *P. C. lib. 1. c. 8*. *Britton* distinguishes between adventure and misadventure; the first he makes to be mere chance; as if a man being upon or near the water, be taken with some sudden sickness, and so fall in and is drowned; or into the fire and is burnt; misadventure, he says, is where a person comes to his death by some outward violence, as the fall of a tree, the running of a cart wheel, stroke of a horse, or such like. *Brit. c. 7*. *Stamford* construes misadventure more largely than *Britton* understands it, and says, it is where one, thinking no harm, carelessly throws a stone, wherewith he kills another, &c. *West* defines misadventure to be when a man is slain by mere fortune, against the mind of the killer, and he calls it homicide by chance mixed, when the killer's ignorance or negligence is joined with the chance. *West, Synb. § 48, 49*. See *Homicide*, II. 1.

**MISCARRIAGE OF WOMEN**, *Procrustes*. See *Homicide*, III. 3.

**MISCASTING**, or **MISCOMPUTING**. See *Assaults, Amendment, Error*.

**MISCHIEF**, *Malignitas*. See *Malicious Injuries*.

**MISCOGNISANT.** Ignorant or not knowing. In the 32 *Hen. 8. c. 9*, against chamberty and maintenance, it is ordained that proclamation shall be made twice in the year of that act, to the intent no person should be ignorant or miscongnant of the penalties therein contained, &c.

**MISCOMPUTING.** See *Miscasting*.  
**MISCONTINUANCE.** Signifies the same with discontinuance. *Kitch* 251. Though it is generally said to be where a continuance is made by undue process. *Jenk. Cent.* 57.

**MISDEMESNOR**, or **MISDEMEANOR**. Any crime less than felony. The term misdeemeanor is generally used in contradistinction to felony, and comprehends all indictable offences which do not amount to felony; as perjury, libels, conspiracies, assaults, &c. See 4 *Comm. c. 1. p. 5. in n.*



A crime or misdemeanor, says *Blackstone*, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms, though in common usage, the word crimes is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of misdemeanors only.

In making the distinction between public wrongs and private, between crimes and misdemeanors, and civil injuries, the same author observes, that public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity. 4 *Comm.* 5.

This term may be considered as, and in fact is, a genus, which contains under it a great number of species, almost as various in their nature as human actions. See *Hale's and Hawkins' Pleas of the Crown*; and tit. *Misprision*.

So long as an act rests on bare intention, it is not punishable, but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. *Cald.* 397; 3 *Inst.* 4; *Forst.* 193. Thus an attempt to commit a felony is in many cases a misdemeanor. 2 *East*, 21; 1 *Stra.* 196; and see 1 *Hawk.* c. 25. § 3. v. c. 55. And an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. 2 *East*, 8; 6 *East*, 464. And it should seem, that an attempt to commit a statutable misdemeanor is as much indictable as an attempt to commit a common law misdemeanor. *Russ & Ry.* 107. An attempt to suborn a person to commit perjury was by all the judges held to be a misdemeanor. *Anon.* cited in *Cald.* 400; and 2 *East*, 14, 17, 28.

Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor. 3 *B. & A.* 161, 164; 1 *Russ. on Crimes*, 48.

By 60 *Geo.* 3. c. 4. it is enacted, that where any person shall be prosecuted in the Court of King's Bench at Westminster or Dublin, for any misdemeanor, either by information or indictment, found in or removed to such courts, and shall appear in person, in term-time, to answer thereto, such defendant shall not be allowed to impar till the following term, but shall plead or demur within four days; or, in default thereof, judgment shall be entered against him. Where the defendant appears by attorney, a rule of court shall be made to require such plea or demurrer. The court may, on sufficient cause, allow further time to plead or demur. Persons prosecuted for misdemeanors, by indictment at any sessions of the peace, &c. having been committed or bailed twenty days at least

before the sessions, shall plead to such indictment; and the trial shall proceed at such same sessions, unless a certiorari be delivered before the jury is sworn for the trial. Such certiorari may be issued before indictment found as well as after. Persons committed or bailed at any period less than twenty days before any session, or having twenty days' notice of an indictment found against them, at a session subsequent to their being committed or bailed, shall plead, and be tried at such subsequent session. Indictments removed from cities or towns corporate into counties, under 38 *Geo.* 3. c. 52. shall be tried according to this act, with power to the court to extend the time of pleading. In all prosecutions for misdemeanors by the attorney-general, the court, if applied to for that purpose, shall order a copy of the information or indictment to be delivered to the defendant, after his appearance, free of expense; and if any such prosecution shall not be brought to trial within twelve months after the plea of not guilty pleaded on application by the defendant, giving twelve days' notice to the attorney general, the court may, by order, authorize the defendant to bring on his trial, unless a *nolle prosequi* be entered. The act is not to extend to informations of *quo warranto*, or for non-repair of bridges or highways.

By the 9 *Geo.* 4. c. 32. offenders convicted of any misdemeanor, (except perjury and subordination thereof,) enduring the punishment adjudged therefore, shall not, by reason of such conviction, be deemed incompetent witnesses in any court or proceeding civil or criminal.

With respect to the pronouncing of judgment in misdemeanors upon records of the King's Bench, see *Judgments in Criminal Cases*.

MISE, Fr.; Lat. *missum*, *misa*.] Is a law term signifying expenses, and it is commonly so used in the entries of judgments in personal actions; as when the plaintiff recovers, the judgment is *quod recuperet damna sua* to such a value, and *pro misis et custagiis*, for costs and charges, so much, &c.

This word hath also another signification in law; which is, where it is taken for a word of art, appropriated to a writ of right, so called because both parties put themselves upon the mere right, to be tried upon the grand assize, so that what in all other actions is called an issue, in a writ of right was termed a mise; but if in the writ of right a collateral point were tried, there it was called an issue. To join the mise upon the mere right was as much as to say, to join the mise upon the clear right, i. e. to join upon the point, which had the more right, the tenant or demandant. 1 *Inst.* 294; 37 *Edw.* 3. c. 16. See 3 *Comm. App.* § 6.

MISES. Taxes or tallages, &c. An honorary gift or customary present, from the people of Wales to every new king and Prince of Wales, anciently given in cattle, wine, and corn, but now in money, being 5000*l.* or more, is denominated a mise; so was the usual tribute or fine of 3000 marks, paid by the inhabitants of the county palatine of Chester, at the change of every owner of the said earldoms, for enjoying

their liberties. And at Chester they have a mise-book, wherein every town and village in the country is rated what to pay towards the mise. The 27 Hen. 8. c. 26. ordains that "lords shall have all such mises and profits of their lands as they had in times past," &c.

Mise is sometimes corruptly used for *mease*, in law French *mees*, a message; thus a mise-place in some manors is such a message or tenement as answers the lord a heriot, at the death of its owner. 2 Inst. 528.

MISELLI. Leprous persons. Cowell.

MISE-MONEY. Money given by way of contract or composition to purchase any liberty, &c. Blount. Ten. 162.

MISERERE. The name and first word of one of the penitential Psalms, and most commonly that which the ordinary gave to such guilty malefactors as were admitted to the benefit of clergy; being therefore called the *Psalm of Mercy*. See *Clergy, Benefit of*.

MISERICORDIA. An arbitrary or discretionary amercement. See *Amercement*.

Sometimes *misericordia* is to be quit and discharged of all manner of amercements that a man may fall into in the forest. See *Crompt. Jur.* 196. See *Moderata Misericordia*.

MISERICORDIA in cibis et potu. Exceedings, or overcommons, or any gratuitous portion of meat and drink given to the religious above their ordinary allowance. *Mat. Par. Vit. Abb. S. Albani*, 71. In some convents they had a stated allowance of these overcommons upon extraordinary days, which were called *Misericordia regulares*. *Monast. Angl.* i. 149, b.

MISERICORDIA COMMUNIS. Is when a fine is set on the whole county or hundred. *Mon. Angl.* i. 967.

MISEVENIRE. To succeed ill; as where a man is accused of a crime, and fails in his defence or purgation. *Lex Canut.* 78 *apud Brompton*.

MISFEASANCE. A misdeed or trespass. Jury to inquire of all *purprestures* and misfeasance. *Cro. Car.* 498. It is commonly used as signifying a positive act of tort in contradistinction to *nonfeasance*. See that title.

MISFEASOR. A trespasser. 2 Inst. 200.

MISKENNING, *miskenninga*; from *mis*, and Sax. *cennan*, i. e. *citare*, *Leg. H. l. c. 12.* *Iniqua vel injusta in jus vocatio; inconstanter loqui in curia, vel invariare*. It is mentioned among the privileges granted and confirmed to the monastery of Ramsay by S. Edward the Confessor. *Mon. Angl.* i. 237. *Et in civitate London in nullo placito miskennagium*. *Chart. H. 2.*

MISNOMER, of the Fr. *mes*, amiss; and *nomen*, *nominare*.] The using one name for another; a misnaming. A name, *nomen*, *est quasi rei notamen*, and was invented to make a distinction between person and person; and where a person is described, so that he may be certainly distinguished and known from other persons, the omission, or, in some cases, the mistake of the name, shall not avoid the grant. 11 Rep. 20, 21. A grant to a man by a wrong

name may be good, *si constat de personâ*, but the *demonstratio personæ* must appear upon the face of the grant. *Ld. Raym.* 301. Yet a grant to a knight, by the name of esquire, is void. *Ib.* 303. And if the name of a party is

mistaken, the judges ought to mould a small mistake therein, to make good a contract, &c. and so as to support the act of the party by the law. *Hob.* 125. But the Christian name ought always to be perfect; and the law is not so precise as to surnames as it is of Christian names. *Poph.* 57; 2 *Lit. Abr.* 199. Misprisions of clerks in names are amendable; *Peter* and *Piers* have been adjudged one and the same name. *Saunder* and *Alexander* and *Garret* and *Gerald* are but one name, but *Ranulph* and *Randolph*, *Isabel* and *Sybil*, &c. are several names, and must be named right. 1 *Roll. Abr.* 135; 1 *And.* 211.

Where a Christian name is quite mistaken, as *John* for *Thomas*, &c. it may be pleaded that there was no such man in *rerum naturâ*. *Dyer*, 349. Or he may plead his having been christened by the name of *Thomas*, and always called and known by that name: and traverse his being called or known by the name of *John*. If a person pleads that he never was called by such a name, it is ill: for this may be true, and yet he might be of that name of baptism. 1 *Salk.* 6. One whose name is *Edmund* is bound in a bond by the name of *Edward*; though he subscribes his true name, that is no part of the bond. 2 *Cro.* 640; *Dyer*, 279. If a person be bound by the name of *W. R.* he may be sued by the name of *W. R.* alias *dictus W. B.* his true name; not *W. B.* alias *dictus W. R.* 3 *Salk.* 238. If a person be indicted by two Christian and surnames, it will be quashed; for he cannot have two such names. 1 *Ld. Raym.* 562. A lady, wife to a private person, ought to be named according to the name of her husband, or the writ shall abate; so if the son of an earl, &c. be sued as a lord, and not as a private person by the name of her family. *Dyer*, 76; 2 *Salk.* 451.

Misnomer of corporations may be pleaded in abatement. 1 *Leon.* 152; 5 *Mod.* 327; 2 *Salk.* 451. And if there be any mistake in the name of a corporation, that is material in their leases and grants, they will be void. 2 *Bendl.* 1; *Anders.* 196. Judgment against a corporation by a wrong name is void. *Ld. Raym.* 119. A defendant may avoid an outlawry by pleading a misnomer of name of baptism or surname; or misnomer as to additions of estate, of the town, &c. See *Outlawry*.

A misnomer must be pleaded by the party himself who is misnamed. 1 *Lutw.* 35. Plea of misnomer by attorney may be refused; but it is no cause of demurrer. *Ld. Raym.* 509. If defendant omits to plead a misnomer, he may be taken in execution by the wrong Christian name. 2 *Str.* 1218. What words in a plea of misnomer shall be considered as a special imparlance, see 1 *Wils.* 261.

If issue is joined on a plea in abatement for a misnomer, in an action upon the case on promises, and found against the defendant, the

judgment shall be peremptory, therefore the jury ought to assess the damages. 2 *Hits* 367.

If a defendant after having given bail on his arrest, and been afterwards served with notice of declaration, do not plead misnomer in abatement within the first four days, the court will not afterwards (though before pleading in chief) set aside the proceedings, on the ground that he had been arrested and declared against by a wrong Christian name. 15 *East*, 159.

If a person enter into a bond by a wrong Christian name, he must be sued thereon by such name. A declaration against him by his right name, stating that he by the wrong name executed the bond, is bad. 3 *Taunt.* 504. See *Lutw.* 894.

What foundation will support a name by reputation, see *Ld. Raym.* 301, 304.—*Note*, names of persons not christened are surnames only. *Ib.* 305.

For the addition or omission of a letter or two, not making any material alteration in the sound, it is not proper to plead a misnomer. The courts of law discourage (and that justly) dilatory pleas, as much as they can, as tending to the delay of justice.

And now by the 3 & 4 *Will.* 4. c. 42. § 11. "no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the cost of the plaintiff, by inserting the right name upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

In criminal cases also no indictment can now be abated by a plea of misnomer. See *Indictment*, VI.

**MISPLEADING.** If, in pleading, any thing be omitted, essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title wholly defective in itself, or if to an action of debt (i. e. on bond, contract, &c.) the defendant pleads *not guilty* instead of *nil debet* (now abolished), these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second. *Sulk.* 365; *Cro. Eliz.* 778. When an issue is joined on an immaterial point, or such a point, as, after trial, the court cannot give judgment, the court regularly awards a repleader. See *Pleading, Repleader*.

## MISPRISION,

**MISPRISO**, from the Fr. *mespris*, contemptus.} A neglect, oversight, or contempt; as, for example, misprision of treason is a negligence in not revealing treason to the king, his council, or a magistrate, where a person knows it to be committed; so of felony. *Staundf. P. C. lib.* 1. c. 19. If a man knoweth of any treason or felony, and conceals the same, it is a

misprision. In a larger sense misprision is taken for many great offences, which are neither treason nor felony, or capital, but very near them; and every great misdemeanor, which hath no certain term appointed by the law, is sometimes called misprision. 3 *Inst.* 36; *H. P. C.* 127; *Wood*, 406, 408.

Misprisions are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only. *Year B.* 2 *Rich.* 3. 10; *Staundf. P. C.* 32, 37; *Kel.* 71; 1 *Hal. P. C.* 374; 1 *Hawk. P. C.* c. 20. § 1.

Misprisions are generally divided into two sorts: 1. *Negative*, which consists in the concealment of something which ought to be revealed; and, 2. *Positive*, which consists in the commission of something which ought not to be done. 4 *Comm. c.* 9.

Of the first or negative kind, is what is called *misprision of treason*; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto; for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law. Thus it is laid down, that when one knows another hath committed treason, and doth not reveal it to the king, or his privy council, or some magistrate, that the offender may be secured and brought to justice, it is high treason by the ancient common law, for delay in discovering treason, was deemed an assent to it, and consequently high treason. *Bract.* 118; *S. P. C.* 37; 3 *Inst.* 138, 140.

But it is enacted, by the 1 & 2 *P. & M. c.* 10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize, or justice of the peace. 1 *Hal. P. C.* 372. But if there be any probable circumstances of assent, as if a man goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason. 1 *Hawk. P. C.* c. 20. § 4.

A person having notice of a meeting of conspirators against the government, goes into their company and hears their treasonable consultation, and conceals it, this is treason; so where one has been accidentally in such company, and heard such discourse, if he meets such a company a second time; for, in these cases, the concealment is attended with circumstances which show an approbation thereof. *H. P. C.* 127; *Kel.* 17, 21.

A man who hath knowledge of a treason cannot secure himself by discovering generally



that there will be a rising, without disclosing the persons intending to rise; nor can he do it by discovering these to a private person, who is no magistrate. *S. P. C.*; *H. P. C.* 127. But where one is told in general, that there will be a rising or rebellion, and doth not know the persons concerned in it, or the place where, &c. this uncertain knowledge may be concealed, and it shall not be treason or misprision. *Kel.* 22; *1 H. P. C.* 36. If high treason is discovered to a clergyman in confession, he ought to reveal it; but not in case of felony. *2 Inst.* 629. This was law when the Roman Catholic religion was professed here as the religion of the land; the same may be still law. *Duct.*

If a person is indicted of misprision, as for treason; though he be found guilty, the judges shall not give judgment thereon, he not being indicted of the misprision. *Jenk. Cent.* 217. Information will not lie for misprision of treason, &c. but indictment, as for capital crimes. There must be two witnesses upon indictments as well as trials of misprision of treason, by *7 Will. 3. c. 8.* See *Treason.*

There is a negative misprision of treason, created by act of parliament. By *18 Eliz. c. 2.* concealers of bulls of absolution from Rome are declared guilty of misprision of treason. A positive misprision of treason was also created by *14 Eliz. c. 3.* which enacted that those who forged foreign coin, not current in this kingdom, their aiders, abettors, and procurers, should all be guilty of misprision of treason; but that statute was repealed by the *2 H. 4. c. 34.*

The punishment of misprision of treason is, loss of the profits of land during life, forfeiture of goods, and imprisonment during life; *1 Hal. P. C.* 374; *3 Inst.* 36, 218; which total forfeiture of the goods was indicted while the offence amounted to principal treason, and of course included in it a felony by the common law; and therefore is no exception to the general rule, that whenever an offence is punished by such total forfeiture, it is felony at the common law. *4 Comm. c. 9.* 120, 121.

*Misprision of felony* is the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory.

To observe the commission of a felony without giving any alarm, or using any endeavours to apprehend the offender, is a misprision; for a man is bound to apprehend a felon, and to disclose the felony to a magistrate with all possible expedition. *1 Hawk. c. 59;* *3 Inst.* 139.

The punishment of misprision of felony in a public officer, by *Westm. 1. 3 Edw. 1. c. 9.* is imprisonment for a year and a day; in a common person, for a less discretionary time; and in both, fine and ransom at the king's pleasure, as declared by the judges in a court of justice. *1 Hal. P. C.* 375.

The stats. *Westm. 1. 3 Edw. 1. c. 9;* *3 Hen. 7. c. 1.* provide against concealments of felonies by sheriffs, coroners, and bailiffs, &c.

Under this title of misprision, that of *theft-bote* may be reduced; which is, where one, knowing of a felony, takes his goods again, or amends for the same. *8 Inst.* 134, 139; *H. P. C.* 130. Though the bare taking goods again which have been stolen is no offence, unless some favour be shown the thief. *1 Hawk. P. C. c. 59. § 7.*

By the *7 & 8 Geo. 4. c. 29. § 58.* corruptly to take money or reward under pretence or on account of helping any person to any chattel, money, valuable security, or other property, which by felony or misdemeanor has been stolen, obtained, or converted, is felony, (unless the party cause the offender to be apprehended and brought to trial,) and the offender transportable for life, &c.; and by *§ 59.* publicly to advertise a reward for property stolen or lost, without making inquiry after the party producing the property, or by means of any advertisement offering to return money advanced on such property, or printing or publishing such advertisement, incurs a penalty of 50*l.*

There is also another species of negative misprision, namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal; this concealment was formerly punishable by death but now only by fine and imprisonment. *Glanv. lib. 1. c. 2;* *3 Inst.* 133.

*2.* Misprisions which are merely positive, are generally denominated contempts or high misdemeanors; of which the first and principal is the mal-administration of such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment, wherein such penalties, short of death, are inflicted, as to the wisdom of the House of Peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of embezzling the public money, which is not a capital crime, but subjects the offender to a discretionary fine and imprisonment. *4 Comm.* 122.

Other misprisions are in general such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government; these are either against the king's prerogative; the king's person and government; the king's title; his palaces, or courts of justice. With respect to the two first of these, see *Contempt, Government.*

Contempts against the king's title, not amounting to treason or *præmunire*, are, the denial of his right to the crown in common and unadvised discourse; for if it be by advisedly speaking, it amounts to a *præmunire*; see that title. This heedless species of contempt is punished with fine and imprisonment. Likewise if any person shall in anywise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament ought not to direct the right of the crown of England; this is a misdemeanor by *13 Eliz. c. 1.* and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglect-

ing to take the oaths appointed by statute for the better securing the government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, viz. those of allegiance, supremacy, and abjuration; which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by 1 *Geo. 1. st. 2. c. 13.* are very little, if any thing, short of those of a *præmunire*; being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; or to vote at any election for members of parliament; and after conviction the offender shall forfeit 500*l.* to any that will sue for the same.\* Members on the foundation of any colleges in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after; otherwise, if the electors do not remove him and elect another within twelve months, or after, the king may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon and tender the oaths to any person whom they shall suspect to be disaffected, 4 *Comm. 124.* See further *Dissenters, Oaths, Præmunire, Roman Catholics.*

Contempt against the king's palaces or courts of justice have been always looked upon as high misprisions; and by the ancient law, before the Conquest, fighting in the king's palace, or before the king's judges, was punished with death. 3 *Inst. 140, l. 1.* *Alured. c. 7. 34.* By the 33 *Hen. 8. c. 12.* malicious striking in the king's palace, wherein his royal person resided, whereby blood was drawn, was punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand; the solemn execution of which sentence was prescribed in the statute at length. See *Sir E. Knevell's Ca. in Stowe, 11 St. Tr. 136;* and the *Earl of Devonshire's, 11 St. Tr. 133.*

That act was repealed by the 9 *Geo. 4. c. 31.* which, however, does not notice the penalty attached by the common law to the offence of striking in the royal presence; which, it is conceived, still subjects the offender to the loss of his hand. 1 *Hawk. c. 21. § 3; 2 Inst. 549; 3 Inst. 140.*

But striking in the king's superior courts of justice in Westminster Hall, or at the assizes, is made still more penal than even in the king's palace: the reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more, viz. the disturbance of public justice. For this reason, by the ancient common law before the Conquest, striking in the king's courts of justice, or drawing a sword therein, was a capital felony; *Ll. Inæ, c. 6; Ll. Canut. c. 56; Ll. Alured. c. 7;* and our modern law retains so much of the ancient severity, as only to exchange the loss of

life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of the offender's lands during life. *Staundf. P. C. 38; 3 Inst. 140, 141.* A rescue also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and the profits of lands during life: 2 *Hawk. P. C. c. 21. § 5;* being looked upon as an offence of the same nature with the last; but only as no blow is actually given, the amputation of the hand is excused. For the like reason, an affray or riot near the said courts, but out of their actual view, is punished only with fine and imprisonment. *Cro. Car. 373.*

Not only such as are guilty of any actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. *Cro. Car. 503.* And even in the inferior courts of the king, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting; as by the steward in a court leet, or the like. 1 *Hawk. P. C. c. 21. § 10, 11.*

Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment; as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer, for keeping him in custody, and properly executing his duty. 3 *Inst. 141, 142.*

Lastly, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or to advise a prisoner to stand mute (all of which are impediments of justice,) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned. 1 *Hawk. P. C. c. 21. § 15.*

MISPRISIONS OF CLERKS, &c. Relate to their neglects in writing or keeping records; and here misprision signifies a mistaking. See 14 *Edw. 3. c. 6;* and see *Amendment.*

MISRECITAL. Of deeds or conveyances will sometimes hurt a deed, and sometimes not. *Hob. 18, 19, 129.*

If a thing is referred to time, place, and number, and that is mistaken, all is void. *Arg. Pl. C. 392 b. Trin. 13 Eliz.* in the case of the *Earl of Leicester v. Heydon.*

**Misrecital** in an immaterial point, and where it is only an additional flourish in things circumstantial, shall not avoid a grant; as where the husband has a term in right of his wife, and this term is recited as made to the husband. A misrecital in the beginning of a deed, which goes not to the end of a deed, shall not hurt; but if it goes to the end of a sentence, so that the deed is limited by it, it is vicious. *Carth. 149. See Amendment, Deed, Lease.*

**MISSA**, the Mass. At first used for the dismissal or sending away of the people; and hence it came to signify the whole church service or common prayer, but more particularly the communion service, and the office of the sacrament, after those who did not receive it were dismissed. *Lit. Dict.*

**MISSAL**, *missale*.] The mass-book, containing all things to be daily said in the mass. *Linds. Provincial, l. 3. c. 2.*

**MISSATICUS**. A messenger. *Cowell. Domesday in Chenth.*

**MISSÆ PRESBYTER**. A priest in orders. *Blount.*

**MISSURA**. Singing the *nunc dimittis*, and performing other ceremonies to recommend and dismiss a dying person. And in the statutes of the church of St. Paul, in London, (collected by *Ralph Baldock*, dean, about the year 1295, in the chapter *de Frateria*, of the fraternity or brotherhood, who were obliged to a mutual communication of all religious officers), it is ordained, *Ut fiat commendatio et missura et sepultura omnibus sociis coadunantibus, et assistantibus. Liber Stat. Eccles. Paullinæ, M. S. fol. 25.*

**MISSURIUM**. A dish for serving up meat to a table. *Thorn's Chron. p. 1762.*

**MISTAKE**. A negligent error in any deed, record, process, &c. As to which see *Amendment, Deed, &c.*

Ignorance or mistake is classed by *Blackstone* among defects of the will; as when a man intending to do a lawful act does that which is unlawful; for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. Thus, if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder; for a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. 4 *Comm. c. 2. p. 27. See Ignorance.*

**MISTERIUM** for **MINISTERIUM**. *Mon. Angl. tom. 3. p. 102.*

**MIS-TRIAL**. A false or erroneous trial, where it is in a wrong county, &c. 3 *Cro. 281.* Consent of parties cannot help such a trial, when past. *Hob. 5. See Trial.*

**MISUSER**. Is an abuse of any liberty or benefit; as "he shall make a fine for his mis-

user." *Old Nat. Brev. 149.* By misuser, a charter of a corporation may be forfeited; so also an office, &c. See *Condition, l. 1, Office.*

**MITRED ABBOTS**. Were those governors of religious houses who obtained from the pope the privilege of wearing the mitre, ring, gloves, and crozier of a bishop. The mitred abbots says *Cowell*, were not the same with the conventual prelates, who were summoned to parliament as spiritual lords, though it hath been commonly so held; for their summons to parliament did not any way depend on their mitres, but on their receiving their temporals from the hands of the king. See *Abbot.*

**MITTA**, from the Saxon *mitten*, *mensura*.] An ancient Saxon measure; its quantity doth not certainly appear, but it is said to be a measure of ten bushels. *Domesday, tit. Wire-scire. Mon. Angl. tom. 2. p. 262.* And *mitta* or *mitcha*, besides being a sort of measure for salt and corn, is used for the place where the cauldrons were put to boil salt. *Gale's Hist. Brit. 767.*

**MITTENDO MANUSCRIPTUM PEDIS FINIS**. Was a judicial writ directed to the treasurer and chamberlains of the Exchequer, to search for and transmit the foot of a fine, acknowledged before justices in eyre, into the Common Pleas, &c. *Reg. Orig. 14.*

**MITTIMUS**. A writ for removing and transferring of records from one court to another; as out of the King's Bench into the Exchequer, and sometimes by certiorari into the Chancery, and from thence into another court; but the Lord Chancellor may deliver such record with his own hand. 5 *Rich. 2. st. 1. c. 15; 28 & 29 Hen. 8; Dyer, 29, 32.*

*Mittimus* is also a precept in writing, under the hand and seal of a justice of peace, directed to the gaoler, for the receiving and safe keeping of an offender until he is delivered by law. 2 *Inst. 590. See Commitment.*

**MITTRE A LARGE**. Is generally to set or put at liberty. *Law Fr. Dict.* And there is a *mettre le estate* and *de droit* mentioned by *Littleton*, in case of releases of lands by joint-tenants, &c. which may sometimes pass a fee, without words of inheritance. 1 *Inst. 273, 274. See Release.*

**MIXED ACTIONS**. Suits partaking of the nature of real and personal, wherein some real property is demanded, and also personal damages for a wrong sustained. They are now abolished. See further *Action, Limitation of Actions, III.*

**MIXED or COMPOUND LARCENY**. Is such as has all the properties of simple larceny, but is accompanied with one or both of the aggravations of violence to the person, or taking from a house. See *Burglary, House, Larceny.*

**MIXED-TITHES**. Are those of cheese, milk, and young beasts, &c. 2 *Inst. 649. See Tithes.*

**MIXTILLIO**. See *Mestilo*.

**MIXTUM**. This word is often mentioned by our monkish historians; it sometimes signi-



fies a breakfast, but always a certain quantity of bread and wine. *Covell.*

**MOBBING.** The assembly of a number of people, to the terror of the subject, and disturbance of the public peace. *Scotch Dict.* See *Riot.*

**MOCKADOES.** Stuffs made in England and other countries; mentioned in 23 *Eliz.* c. 9.

**MODERATA MISERICORDIA.** A writ founded on *Magna Carta*, which lies for him who is amerced in a court not of record, for any transgression beyond the quality or quantity of the offence; it is directed to the lord of the court, or his bailiff, commanding him to take a moderate amercement of the parties. If a man be amerced in a court baron, on presentment by the jury, where he did not any trespass, he shall not have this writ, unless the amercement be excessive and outrageous; and if the steward of the court, of his own head, will amerce any tenant or other person without cause, the party ought not to sue for his writ of *moderata misericordia*, if he be distrained for that amercement; but he shall have action of trespass. *New Nat. Br.* 167. When the amercement which is set on a person is affirmed by his peers, this writ of *moderata misericordia* doth not lie; for then it is according to the statutes. See *F. N. B.* 76, 4to edit. 176.

**MODIATIO.** Was a certain duty paid for every tierce of wine. *Mon. Angl. tom. 2.* p. 994

**MODIFICATION.** The term used in Scotland to express the ascertaining, by the commission of teinds (tithes), the amount of the stipend to the minister of the parish.

**MODIUS.** The measure, usually a bushel; but various according to the customs of several countries.

**MODIUS TERRÆ VEL AGRI.** This phrase was much used in the ancient charters of the British kings, and probably signified the same quantity of ground as with the Romans, viz. one hundred feet long, and as many broad. *Mon. Angl.* iii. 200.

**MODO ET FORMA.** Words of art in law pleading, &c. and particularly used in the answer of a defendant, whereby he denies to have done the thing laid to his charge *modo et formâ declaratâ*, in manner and form as declared by the plaintiff. *Kitch.* 232.

Where *modo et formâ* are of the substance of the issue, and where but words of form, this diversity is to be observed; where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of form, as in the case of the writ of entry in *casu proviso*. But otherwise it is when a collateral point in pleading is traversed; as if a feoffment be alleged by two, and this is traversed *modo et formâ* and it is found the feoffment of one, there *modo et forma* is material. So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feoffavit modo et formâ*, upon this collateral issue *modo et formâ* are so essential as the jury cannot find a feoffment without deed. *Co. Lit.* 281 b. See *Br. Laboursers,*

*pl.* 46. cites 38 *Hen.* 6. 22. So in breach of covenant, as for ploughing meadow land, a licence in writing, by several, entitled at the time to the reversion with the appurtenant (or lands *pro tempore*), may be traversed *modo et formâ*, and a licence by parol, or by one or two, &c. and not by all, will not support the issue.

*Modo et formâ* do not put the day nor place in issue, but only the matter and substance of the plea. *Reg. Plac.* 188 a. 5; *Hob.* 72; 1 *B. & B.* 536.

Where a traverse is with a *modo et formâ*, &c. that will put the manner as well as the matter in issue, where the manner is material, as the time, the fact, and other circumstances, when they are the effect of the issue. *Reg. Plac.* 189. c. 5.

As to the effect of these words with respect to covering the whole matter of the allegation traversed, see 3 *Bing.* 135. See further tit. *Pleading.*

**MODUS DECIMANDI.** Is when lands, tenements, or some certain annual sum or other profit hath been given time out of mind to a parson and his successors, in full satisfaction and discharge of all tithes in kind in such a place. 2 *Rep.* 47; 2 *Inst.* 490.

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as 2d. an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. 2 *Comm. c.* 3. p. 29.

By the 2 & 3 *Wm.* 4. c. 100. the time required for establishing a *modus* or other exemption from the payment of tithes, has been shortened. See further *Tithes.*

**MOHAIR YARN.** See *Manufactures, Silk.*

**MOIETY, medietas, Fr. moitié, i. e. coæqua vel media pars.]** The half of any thing, and to hold by moieties, is mentioned in our books, in case of joint-tenants. &c. *Lit.* 125. See *Joint-tenants*

**MOLENDINUM.** A mill of divers kinds See *Mill.*

**MOLENDUM.** Corn sent to a mill; a grist. *Chart. Abbat. de Rading, MS. fol.* 116.

**MOLITURA.** Was commonly taken for the toll or multure paid for grinding corn at a mill; sometimes called *molla*, Fr. *moulin*. *Molitura libera*, free grinding or liberty of a mill, without paying toll; a privilege which

the lord generally reserved to his own family  
*Paroch. Antiq.* 236.

**MOLITER MANUS IMPOSUIT.** Several justifications in trespass, *i. e.* actions of assault, are called by this name, from the words "gently laid his hands upon him," used in the plea; as where the defendant justifies an assault, by showing that the plaintiff was unlawfully in the house of defendant, making a disturbance, and being requested to cease such disturbance and depart, he refused, and continued therein, making such disturbance, he, the defendant, gently laid his hands on the plaintiff, and removed him out of the house. So in various other instances, as separating two persons fighting, in order to preserve the peace; so in the legal exercise of an office, &c. See *Assault, Pleading, Trespass*.

**MOLMAN.** A man subject to do service: applied to the servants of a monastery. *Prior. Leves. p.* 21. *Spelm. Gloss*.

**MOLMUTIAN** or **MOLMUTIN LAWS.** The laws of Dunvallo Molmutius, sixteenth king of the Britons, who began his reign above four hundred years before the birth of our Saviour; these were famous in this land till the time of William the Conqueror. This king was the first who published laws in Britain; and his laws (with those of Queen Mercia) were translated by Gildas out of the British into the Latin tongue. *Usher's Primord.* 116.

**MOLNEBA, MULNEBA.** A mill-pond or pool. *Paroch. Antiq.* 135.

**MOLTA.** The duty or toll paid to the lord by his vassals to graze corn at his mill. *Monastic.* ii. 97. See *Molutura*.

**MONARCHY.** That form of government where the sovereign power is entrusted in the hands of a single person. See *Government*.

**MONASTERIES** and **ABBEYS.** See *Abbey*.

**MONETAGIUM.** A certain tribute paid by tenants to their lord every third year, that he should not change the money which he had coined, formerly when it was lawful for great men to coin money current in their territories, but not of silver and gold. It was abrogated by the 1 Hen. 1. c. 2. The word *monetagium* is likewise used for a mintage, and the right of coining or minting money. *Jus et artificium cudendi monetas*.

**MONEY, moneta.]** That metal, be it gold or silver, which receives authority by the prince's impress to be current; for as wax is not a seal without a print, so metal is not money without impression. *Co. Litt.* 207. Money is said to be the common measure of all commerce through the world, and consists principally of three parts, the material whereof it is made, being silver or gold, the denomination or intrinsic value, given by the king, by virtue of his prerogative; and the king's stamp thereon. 1 *Hule's Hist.* P. H. 188.

It belongs to the king only to put a value, as well as the impression, on money; which being done, the money is current for so much as the king hath limited. 2 *Inst.* 575.

Gold and silver coin, &c. was not to be ex-

ported without license, on pain of forfeiture. 9 *Edw. 3. st. 2. c. 1.* And silver money melted down was to be forfeited, and double value. 13 & 14 Car. 1. c. 31. But by old statutes, foreign money might have been melted down. See 27 *Edw. 3. c. 14*; 17 *Rich. 2. c. 1*.

Now, by the 59 Geo. 3. c. 49. § 10. the gold and silver coin of the realm may be exported, or melted down, and the bullion produced thereby manufactured or exported. See also *Coin*.

As a distress for rent was at common law only in the nature of a pledge, whatever can not be identified, so as to be returned in specie, can not be taken. Thus loose money cannot be distrained; but where it is in a bag sealed, it may. *Co. Lit.* 47; 1 *Lutw.* 214.

Formerly it was not an offence to receive money, knowing it to have been stolen; and the like as to choses in action. The former rule might have obtained by the difficulty which must always have been experienced in following and identifying (when found) the metal: and as to the latter, they were clearly not chattels. These defects have been supplied by a recent statute, 7 & 8 Geo. 4. c. 29. § 54. which punishes the receivers of stolen chattels, money, or valuable securities, with transportation, &c. See *Receivers*.

**MONEY, LENDING IT ABROAD.** By a temporary statute, 3 Geo. 2. c. 5. the king by proclamation might for one year, prohibit all his subjects from lending or advancing money to any foreign prince or state without license under the great or privy seal; and if any person knowingly offended in the premises, he should forfeit treble the value of the money lent, &c., two-thirds to the king, and the other to the informer: but persons might deal in foreign stocks, or be interested in any bank abroad, established before the issuing of his majesty's proclamation. See *Alien*.

**MONEY, PAYMENT OF, INTO COURT.** In law proceedings, money demanded is oftentimes brought into court, either by a rule of court, or by pleading a *proferit in curiam* of the money on a tender.

The practice of bringing money into court was first introduced in the time of Kelying, Ch. J., to avoid the hazard and difficulty of pleading a tender: and until recently it was only allowed in cases where an action was brought upon contract for the recovery of a debt, which was either certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by a jury. 2 *Burr.* 1120.

Thus in assumpsit or covenant for the payment of money the defendant might have brought money into court, and in covenant to find diet and lodging, or pay 10*l.*, the court allowed a defendant to bring in the 10*l.* In debt for rent, the defendant was formerly allowed to bring money into court, as is done in the Common Pleas and the Exchequer; but the Court of King's Bench refused it, and said they never did it in debt. But there was a distinction between those actions of debt wherein

the plaintiff could not recover less than the sum demanded, as on a record, specialty, or statute, giving a sum certain by way of penalty, as in those actions wherein the plaintiff might recover less, as in debt for rent, or on a simple contract. In the former the defendant could not bring money into court, though he might have moved to stay the proceedings, on payment of the whole debt and costs; as was the practice in cases of debt on bond conditioned for payment of a lesser sum than the penalty, previous to *st. 4 & 5 Ann. c. 16*, which allows the defendant, pending an action on such bond, to bring the principal, interest, and costs into court, and declares that such payment shall be a full satisfaction and discharge of the bond. But in the latter, the defendant was allowed to bring money into court, because the plaintiff did not recover according to his demand, but according to the verdict of the jury. By the *19 Geo. 2. c. 37*, the defendant might bring money into court, in debt, covenant, or other action, on a policy of assurance. See *3 Burr. 1773*. In an action by an executor or administrator, the plaintiff not being until very recently liable to costs, the defendant was not formerly allowed to bring money into court; but he was afterwards permitted to do so. See *2 Salk. 596*; *2 Stra. 796*.

In trover, the defendant could not bring the goods and costs into court. *1 Wils. 23*. Nor in an action for the mesne profits after a recovery in ejectment. *2 Wils. 115*.

And as a tender could not be pleaded, so the defendant could not bring money into court, in an action for general damages upon a contract, or for a tort or trespass. But in action on assumpsit against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20*l.* unless they were entered and paid for accordingly, the Court of King's Bench allowed him to bring the 20*l.* into court. And where, in action for general damages, the bringing of money into court was irregular, if the plaintiff took it out, he thereby waived the irregularity, and could not afterwards have a verdict, unless he recovered more than the sum brought in.

By *24 Geo. 2. c. 44. § 4* (which seems to be the first statute allowing money to be brought into court in an action for general damages), *20 Geo. 3. c. 70 § 33*; *7 & 8 Geo. 4. c. 29 § 75*; *c. 30, § 41*, and several subsequent statutes, in actions against justices of the peace, or officers of the excise or customs, for any thing done in the execution of their offices, the defendants are permitted to tender amends before action brought, or to pay money into court after proceedings have been commenced.

By the *11 Geo. 4. and 1 Wm. 4. c. 68. § 10* in all actions brought against any mail contractor, stage coach proprietor, or other common carrier for hire, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, the defendant may pay money into court in the same manner and with the same effect as

money may be paid into court in any other action.

And now by the *3 & 4 Wm. 4. c. 42. § 21*, the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest on prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of the superior courts where such action is pending, or of a judge of any of the said courts, may pay into court a sum of money, by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as the said judges or eight or more of them shall, by any rules or orders by them to be from time to time made, order and direct.

Under the old practice, the motion for leave to bring money into court was a motion of course, and should regularly be made before plea pleaded; but it was frequently made, and in some cases expressly authorized by statute, after plea, on obtaining a judge's order for that purpose. And if there had been no delay, the court would give the defendant leave to withdraw the general issue, in order to bring money into court, and plead it on payment of costs. *Tidd's Pract.*

By the rules of *H. T. 2 Wm. 4. r. 55*, it was ordered that "in all cases in which money may be paid into the court, leave to pay it in may be obtained by a side bar rule."

By *r. 56*, "on payment of money into court the defendant shall undertake by the rule to pay the costs; and in case of non-payment, to suffer the plaintiff either to move for an attachment on a proper demand and service of the rule, or to sign final judgment for nominal damages."

And by *r. 101*, "where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others up to the time of paying money into court."

Now by the rules of *H. T. 4 Wm. 4. r. 17*, when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the form therein given.

By *r. 18*, no rule or judge's order shall be necessary, except under the *3 & 4 Wm. 4. c. 42. § 21*, (see *ante*;) but the money shall be paid to the proper officer of the court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

And by *r. 19*, "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit; and in case of non payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, 'that he has sustained damages (or 'that the defendant is indebted to him,' as the case



may be, to a greater amount than the said sum, and in the event of an issue thereon being found for the defendant, the decedent shall be entitled to judgment and his costs of suit."

The court will not order money, paid into court through a mistake to be repaid to the defendant; but perhaps they will in case of fraud. 2 B. & P. 392; and see 3 B. & P. 556.

With respect to the payment of money into court under a plea of tender see that title

MONGIR. A little sea vessel which fishermen used. See *Illustr.* 11.

When a word ends in *ma*, *pe*, as *ic. n. i. q. u. e. r. e.*, &c. it signifies in. reman. from the day *ma. p. e. i. e. m. a. t.*

MONIERS, or MONEYERS, *in instanti*.  
Are ministers of the mint, who make and coin  
the kings money. *Re. Georg. 202. 1 Dec. 1714*  
see *of it*. It appears in ancient authors  
that the kings of France had mints in several  
countries and those who had the conduct of  
the mints appear to have been called *monetarii*  
**moniers**. In the tract in the Exchequer, written  
by Coker, it is said that whereas sheriffs  
were usually obliged to pay into the kings  
exchequer the kings sterling money for such  
debts as they were to answer; those of Cam-  
berland and Northumberland were admitted to  
pay in any sort of money so it were silver and  
the reason there given is, because those two  
shires *monetauerent et auoient une monnaie*  
*liberté, quant ce n'est pas une monnaie libe-*  
*re tant une monnaie d'argent tant une*  
*apud Bathoniæ tant une d'or, tant une*  
*obolis et soteris et in multis alijs prou-*  
*incis et p'prietatibus et tunc ad Henr. and*  
*Sou. de An. 30 Edw. 3. rate round, to*  
*Trin. Rot. O. later it is the title of bankers*  
both been given to bankers, that is such as  
take in their trade to deal in moneys upon re-  
turns. *Coculi. See Mint*

MONKS, *monachi*, from the Gr. *Monos* *solus*, *in a soli*, i. e. *separatus*, as a *crum consorto* i. e. *sol*. Because the first Monks lived alone in the wilderness. They were after divided into three ranks, *Cenobitæ*, i. e. a society living in common in a monastery, &c. under the government of a single person, and these were under certain rules, and afterwards called *Regulæ*; *Anachoritæ*, or *Heremiti*, those Monks who lived in the wilderness on bread and water, and *Sarabaitæ*, Monks living under no rule, but wandered in the world.

The seven orders of regular monks in England and Wales were the *Benedictines*; the *Cistercians*, and the *Cartusians*, both branches of the former, the *Cistercians*, who followed the rule of St. Benedict but with the addition of many austerities, the *Cluniacs*, also a branch of the Benedictines, who were called white monks from the colour of their habits, and the *Sauvages*, or *Fratres Grisei*, so termed from their gray dress, another snoot from the Benedictine tree. The *Trinitarians*, who were reformed Benedictines, and no house in England, but possessed an abbey

in Wales. The above were all the orders in England and Wales except the *Culdees* or *Culverdes* who were Scotch monks, and of the same rule with the Irish, and who were only to be met with at St. Peter's in York. See 2 *Burn's Eccl. Law* 517.

MONKERY. The profession of a Monk, mentioned in *Whitton's* reading upon *st. 21 Hen. 8. c. 13.*

**MONKS' CLOTHES.** Made of a certain kind of coarse cloth. See 20 *Hen.* 6

MONOPOLY, from *Monos*, *solus*, and *πωλω*, *re. do* ] A license or privilege allowed by the king, by his grant, commission or otherwise, to any person or persons, for the sole buying, selling, making, working or using of any thing; by which other persons are restrained of any freedom or liberty that they had before or enjoyed in their lawful trade. 3 *Inst.* 181, 4 *Inst.* 15. It is defined to be where the power of selling any thing is in one man alone; or where one shall in robb and get into his hands such a merchandise, &c. as none may sell or buy by them but himself. 11 *Rep.* 86.

A monopoly, it is said, hath three indictments mischievous to the public. 1. The raising of the price. 2. The commodity will not be so good. 3. The impoverishing of poor artificers. 11 Rep. 86

All monopolies are against the ancient and fundamental laws of the realm. A bye law, which makes a monopoly is void; so is a prescription for a sole trade to any one person or persons exclusive of all others. *M. v. 591.* Monopolies by the common law are void as being against the freedom of trade and discouraging labour and in industry, and putting it in the power of particular persons to set what prices they please on a commodity. *1 Huch. P. C.*

Upon this ground it hath been held that the king's grant to any corporation of the sole importation of any merchandise, is void. 2 *Rot. Abr.* 214, 3 *Inst.* 182. The grant of the sole making, importing, and selling of playing cards, was adjudged void. 11 *Rep.* 81; *Moor.* 671. And the king's grant of the sole making and writing of bills, piers, and writs in a court of law, to any particular person, hath been resolved to be void. 1 *Jur.* 231, 3 *Mod.* 75.

As to the king's prerogative copyright in the  
holy scriptures, &c see *Lit. ary Property*

An matter of this nature ought to be tried by the common law, and not at the council table, or any other court of that kind, and the making use of or procuring any unlawful money is punishable by fine and imprisonment at common law. 3 Inst 181, 182

These monopolies had been carried to an enormous height during the reign of Queen Elizabeth, but were in a great measure remedied by the 21 Jac 1 c 3 by which all monopolies, grants, letters-patent, and licences for the sole buying selling, and working of goods and manufactures, are declared void except in some particular cases; and persons grieved by putting them in use, shall recover treble damages and double costs, by action on the statute;

and delaying such action before judgment, by colour of any order warrant, &c. or delaying execution after incurs a *penance*; but this does not extend to any grant or privilege granted by act of parliament, or to any grant or charter to corporations or cities &c., or to grants to companies or societies of merchants for enlargement of trade, or to inventors of new manufactures, who have patents for the term of fourteen years, grants or privileges for printing; or making gun-powder, casting ordnance, &c.

As to inventors of new manufactures &c. it has been adjudged on this statute that a manufacture must be substantially new, and not barely an additional improvement of any old one, to be within the statute; it must be such as none other used at the granting of the letters patent; and an old manufacture in use before cannot be prohibited to any grant of the sole use of any such new invention. 3 *Inst.* 184. Yet a grant of monopoly may be to the first inventor, by the 21 *Jas. I.* 3, notwithstanding the same thing was practised beyond sea; because the statute mentions new manufactures within the realm, and intended to encourage new devices useful here; and it is the same thing, whether acquired by experience or travel abroad, or by study at home. 2 *Salk.* 447. It is said, a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is contrary to the statute; by reason it is inconvenient, in turning so many men into idleness. 3 *Inst.* 184. But experience seems in favour of such inventions, as they tend to lessen the price of manufactures, and enable us to undersell foreigners, both at home and abroad.

The statute of *James* is only declaratory of the common law. The monopoly which can be created by the crown arises from the grant conferring on an individual the privilege of the sole making and selling of some article or thing. It can only be made when thereby no other person is restrained in what he had before, or prevented from following his lawful trade. 1 *Hawk.* 470. And therefore such a grant, at the present day, is confined to a new invention. When it is contemplated to constitute a new monopoly, recourse must be had to parliament. See *Patent*.

Monopolies among the people consist of forestalling, engrossing, and regrating, which were punishable by several statutes now repealed, but they are still offences at common law. See *Forestalling*.

**MONSTER.** One who hath not human shape, and yet is born in lawful wedlock; and such may not purchase or retain lands, but a person may be an heir to his ancestor's lands, though he be deformed in some part of his body. *Co. Lit.* 7.

Showing a monster for money is a misdemeanor. See *Indecency*.

**MONSTRANS DE DROIT**, a showing a right.] A writ out of Chancery to be restored to lands and tenements that are a man's in right, though by some office found to be in the possession of one lately dead; by which of-

fice the king would be entitled to the said lands, &c. *Saund. P. C.* 21; 4 *Rep.* 54.

The common-law methods of obtaining possession or restitution from the crown, of either real or personal property are, 1. By *petition de droit* or petition of right, which is said to owe its origin to King Edward 1. 2. By *monstrans de droit*, manifestation or plea of right; both which may be preferred or prosecuted either in the Chancery or Exchequer. *Skin.* 609.

The former is of use where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as contravenes the title of the crown, granted on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate. *1 Rich. II.* 256. And again, upon this answer being made or answered by the king, *subornatio per petuam*—let me title done to the party, a commission shall issue to inquire the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. *Saund. P. C.* 608; *Rich. II.* 101. Thus if a disseisor of lands, which were holden of the crown died seised without any heir, whereby the king was *primâ facie* entitled to the lands, and the possession was cast on him either by inquest of office, or by act of law without any office found; the disseissee should have remedy by petition of right, suggesting the title of the crown, and his own superior right before the disseisin made. *Bro. Ab. Petition*, 20; 4 *Rep.* 58.

But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established; and praying the judgment of the court, whether upon those facts, the king or the subject hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disseisin as the dying without any heir,) the party grieved shall have *monstrans de droit* at the common law. 4 *Rep.* 5. But as this was so tedious, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged, and rendered almost universal by several statutes; particularly 36 *Edw. 3.* c. 13; 2 & 3 *Edw. 6.* c. 8; which also allow inquisition of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases. *Skin.* 608.

By the common law, whenever the king was in possession by virtue of an inquisition, the subject was put to his *petition* of right, unless the right of the party appeared in the inquisition, and then at the common law he might have had a *monstrans de droit*; but when the inquisition only entitled the king, and he was afterwards seized as of fee against the party to recover possession there at common law the party might have traversed the king's title, for

in that case the king being in nature of a plain party, the party in possession might by pleading in record his interposition of his own officers to have put him to prove the title, and without the need of a traverse. But when a traverse was pleaded, session by virtue of the inquisition, there the party who would get that possession in record was in nature of a defendant, and therefore had no method of proceeding but by way of petition; for he could not plead the king's case, nor could issue, as he could not demand himself. It is remedy by petition, however being all ruled with great delay, in charge to the party grieved, the statutes of 24 Edw. 3. c. 11. 36 Edw. 3. c. 13. and 2 & 3 Edw. 6. c. 8. were made to enable the party to traverse inquisition, or otherwise to show his right, and was traverses and *monstrans de droit* in nature of a defendant, the only difference between them being, that in a traverse the title set up by the party is inconsistent with the king's title found by the inquisition, which traverse must traverse, in a *monstrans de droit* the plaintiff does not traverse the king's title, but in both cases he must make a title to himself, and if he cannot prove his title to a truth, although he be able to prove that the king's title is not good, it will not serve him. In traverses at common law, however, the party is in nature of a defendant, and therefore need not set up any title in himself.

The method of proceeding at common law by petition, was, that the king's title being found by inquisition, the party petitioned to have an inquest of office, to inquire into his title. If his title was found by such office, then he came into court and traversed the king's title. So at the record began by setting out the first inquisition found for the king, and after that the return of the inquisition taken upon the petition, and then went on with *Et modo ad hunc de m reu't*, and so traversed the king's title. In conformity to these proceedings at common law, the traverse and *mon-trans de droit* given by the statutes, begin by stating the inquisition, and then go on, *Et modo ad hunc de m reu't*, &c. And from this manner of pleading some have considered the party traversing as *defendit*: but when it is considered that this traverse comes in lieu of the petition at common law, and that it does not suspend the vesting in the king by the inquisition,—and that the judgment for the party is an *amoveas manus*, and the judgment against him a *repleat*, it seems clear he ought to be denominated a plaintiff, and as such, is capable of being non-suited. *Tidd's Pract.*

These proceedings are had in the Petty-bag Office, in the Court of Chancery, and if upon either of them the right be determined against the crown, the judgment is *quod manus Domini Regis an o eantur, et possessio restituatur petenti, salvo jure Domini Regis*; which last clause is always added to judgments against the king, to whom no laches is ever imputed, and whose right, and it was otherwise provided by statute, was never defeated by limitation or length of time.

By the above judgment the crown is instantly

out of possession, so that there needs not the transfer the seisin from the king to the party grieved. *Plow. l. 159; see 3 Canon. c. 17. p. 256, 257.*

The essée of an outlaw cannot maintain *monstrans de droit*. *Ld. Raym. 307.*

**MONSTRANS DE FAITS ou RECORDS.** Showing of deeds or records is a writ upon an action of debt brought upon an obligation after the plaintiff hath declared, he ought to show his obligation, and so it is of records. And the difference between *monstrans de faits* and *oyer de faits* is this: he that pleads the deed or record or declares upon it, ought to show the same; and the other against whom such deed or record is pleaded, may demand *oyer de the same*. *Covell.*

When a man pleads a deed which is the substance of his plea or declaration, if he does not plead it with a *probat in curia* his plea or declaration is bad upon a special demurrer showing it for cause; and if he plead it with a *probat in curia* and the other party demur and a scint of it, he cannot proceed till he hath shown it, and when the defendant has had a scint of it, if he demurs a copy of the same, the plaintiff may not proceed until a copy is delivered unto him. See 4 & 5 Ann. c. 16; 2 T. 1. r. 201, 202, and tit. *Oj. r. Pleading, Probat in Curia*.

**MONSTRAYERUNT.** Is a writ which lies for tenants in ancient demesne, who hold land by free charter when they are distrained to do unto their lords other services and customs than they or their ancestors used to do. Also it lieth where such tenants are distrained for the payment of toll, &c. contrary to their liberty, which they do or should enjoy. *F. N. B. 11, l. 1. st. 200.* This writ is directed to the sheriff, to charge the lord that he do not distress them for such unusual services, &c. And if the lord nevertheless distresses his tenants for other services than at right they ought to do, the sheriff may command the neighbors who dwell next the manor, or take the power of the county, to resist the lord &c. And the tenants in such case may likewise sue an attachment against the lord returnable in C. B. or B. R. to answer the contempt and recover damages. *New Nat. Br. 32.*

But the lord shall not be put to answer the writ of attachment sued against him upon the *monstrayerunt*, before the court is certified by the treasurer and chamberlains of the Exchequer, from the book of Domesday, whether the manor be ancient demesne, so that it is requisite that the plaintiff in the *monstrayerunt* do sue forth a special writ for the certifying of the same. *L. 35.* The writ of *monstrayerunt* may be sued for many of the tenants, without naming any of them by their proper names, but generally *monstrayerunt nobis homines de &c.* But in the attachment against the lord, the tenants ought to be named, though one tenant may sue it in his own name, and the name of the other tenants by general words, *Et ho-*



*mines, &c.* 2 *Hen. 6. c. 26.* See *Ancient De-me-ne, Ne injuste veres.*

**MONSTRUM.** Is sometimes taken for the box in which relics are kept. *Item unam monstrum cum ossibus St. Petri, &c. Monast. iii. 173.* *Monstrum* is also taken for what we call corruptly a *muster* of soldiers. *Cowell.*

**MONTH, or MONETH,** Sax. *monath, mensis, a mensione lunæ cursûs.*] Signifies the time the sun goes through one sign of the zodiac, and the moon through all twelve; properly the time from the new moon to its change, or the course or period of the moon, whence it is called *month* from the moon. *Lit. Dict.* A month is a space of time containing by the week twenty-eight days; by the calendar sometimes thirty, and sometimes thirty-one days; Julius Cæsar divided the year into twelve months, each month into four weeks, and each week into seven days.

The space of a year is a determinate period, consisting commonly of 365 days; for though in Bissextile or Leap-years it consists properly of 366, yet by 21 *Hen. 3. de anno Bissextili,* the increasing day in the Leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous; there being in common use two ways of calculating months, either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only 12. A month in law is a lunar month, or 28 days; unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for 12 months is only for 48 weeks; but if it be for a twelvemonth in the singular number, it is good for the whole year. 6 *Rep. 61.* For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant a whole year, consisting of one solar revolution. 2 *Comm. 141.*

The month by the common law is but twenty-eight days; and in case of a condition for rent, the month shall be computed at twenty-eight days; so in the case of inrolment of deeds, and generally in all cases where a statute speaks of months; but where the statute accounteth by the year, half-year, or quarter of a year, then it is to be reckoned according to the calendar. 1 *Inst. 135; 6 Rep. 62; Cro. Jac. 167; 6 T. R. 221.*

When the word month occurs in any statute, it must be taken to mean a lunar month, unless calendar months are specified. *Cro. Eliz. 135; Yel. 100.*

A twelvemonth in the singular number includes the whole year, according to the calendar; but twelve months, six months, &c. in the plural number, shall be accounted after

twenty-eight days to every month; except in case of presentation to benefices, to avoid lapse, &c., which shall be in six calendar months. 6 *Rep. 61; Cro. Jac. 141.* But if an agreement is to pay fifty shillings for the interest of one hundred pounds at the end of six months, the computation must be by calendar months; because, if it was by lunar months, the interest would exceed the rate allowed by the statute. So in bills of exchange and promissory notes, a month is always a calendar month; as if a bill or note is dated on the 10th of January, and made payable one month after date, it is due (the three days of grace being added) on the 13th of February.

The word month may in fact mean lunar or calendar, according to the intention of the contracting parties; therefore, when upon a sale of land upon the 24th of January it was agreed by the conditions of sale that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be redelivered within four months from said date, and the purchase to be completed on the 24th of June; making a period of precisely five calendar months from the date of the sale and conditions; the word month was held to mean calendar, and not lunar months, by reference to the whole period fixed for the completion of the contract. 1 *M. & S. 111.*

It is somewhat remarkable that the difference between six calendar months and half a year, does not seem to have been considered by legal writers. *Coke* says, half a year consists of 182 days. 1 *Inst. 135.* But six calendar months will be two or three days less or more than such a half year, accordingly as February is reckoned or not one of the six. *Coke*, in his report of *Catesby's* case, clearly considers the *tempus semestre* to be six calendar months; 6 *Co. 61;* yet *Croke*, in his report of that case, states it as confidently to consist of 182 days; *Cro. Jac. 141, 166;* and in neither report is the difference taken notice of. 2 *Comm. 141, in n.*

A notice to a tenant from year to year to quit the premises, must be half a year, and not six calendar months. 3 *Wils. 21; 1 T. R. 159; 7 B. & C. 64.*

**MONUMENT.** An heir may bring an action against one that injures the monument, &c. of his ancestor; and the coffin and shroud of a deceased person belong to the executors or administrators; but the dead body belongeth to none. 3 *Inst. 202, 203.* See *Heir, 111. 3.*

It has been decided by the Court of C. P. that although the freehold of the churchyard is in the parson, yet trespass may be maintained by the erector of a tombstone against one who wrongfully removes it from the churchyard, and erases the inscription. 3 *Bing. 136.*

**MOORS,** in the Isle of Man who summon the courts for the several sheadings, are the lords bailiffs, called by that name; and every

moor has the like office with our bailiff of the hundred. *King's Descript. Isle of Man.*

MOOT, from the Sax. *motian, placitare*, to treat or handle.] A term in the Inns of Court, signifying the exercise of arguing of cases; which young barristers and students used to perform at certain times the better to enable them for the practice and defence of clients' causes.

The place where moot-cases were argued was anciently called the Moot-Hall; and in the Inns of Court there is a bailiff of the moot yearly chosen by the benchers to appoint the mootmen for the Inns of Chancery, and keep accounts of the performances of exercises, both there and in the house. *Orig. Juridical.* 212.

MOOTA CANUM. A pack of dogs. *Cowell.*

MOOTMEN. Those who argue the reader's cases, called moot-cases, in the Inns of Chancery, in the term-time, in the vacation. See *Moot*.

MORA. A moor, or barren or unprofitable ground, derived from the Sax *mor*, signifying also marsh land. *Mon. Angl. tom. ii. p. 50; 1 Inst. 5.* Also a heath. *Fleta, lib. ii. c. 71.*

MORA MUSSA. A watery or boggy moor; a morass, and such, in Lancashire, they call *mosses*: *morassa* is used in the same sense. *Mon. Angl. tom. i. p. 306.*

MORATUR IN LEGE. He demurs; because the party goes not forward in pleading, but rests or abides upon the judgment of the court, in a certain point, as to the sufficiency in law of the declaration or plea of the adverse party, who deliberate and take time to argue and advise thereupon, and then determine it. *Co. Litt. 71.* See *Demurrer*.

MORAVIANS. See *Quakers*.

MORETUM. A sort of brown cloth with which caps were formerly made. *Mat. Paris, anno 1258.*

MORGANGINA, or MORGANGIVA, from Sax. *morgen*, the morning, and *gisan*, to give.] The gift on the wedding-day. Dower, or rather dowery—*Si sponsa virum suum supervixerit, dotem et maritacionem suam, cartarum instrumentis, vel testium exhibitionibus et traditum, perpetualiter habeat et morganginam suam.* *LL. Hen. 1. c. 11, 70.* In some books it is written *morganegiba*, *morgingab*, &c. In *Leg. Canuti apud Brompton*, it is written *morgagisa*, c. 99. It signifies literally *donum matrimoniale*; and it is what we now call *dowery money*, or that gift the husband presents to his wife on the wedding-day. It was usually the fourth part of his personal estate; not here, but amongst the Lombards. *Du Cange in v. Morganegiba.* *Cowell.*

MORIAM, Fr. *morion*; *cassis*.] A head-piece. It seems to be derived from the Italian *morione*. See 4 & 5 P. & M. c. 2.

MORINA. Murrain; an infectious distemper in cattle. It also signifies the wool of sick sheep, and those dead with the murrain, *Fleta lib. ii. c. 79. par. 6.*

MORLING, or MORTLING. That

wool which is taken from the skin of dead sheep, whether being killed or dying of the rot. See 4 *Edw. 4. c. 2 & 3; 27 Hen. 6. c. 2; (both repealed); 3 Jac. 1. c. 18; 14 Car. 2. c. 88; and tit. Shorling.*

MOROSUS. Marshy. See *Mora*.

MORSELLUM, or MORSELLUS TERRÆ. A small parcel or bit of land. *Charta 11 Hen. 3; Mutt. Paris, 438; Mon. Angl. 282.*

MORTARIUM. A light or taper set in churches to burn over the graves or shrines of the dead. *Consuetud. Dom. Farendon, MS. fol 48*

MORT-D'ANCESTOR. See *Assise of Mort d'Ancestor*.

## MORTGAGE.

MORTGAGIUM vel mortuum vadium; from *mort*, *mortuus*, and *gage*, *pignus*.] A pawn of land or tenement, or any thing immoveable, laid or bound for money borrowed, to be the creditor's for ever, if the money be not paid at the day agreed upon, and the creditor holding land and tenement upon this bargain, is called Tenant in Mortgage. Of this we read in the *Grand Customary of Normandy*, c. 313, which see. *Glanvill*, likewise, lib. 10. c. 6. defineth it thus: *Mortuum vadium dicitur illud, cujus fructus vel redditus interim percipiuntur in nullo se acquiescant.* So that it is called a *dead gage*, because whatsoever profit it yieldeth, yet it redeemeth not itself by yielding such profit, except the whole sum borrowed be paid at the day. See *Skene de verb. signif. verbo Mortgage*. He who pledgeth this pawn or gage is called the *mortgagor*, and he who taketh it the *mortgagee*. *West. Symbol. p. 2. ut Fines, § 115.* This, if it contain excessive usury, is forbidden by 37 *Hen. 8. c. 9.* But it is called mortgage, because, if the money is not paid at the day, the land *moritur* to the debtor, and is forfeited to the creditor. *Cowell.*

- I. *Of the Origin, Nature, and several Kinds of Mortgages.*
- II. *What shall be deemed a Mortgage, or an Estate redeemable; and of the distinct Interests of Mortgagor and Mortgagee.*
- III. *Of the priority of Incumbrances, of Tacking, and of the concealment of former charges by the Mortgagor.*
- IV. *Of the Equity of Redemption and Foreclosure; and of the manner of redeeming and foreclosing, &c.*

I. The notion of mortgaging and redemption seems to be of Jewish extraction, and from them derived to the Greeks and Romans: the plan of the Mosaic law constitutes a just and equal Agrarian, that the lands may continue in the same tribes and families, and the people might not be diverted by any exotic arts and inventions from the exercise of agriculture, in which innocent employment they were to be continually educated; therefore, whoever were compelled by want to sell, could transfer no estate in lands farther than the next general

jubilee, which returned once in fifty years; wherefore they computed till the jubilee, that, according to the distance from thence, such was the interest that could be transferred to the buyer. But the vendor had power at any time to redeem, paying the value of the lands to the jubilee; but though he did not redeem it at the year of jubilee, yet the lands came back again free to the vendor and his heirs. *Cumæus*, 11, 12.

But our notion of mortgaging and redemption seems to have come more immediately from the civil law; therefore it will be necessary herein to consider the distinctions in that law between pledges and things hypothecated *Justin.* 592. See *Butler's note, Co Litt.* 205; *Justin. Cod. l. 4. t. 54. § 2, 7.*

The *pignus* or pledge was, when any thing was obliged for money lent, and the possession passed to the creditor.

The *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. Now in case of tools or ornaments, the creditor was obliged to take the same diligence in keeping them, as he used about his own; so that if the goods were lost by the neglect of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own. See *Bailment*.

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*; which, when he had pursued, and obtained sentence thereon, he might sell as his own property. But there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only against the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem, quam in personam*, and was given *ad pignus prosequendum, contra quemcumque possessorum*; because herein the creditor had not the possession of the pledge, but it remained to the debtor; and until sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption: and where the same thing was pledged to several, those were said to be *potiores in pignore*, to whom the things were first hypothecated. *Digest lib. 20. tit. 6; Corrin*, 269, 270, 271.

If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back as a thing lent; which seems to have introduced the notion among us of the debtor's right to redemption; and with them the usucaption, or the right of prescription, did not extinguish the pledge, unless a stranger had held it for thirty years, or the debtor had held it for forty years. *Digest, lib. 20. tit. 6.*

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non rectè subjiciuntur hypothecæ, quamvis fructus posse esse*

*receptum est*: and the reason of this rule was, because the feud was filled with a tenant from the lord's original bounty, on whom he depended for his personal service in war and peace; therefore the feudatory could not intrude a tenant on him without his leave, who might be less capable of those services; for which reason, as the tenant could not originally alien without license, so he could not mortgage. *Corrin*, 268. See *Fonblanque's Treat. Eq. lib. 3. c. 1. § 1.*

But when a license of alienation was given about the time of Henry III. and it became a maxim in law, that the purity of a fee-simple imported a power of disposing of it as the owner pleased, there were two ways of mortgaging lands introduced, which *Littleton* distinguishes by the names of *vadium vivum*, living pledge, and *vadium mortuum*, dead pledge. 9 *Hen.* 3. 32; 18 *Edw.* 1.

*Blackstone* classes these estates held in pledge among estates defeasible on condition so support the words then as above into *conditioned estates*. See 2 *Comm.* c. 10; 111. p. 157.

*Vivum vadium*, or living pledge, is, when a man borrows a sum, suppose 200*l.* of another, and grants him an estate as of 20*l.* *per ann.* to hold, till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be *living*; it subsists and survives the debt, and immediately on the discharge of that, results back to the borrower. This seems to be the ancient way of pledging lands; for they held, that lands could not be hypothecated; therefore they used to subject the *usufructus*, which continued originally during the life of the feudatory; but when there was a free liberty given of alienation, then the feudatory could pledge the *usufructus* of the land at pleasure; but because, by this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome; and those that lend money to usury are generally willing to receive the whole in a gross sum; therefore this way of pledging is now out of use. *Co. Lit.* 205; see *Madd. Formal.* 136.

But *mortuum vadium*, a dead pledge, or mortgage, (which is much more common than the other,) is where a man borrows of another a specific sum, *e. g.* 200*l.* and grants him an estate in fee, on condition, that if he, the mortgagor, should repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. 2 *Comm.* 158.

The *vadium mortuum* is so called by *Littleton*, because it is doubtful, whether the feoffor will pay the money at the day limited or not; and if he do not pay, then the land, which is but in pledge upon condition, for the payment of the money, is, in strictness of law, taken



from him for ever, and so *dead* to him; and the mortgagee's estate in the lands is then no longer conditional, but absolute; and if he do pay it, then the pledge is dead to the tenant of the land. *Lit. § 332; Co. Lit. 205.*

So long as the estate of the mortgagee continues conditional, that is, between the time of the lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. *Lit. § 332.* But as it was formerly a doubt, whether by taking such estate in fee it did not become liable to the wife's dower and other incumbrances of the mortgagee; though that doubt has been long ago overruled by our courts of equity (*see post* 111) it therefore became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage-money; which course has been since pretty generally continued, principally because on the death of the mortgagee such terms becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be. 2 *Comm. 158.*

Of these mortgages, therefore, we see there are two sorts; 1st. Of the freehold and inheritance; and 2dly. Of terms for years. *Maddox, 318, 319.*

1st. Of the freehold and inheritance; and here the ancient way was to make a charter of feoffment, on condition that if the feoffor or his heirs paid the sum to the feoffee or his heirs, he should re-enter and re-possess; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by another charter, as may be seen in the old forms. *Maddox, 318, 319.*

For as a man might annex a condition to his feoffment, for *cujus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date and executed at the same time; for, being executed at the same time, it is really but one and the same disposition, *quæ incontinenti fiunt inesse videntur*; but a defeasance or condition annexed after the feoffment executed come too late; because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture; but rents, annuities, or warranties, that are things executory, may be defeated by defeasances at least at the time of their creation or any time after, because there is not any necessity of the notoriety of livery to make an investiture; therefore being created by deed only, they may be defeated or destroyed by deed alone. *Co. Lit. 220, 227.*

These sorts of conveyances were subject to some inconveniences; as if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and incumbrances; for though if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and consequently was in, above all the charges and incumbrances of the feoffee; yet,

if he did not literally perform the condition by payment of the money at the day, then the estate was legally subject to the charges and incumbrances of the feoffee, though the money was afterwards paid to, and the estates re-conveyed by the feoffee. *Co. Lit. 221, 222.*

But the courts of equity, as they grew in power, have set this matter right; and have maintained the right of redemption, not only against tenant in dower, and the persons who came in under the feoffee, but even against the tenant by the curtesy, and lord by escheat that are in the *post*; because the payment of the money doth, in the consideration of equity, put the feoffor in *status* *ante*, since the lands were originally only a pledge for the money lent. *Hard. 465. See post, IV.*

2d. As to mortgages by way of creating terms, this was formerly by way of demise and re-demise. As, for example; A. borrowed money of B., thereupon A. would demise the lands to B. for a term of 500, &c. years absolutely, with common covenants against incumbrances, and for farther assurance; and then B. would, the day after, re-demise to A. for 110 years, with condition to be void on non-payment of the money at the day to come. This manner of mortgaging came in after the 21 *Hen. 8.* for falsifying recoveries, when there was a mixed interest settled in terms for years; and was esteemed best for the mortgagor, to avoid all manner of pretension from the incumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure; and was only inconvenient in this, that if the second deed were lost, there appeared to be an absolute term in the mortgagee.

And this became afterwards the common method, viz. by a demise of the land for a term, under a condition to be void on the payment of the mortgage-money and interest; and a covenant was inserted at the end of such deeds, that, till default should be made in the payment of the money, that the mortgagor should receive the rents, issues, and profits, without account.

It subsequently became the practice to insert in the mortgage deed of a term for years, or in the assignment thereof, a covenant from the mortgagor for himself and his heirs that, if default were made in the payment of the money at the day, he and his heirs would, at the cost of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent a merger of the term) as he or they should direct and appoint; for the reversion, after a term of years, being of little worth, and yet the mortgagee for want thereof continuing but a termor, and subject to forfeiture, &c. and not capable of the privileges of a freeholder, therefore where the mortgagor could not redeem the land it was but reasonable the mortgagee should have the whole interest and inheritance of it, to dispose of as absolute owner.

In modern times mortgages of freeholds for

years have become of rare occurrence; except under family settlements by which terms are created for the purpose of raising portions for younger children, &c. The whole fee is now generally conveyed to the mortgagee or to his trustee; and, in order to avoid the delay and expense attending a bill of foreclosure, the mortgage contains a trust or power to sell the estate comprised in the security after a specified time, or after notice has been given by the mortgagee to the mortgagor to repay the principal and interest at the end of a certain period, and default has been made by the latter pursuant to such notice. Under the trusts or powers contained in mortgage deeds properly prepared, any concurrence in the sale on the part of the mortgagors or their representatives is unnecessary; for a good title can be made to the property sold by the mortgagors or their trustees. See 18 Ves. 344.

II. Whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so. 1 Vern. 183, 268, 394. And the mortgagor will be allowed to redeem, notwithstanding any condition that it shall, in any future event, operate as a purchase. 2 Vern. 84; 1 Vern. 476, 488; 1 Ch. Ca. 1; Finch. Rep. 376; but see 1 P. Wms. 268; 2 Atk. 494; *Tasburgh v. Eccles*, Bro. P. C.; and *Powell on Mortgages*, 31. A mortgage will not, however, be easily presumed, against an absolute conveyance, especially if the possession has gone along with the conveyance. *Forrest*. 61. But parol evidence is admissible to show or explain the real intention and purpose of the parties, though the conveyance be absolute. See *Pre. Ch.* 526; 2 Atk. 98; 3 Atk. 388.

Where the condition of a mortgage is, that the mortgagor should redeem during his life, or that the mortgagor and the heirs of his body should redeem, yet equity will admit the general heir of such mortgagor to a redemption; because this can be no purchase, since there is a clause of redemption; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it should be in the power of the scrivener, or gripping usurer, by such impertinent restrictions, to elude the justice of the court. 1 Vern. 33, 190; Ch. Ca. 147; 1 Edw. 55.

But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no issue male, his brother should have the land; such an agreement, made out by proof, will be decreed in equity. 1 Vern. 193.

A. in consideration of 1000*l.* made an absolute conveyance to B. of the reversion of certain lands after two lives, which, at the time, were worth little more; and by another deed, of the same date, the lands were made redeem-

able any time during the life of the grantor only, on payment of 1000*l.* and interest; A. died, not having paid the money; and it was held by Lord K. *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause, and that it was a rule, once a mortgage, and always a mortgage; and that B. might have compelled A. to redeem in his life-time, or have foreclosed him. But on a rehearing, Lord *North* reversed the decree on the circumstances of this case; for it appeared by proof, that A. had a kindness for B., and that he married his kinswoman, which made it in the nature of a marriage-settlement; he likewise held, that B. could not have compelled A. to redeem during his life, which made it more strong. 1 Vern. 7, 193, 214, 230; 2 Vent. 364. S. C. where it is said, that Lord *North's* decree was affirmed in the House of Lords. See also *Hard*. 511.

If A. mortgage lands to B. worth 15*l.* per ann. for securing 200*l.*, and at the same time B. enters into a bond, conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay A. his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c. and A. dies within the year, and the money is paid the next day after, the mortgage is forfeited to his administrator; yet A.'s heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid to the administrator. 1 Vern. 488.

So where A. for 550*l.* made an absolute assignment of a church lease for three lives to B., and B. by writing under his hand, agreed, that if A. paid 600*l.* at the end of the year, B. would convey; B. died, leaving C. his son and heir; two of the lives died, and the lease was twice renewed by C. and his father; and though it was near twenty years since the conveyance was made, yet the master of the rolls decreed a redemption on payment of 550*l.* and the two fines. 2 Vern. 84.

A. lends money to B. to carry on certain buildings and takes a mortgage from him to secure 1600*l.* with interest; and by another deed, executed at the same time, takes a covenant from B. that he should convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of twenty years' purchase; and on a bill brought to redeem, the master of the rolls decreed a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by agreement. 2 Vern. 520.

But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet if A. on a mortgage lends money at 5*l.* per cent. but agrees in the deed, that if the money were paid within three months after it became due, that he would accept of 4*l.* per cent. and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l.* per cent.; for though the court relieves against unreasonable penalties, yet this is not

so, for the mortgagee might have refused to lend his money under 5*l.* per cent. *Preced. Chanc.* 150; 1 *P. Wms.* 653. See post, III. *ad finem.*

So if the mortgagee devises that the mortgagor should be remitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; because, being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case, after the day. 1 *Ch. Ca.* 52.

But where in a mortgage there was a proviso, that if the interest was behind six months, that then the interest should be accounted principal, and carry interest; this, by Lord Cowper, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far, and that an agreement made at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. 2 *Salk.* 499.

A distinction is made in chancery between an agreement, that the interest shall be raised, if not punctually paid, and for abatement thereof upon punctual payment. For in the former case it is considered as a penalty which the courts of equity will relieve against; but in the latter as a condition, which must be strictly adhered to; in which case the debtor cannot have relief in equity after the day of payment elapsed; because the abatement is to be upon a condition which is not performed. 3 *Burr.* 1374, 5.

But though the condition on which the interest is to be abated must be strictly performed on the part of the mortgagor, yet the agreement for abatement is not considered so strictly in the light of a condition as to be utterly defeated by a single breach. See 2 *Edw. R.* 197; 1 *M. & S.* 706.

The mortgagor, before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited or not, hath the legal estate in him; also after forfeiture he hath an equity of redemption; so that he is still considered as owner and proprietor of the estate, until the equity of redemption be foreclosed; therefore may make leases of any settlement thereof, which will bind his equity of redemption. (But they will not bind the mortgagee, unless he is a party to the lease, &c.)

The legal interest of the mortgagor after default is that of a tenant at sufferance, not a tenant at will, since he may be ejected without notice. 8 *B. & C.* 767; whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will. 4 *T. R.* 680. And he is not, like a tenant at will, entitled to his growing crops after the will is determined. 1 *T. R.* 383; and see *Dougl.* 266, (279); *Id.* 21; 9 *B. & C.* 245. So where a mortgage was made with power to sell, if the money was not

paid on a certain day, the mortgagor continuing in possession, it was held, in an ejectment brought after the time was passed, that it might be maintained without giving notice to quit or demand of possession. 3 *Bing.* 421.

And by the recent statute of limitations, (3 & 4 *Wm. 4. c.* 27.) no mortgagor is to be deemed a tenant at will to his mortgagee within the meaning of the seventh section relating to tenancies at will.

As to the nature of the estates of the mortgagor and mortgagee; it seems to be at length settled, that as the mortgagee is considered as holding the estate, merely in the nature of a pledge or security for payment of his money, a mortgage, though in fee, (the legal estate in which descends to the heir at law,) is considered in equity only as personal estate. *Fonbl. Treat. Eq. lib. 2. c. 1. § 3 & 13 in n.*

Hence as the mortgagor, till the equity of redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee, before the account taken, having presented to a church that became void, should revoke his presentation, and present such a person as the mortgagor or his vendee (he having contracted to sell) should appoint. *Preced. Chanc.* 71; 2 *Vern.* 401. So even though nothing but the advowson is mortgaged, and the deed contain a covenant that on any avoidance the mortgagee should present. 3 *Atk.* 559. For, in such case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, it might be a benefit beyond the securing of the principal debt and lawful interest thereon; which decision overrules that in 2 *P. Wms.* 403. The mortgagee may however grant leases of the premises, and avoid such leases as have, since his mortgage, been granted without his consent by the mortgagor. *Treat. Eq. lib. 3. c. 1. § 3.*

As to the estate of the mortgagor, though formerly doubted whether he had more than a right of redemption, it is now established that he hath an actual estate in equity, which may be devised, granted, and entailed, and of which there might have been a *possessio fratris*, and may be a tenancy by the curtesy. 1 *Atk.* 603.

It is said that a tenant in tail of an equity of redemption, may devise it for the payment of debts. 1 *Vern.* 41.

As to mortgages by tenants in tail under the recent statute for the abolition of fines and recoveries, see *Tail.*

The mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. 3 *Anst.* 402.

By 7 *Will. 3. c.* 25. "no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust-estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same; but



that the mortgagor, or *cestui que trust* in possession, shall and may vote for the same, notwithstanding such mortgage or trust." And see the Reform Act, 2 Will. 4. c. 45. to the same effect.

And by 9 Ann. c. 5. which requires that knights of the shire should have 600*l.* per annum, and every other member 300*l.* per annum, it is enacted, "that no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any mortgage whereof the equity of redemption is in any other person; unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of election."

III. On an appeal to the House of Lords it was settled, that if there be several mortgages or other incumbrances upon the same estate, the first incumbrancer who has the legal estate shall be preferred to the second, and so on, according to the periods at which their respective securities bear date. 1 Bro. P. C. 66.

It is a rule in equity, that where several persons have equal equity, he amongst them that has possession of the legal estate, may make all the advantages of it which the law admits, and thereby protect his title, although it be subsequent in point of time; and his adversaries shall have no help in equity; for it will not disarm a purchaser, but where the equity is equal, will leave the law to prevail. Therefore if there are several mortgages, the last mortgagee having lent his money upon a valuable consideration, and without notice of the intervening charges, (3 Atk. 231; 2 Ch. Ca. 35), may, by purchasing the precedent incumbrance, which carries with it the legal estate, protect himself against any mortgage subsequent to the first and prior to the last; for then he will have both law and equity upon his side. 1 Ch. Ca. 201; 1 Vern. 187, 188; 2 Ves. 573.

But where the interests affecting an estate are all equitable, they will attach upon it according to the periods at which they commenced; for it is a maxim in equity as well as at law, that "*Qui prior est tempore praeior est jure.*" 2 Atk. 52; 2 Ves. 486; 6 Bro. P. C. 28; 11 Ves. 609; 15 Ves. 329.

It was at one time considered that the party who had the most equity to call for a conveyance of the legal estate should in equity be considered in the same situation as if he had it, (see 10 Ves. 246; 11 Ves. 618), but it has since been decided that the person having the best right to call for the legal estate obtains no priority, unless he actually procures an assignment of such legal estate. 8 P. C. 175.

It has been said to be an established rule of equity, that a second mortgagee who has the title-deeds without notice of any prior incumbrance shall in all cases be preferred; because if a mortgagee lend money upon real property without taking the title-deeds, he enables the mortgagor to commit a fraud. 1 Terep Rep 762. But Lord Tenterden, C., afterwards observed upon this, that he did not conceive that the not taking the deeds was alone sufficient to

postpone the first mortgagee; if it were so, there could be no such thing as a mortgage of the reversion; and he held, that a second mortgagee in possession of the title-deeds was preferred only in cases where the first had been guilty of fraud or gross negligence. 2 Bro. C. R. 652. It seems, however, that fraud or gross negligence would be presumed, unless the mortgagee could show that it was impossible for him to obtain possession of the title-deeds, or that he had used the due and necessary diligence for that purpose. 2 Comm. 160, in n. See Treat. Eq. lib. 1. c. 3. §. 4; where the rule of equity is thus stated on the ground of a solemn judgment in the Court of Exchequer; "that nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee, to the mortgagor's retaining the title-deeds, shall be a reason for postponing his priority."

Whatever may be the value of the estate, it is of great importance to those who lend money upon real security, to be certain that there is no prior mortgage upon the estate; for it has been long settled, that if a third mortgagee, who at the time of his mortgage had no notice of the second, purchases the first mortgage, even pending a bill filed by the second to redeem the first, both the first and third mortgages shall be paid out of the estate before any share of it can be appropriated to the second. The reason assigned is, that the third, by thus obtaining the legal estate, has both law and equity on his side, which supersede the mere equity of the second. And even Lord Hale held it right that the third should thus seize what he called *tabula in naufragio*, a plank in the shipwreck, and so leave the second to perish. See 2 Vent. 337; 1 C. C. 162, 36, 149. But among mortgagees, where none has the legal estate, the rule in equity, as has been already observed, is *qui prior est tempore potior est jure*. 2 P. Wms. 491; 1 Bro. C. R. 63; see also 2 Vern. 81, 29, 525; 2 Atk. 52, 347. If, however, the second or mesne incumbrancer has obtained a decree for an account, a subsequent incumbrancer cannot, by buying in the first incumbrance, defeat the effect of such decree. 3 Atk. 809. See Fonblanque's Treatise of Equity, lib. 1. c. 4. § 25. Some reflections have been made by Mr. Christian on the above doctrine, 2 Comm. 160, in n.; but it seems perfectly consistent with the maxim of law, *vigilantibus non dormientibus servit lex*. See Treat. Eq. lib. 3. c. 3. § 1.

2. As a puisne mortgagee, by purchasing a prior incumbrance third things with it the legal estate may unite it with his own, and thereby protect himself from intervening charges on the property, so a first mortgagee having the legal estate may take a subsequent sum advanced by him upon the former security to his prior mortgagee and thereby protect himself against mesne incumbrances. 2 Ch. Ca. 20.

So if there be first and second mortgages, and the first lend money after the latter mortgage has been made, taking a judgment as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he has the legal estate and the judgment, which, though

it passes no interest presently in the land, operates as a lien. 2 *Atk.* 352; 2 *P. Wms.* 494; 2 *Ves.* 662.

But such subsequent advances must be without notice of the intervening incumbrances. *Pre. Ch.* 226; and they must be made to one who has a right to charge the estate. *Nels. Rep.* 153.

As to what is considered a sufficient notice in equity, see 2 *Powell on Mortgages, by Coventry*, 1.

3. It is well observed by *Blackstone*, that in *Glantvil's* time, when the universal method of conveyance was by livery of seisin, or corporal tradition of the lands, no gage or pledge of lands was good, unless possession was also delivered to the creditor, for which the reason given is, to prevent subsequent and fraudulent pledges of the same land. *Glantv. lib.* 10. c. 8. And the frauds which have arisen, since the exchange of those public and notorious conveyances for more private and secret bargains, has well convinced the wisdom of our ancient law. 2 *Comm.* c. 10. p. 160.

There is one case in which the legislature has thought proper to take from the mortgagor the equity of redemption, and to give the mortgagee an absolute estate in the land, that is, where the former is guilty of a fraud upon the latter by concealing prior incumbrances. For by the 4 & 5 *W. & M. c.* 16. it is enacted, that if any person shall borrow any money, and for payment thereof, or for any other valuable consideration, shall voluntarily give a judgment, statute, or recognizance, and shall afterwards borrow any other sum of another, or for other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands, or any part thereof, to the second lender, &c. or to any other in trust for or to the use of such second lender, &c. and shall not give notice to the said mortgagee, of such previous judgment, &c. in writing, under his hand, before the execution of the said mortgage or mortgages; unless such mortgagor or his heirs, upon notice given by the mortgagee, his heirs, &c. in writing, &c. attested by two witnesses, of any such former judgment, &c. shall within six months pay off the said judgment, &c. and all interest and charges, and procure the same to be vacated, &c., then the mortgagor or his heirs, &c. shall have no benefit or remedy against the said mortgagee or his heirs, &c. in equity or elsewhere, for redemption; but the mortgagee shall hold the lands, &c. for such estate and term as was granted to the mortgagee, against the mortgagor, and all persons claiming under him, freed from equity of redemption, &c.

And if any person who shall once mortgage lands for valuable consideration, shall again mortgage the same lands, or any part thereof, to any person for valuable consideration, (the former mortgage being in force,) and shall not discover to the second mortgage the former mortgage, in writing under his hand, such mortgagor his heirs, &c. shall have no relief or equity or redemption against the second or after

mortgagee, &c. And such second or third mortgagees may redeem any former mortgage, upon payment of the principal debt, interest, and costs of suit, to the proper mortgagee, &c.

But the statute does not bar any widow of any mortgagor from her dower, who did not legally join with her husband in such mortgage, or otherwise lawfully exclude herself.

It hath been held, that this statute extends to assignees of a mortgagee; and that if a man mortgages certain lands to one man, and mortgages those lands with some others to another; though this seems to be a case omitted out of the above statute against clandestine mortgages, yet if it appears to be a contrivance to evade it, as if an acre or two of land were only added, this will not exempt it; also a person, who will take advantage of the statute, must be an honest mortgagee; therefore, if a man has used any fraud or practice in obtaining a second mortgage, he shall not have the benefit of the statute. 2 *Vern.* 589, 590; 1 *Eq. Ca. Ab.* 320, pl. 5.

IV. As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure whereby the estate becomes absolute, the mortgagee may enter upon it, and take possession without any possibility at law of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here the courts of equity interpose; and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee, at the common law, yet they will consider the real value of the tenements, compared with the sum borrowed; and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time, to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses. And by the 7 *Geo. 2. c.* 20. after payment or tender by the mortgagor of principal, interests, and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities. See the statute at length, *post*, at the end of this division.

This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently; or in default thereof to be for ever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall. It is not, however, usual for mortgagees to take pos-

session of the mortgaged estate, unless where the security is precarious or small, or where the mortgagor neglects even the payment of interest; when the mortgagee was frequently obliged to bring an ejectment and take the lands into his own hands, in the nature of a pledge, or the *pignus* of the Roman law already alluded to; *ante*, 1. But it has now been determined that the mortgagee is not obliged to bring an ejectment to recover the rents and profits of the estate; for where there is a tenant in possession by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him, and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. *Moss v. Gallimore*, *Doug.* 266, (279). See *Treat. Eq. lib. 3. c. 1. § 8. in n.*

A mortgagee, however, is entitled only to such rents as accrue due while he is in possession of the premises; he has therefore no claim for rents paid to a receiver appointed in a suit for establishing the will of the mortgagor, notwithstanding, after such appointment, he gave notice to the tenant to pay the rents to himself. He should have moved the court to discharge the receiver. 4 *Russ.* 461.

Prior to the recent statute of limitations, if the mortgagee had been twenty years in possession, the Court of Chancery, in conformity to the time of bringing an ejectment, would not permit a mortgagor to redeem; unless during part of the time such mortgagor has been an infant or a married woman; or unless the mortgagee admitted he held the estate as a mortgage, or there was some other special circumstance which formed an exception to the general rule. 1 *Eq. Abr.* 313, *b*; 2 *Bro. C. R.* 399; *Treat. Eq. lib. 3. c. 1. § 7.* See 17 *Ves.* 99; 4 *Dow. P. C.* 27; and remarks of *Plumer*, *M. R.* 1 *Jack. & Walk.* 63; 2 *Jack. & Walk.* 183. For the provisions of the statute, see *Limitation of Actions*, II. 1.

Where two different estates are mortgaged by the owner to the same person, one cannot be redeemed without the other. *Ambly.* 733. So of other securities given by the mortgagor to the mortgagee. See *Treat. Eq. lib. 3. c. 1. § 9.* See 2 *Russ.* 275.

Although, after breach of the condition, an absolute fee-simple is vested at common law in the mortgagee; yet a right of redemption being still inherent in the land, till the equity of redemption be foreclosed, the same right shall descend to and is vested in such persons as have a right to the land, in case there had been no mortgage or incumbrance whatsoever; and as an equitable performance as effectually defeats the interest of the mortgagee, as the legal performance doth at common law, the condition still hanging over the estate till the equity is totally foreclosed; on this foundation it hath been held, that a person who comes in under a voluntary conveyance, may redeem a mortgage; and though such right of redemption be inherent in the land, yet the party claiming the benefit of it, must not only set forth such right,

but also show that he is the person entitled to it. *Hard.* 465; 1 *Vern.* 182, 193.

The right of redemption is not confined to the mortgagor, his heirs, executors, assignees, or subsequent incumbrances; but extends to all persons claiming any interest whatever in the premises as against the mortgagor; therefore a person claiming under a deed void (as being voluntary) against a subsequent mortgagee, may redeem; for the deed, though void as to the mortgagee, is binding on the mortgagor. 1 *Ch. Ca.* 59; 1 *Vern.* 193. *A fortiori* may any person who has acquired for valuable consideration an interest in the land; as a tenant under the mortgagor or a judgment-creditor having previously sued out a writ of execution; or a tenant by *electio*, statute merchant, or staple, or tenant by the curtesy, or in dower; or a jointress; the crown may also redeem estates mortgaged, and afterwards forfeited by the treason, &c. of the mortgagor. *Treat. Eq. lib. 3. c. 1. § 8. in n.* and the authorities there cited. And see 1 *Eden's R.* 211.

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in case of the heir, by whatever means the heir becomes indebted as heir, for the personal estate having received the benefit by contracting the debt, the real is considered only as a pledge for it; according to the common rule, *qui sentit commodum sentiri debet et onus*. *Prec. Chanc.* 477. See *Treat. Eq. lib. 3. c. 2. § 1.* and *ante*, tit *Executors*, V. 6.

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage. 2 *Salk.* 449.

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *hæres natus*, but also to an *hæres factus*; from a presumption, that it is the intention of the testator, that he should have all the privileges of the *hæres natus*; and it has been even held, that an ordinary devisee shall have this benefit. 1 *Vern.* 37. But as to this last point it hath been held otherwise; and that if a man mortgages his land, and devises it to J. S. or A. for life, the remainder in fee to B. that there the charge doth pass with the estate, there appearing no intention of the testator that he should have it discharged. 2 *Chan. Ca.* 84; 1 *Chan. Ca.* 271. This distinction, however, between an *hæres factus* and a particular devisee, has been long since overruled, and the opinion in 1 *Vern.* 37 is now established law. 2 *Atk.* 436. And the devisee of a particular estate shall not only have his devised estate exonerated out of the personal estate, but if there be another estate expressly devised for payment of debts, and the personal estate be excepted or exhausted, he may also resort to such devised estates; and that although the



particular estate devised to him be devised subject to the incumbrances thereon. 2 P. Wms. 385. So if the personal estate be exempt or exhausted, and there be no real estate expressly devised for payment of debts, but there be a descended estate, the devisee of a particular estate shall have it exonerated out of the descended estate. 2 Atk. 430; and see 4 Madd. 453; 9 Ves 417. See also *Executor*, V. 6.

So if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere*. 2 Salk. 450; 1 Vern. 37.

It has likewise been held, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, though there be no covenant in the mortgage deed for the payment thereof; because the mortgage-money is a debt whether there be any express covenant for its payment or not, and the personal estate has had the benefit of it. 2 Salk. 449; 1 Vern. 436; *Preced. Chanc.* 61.

But where a mortgage in fee was made redeemable at Michaelmas, 1702, or any other Michaelmas day following, on six months' notice; and there was no covenant for payment of the mortgage money, it was held by Lord Chancellor *Cowper*, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estates could not be applied in ease and exoneration of the real estate for the benefit of the heir at law; for, being no covenant for paying of the money, there was no contract at all between them, neither express nor implied, nor would any action lie against the mortgagor to subject his person, to compel him to pay this money. But this was in nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any Michaelmas day, at election of the mortgagor or his heirs; for here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of this court; but the plaintiffs might, even at law, defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Michaelmas day, to the end of the world; and since there was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor he thought there was no reason to lay the load of this debt upon that which was given to other persons. *Preced. Chanc.* 423; 2 Vern. 701.

If an estate descends, subject to a mortgage, and the heir creates a new mortgage for securing the old debt and one contracted by himself, and takes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts his person and his property, except what is comprised in the new mortgage, from liability in respect of the same debts; and there is no equity for separating the aggregate debt,

and throwing any part of it on the estate which descended. 1 Sim. 435, 478.

The 7 Geo. 2. c. 20 before alluded to, enacts, that where any action shall be brought on any bond for the payment of the money secured by mortgage, or performance of the covenants therein contained; or where any action of ejectment shall be brought by any mortgagee, &c. for the recovery of the possession, and no suit shall be then depending in equity, for foreclosing or redeeming such mortgaged lands, if the person having right to redeem shall appear and become defendant in such action, and shall, at any time pending such action, pay unto such mortgagee, or in case of his, her, or their refusal, shall bring into court where such action shall be depending, all the principal money and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest, and costs, to be ascertained and computed by the court where such action is or shall be depending), the moneys so paid, &c. shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the court shall discharge every such mortgagor or defendant of and from the same accordingly, and shall, by rule of the same court, compel such mortgagee, at the costs of such mortgagor, to assign, surrender, or reconvey such mortgaged lands, and deliver up all deeds, &c. relating to the title.

And that where any bill or suits shall be filed or brought in equity by any person having or claiming any estate right, or interest in any lands, &c., by virtue of any mortgage, to compel the defendant to pay the plaintiff the principal money and interest, together with any sum due on any incumbrance or specialty, charged or chargeable on the equity of redemption; and in default of payment to foreclose such defendant's right of equity of redeeming such mortgaged lands, &c. upon his admitting the right and title of the plaintiff such court of equity shall at any time before such suit shall be brought to hearing, make such order or decree therein as it might or could have made therein, in case the same had been regularly brought to hearing; and all parties to such suit shall be bound by such order or decree, to all intents and purposes, as if the same had been made at or subsequent to the hearing of the cause.

This act not to extend to any case where the person against whom the redemption shall be proved, shall (by writing under his hand, or the seal of his attorney, &c. to be delivered, before the money shall be brought into court at law, to the attorney or solicitor for the other side, insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any cause where the right of redemption to the mortgaged lands shall be controverted or questioned by or between different defendants in the same cause; nor shall be any

prejudice to any subsequent mortgagee or subsequent incumbrancer.

If a mortgagee recovers possession of the mortgaged premises under a judgment in an undefended ejectment, the court has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgagor who has not appeared. 4 Taunt. 887.

But if the recovery is had against a tenant of the mortgagor, the court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the court to stay proceedings. See the terms of the statute. *Ibid*.

In an ejectment on a forfeiture for not paying mortgage money, the defendant is entitled to have the proceedings stayed under the above statute, on payment of principal and interest, with the costs incurred at law and in equity, without paying any bygone interest or the expense of preparing the mortgage deed or any assignment of it. 1 Dougl. P. C. 359; and see 2 C. & J. 613.

It was heretofore held, that if a contract were made in England for a mortgage of a plantation in the West Indies, no more than legal interest might be paid; and that a covenant in such mortgage for payment of 8 per cent. interest would be within the statute of usury, notwithstanding this were the rate of interest where the lands lay. But now this point is settled by the 3 Geo. 4. c. 47. § 2, which enacts that all mortgages made in Great Britain of lands, &c. in Ireland or the West Indies, and all collateral securities for the same, and for the interest thereon, shall be as good and effectual as if made and entered into in the country, island, &c. where the lands, &c. mortgaged, lie; and no person shall be liable to the penalties of the statute of Anne, for recovering interest on the sums lent, so as the interest do not exceed the rate of interest in the country, island, &c. where the lands lie.

If the mortgagee assign the mortgage, with the concurrence of the mortgagor, all money really and *bond fide* paid by the assignee, that was due to the mortgagee, shall be considered as principal, and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent. 2 Ch. Ca. 67, 68, 258, 1 Vern. 169, 2 Vern. 135. As to the other cases in which interest shall become principal, see 2 Powell on Mortgages, c. 5.

A remainder-man can force the tenant for life to keep the interest down if the land be charged; but cannot directly compel him to redeem, though indirectly he may, by purchasing in the mortgage; when the tenant for life must pay one-third, or part with the possession. Rep. Eq. 69. See 5 Ves. 99; 9 Ves. 560.

Arrears of interest are only recoverable for six years. See Limitation of Actions, II.

By the 1 Wm. 4. c. 60. § 3. the Lord Chancellor may direct the committees of mortgagees, who are lunatics, to convey the mortgaged estates to such persons as he shall think proper. See further Lunatic.

By § 6. infant mortgagees are empowered, by the direction of the Court of Chancery, to convey lands vested in them to such persons as the court shall think proper.

And by § 7. infant mortgagees of land within the jurisdiction of the courts of Lancaster and Durham, may convey the same by the direction of those courts.

§ 14. Mortgage money belonging to infants is to be paid into the Bank, or as the court shall direct.

§ 19. The husbands of female mortgagees are to be deemed trustees within the act.

For the general provisions of this statute, see Trust.

For the law with respect to devises of mortgaged estates, see Will.

For further matter relative to mortgagees, see Powell on Mortgages; Bac. Abr.; Vin. Abr.; Treat. Eq; and Com. Dig.

**MORTGAGOR.** Is he who mortgages or pawns the lands; as he to whom the mortgage is made is called the MORTGAGEE.

**MORTH**, murder; Sax. *morth*, death; *morthlaga*, a murderer or manslayer.] *Morthluge*, homicide or murder, &c.

**MORTIFICATION.** See Mortmain.

**MORTITIVUS.** Dead of the rot, applied to sheep and lambs. Mon. Angl. ii. 114.

**MORTMAIN**, *manus mortua*, from the French *mort mors*, and *maine*, *manus*. Cowell, Skene, Hotloman.] An alienation of lands and tenements to any guild, corporation, or fraternity, and their successors, as bishops, parsons, vicars, &c. which could never be done without the king's licence, and that of the lord of the manor, or of the king alone, if it be immediately holden of him. The reason of the name may be deduced from hence, because the services and other profits due, for such lands, as escheats, &c. should not without such licence come into a dead hand, or into such a hand as it were dead, and so dedicated unto God, or pious uses, as to be abstractedly different from other lands, tenements, or hereditaments, and never to revert to the donor, or any temporal or common use. Magna Carta, c. 36.

Polydore Virgil, in the seventeenth book of his *Chronicles*, mentions this law, and gives this reason of the name: *Et legem hanc manum mortuam vocarunt, quod res semel datae collegiis sacerdotum, non utique rursus venderentur velut mortuæ, hoc est, usui aliorum mortuorum in perpetuum adeptæ essent. Lex diligenter servatur, sic, ut nihil possessionum ordini sacerdotali à quoquam delur, nisi regis permissu; but the statutes of mortmain are in some manner abridged by 39 Eliz. c. 5. by which the gift of lands, &c. to hospitals is permitted, without obtaining licences in mortmain. But see post.*

Hotloman, in his *Commentaries, De verbis Feudalibus*, verbo *Manus mortua*, hath these words; *Manus mortua locatio est, quæ usurpatur de iis, quorum possessio (ut ita dicam) immortalis est, quia nunquam heredem habere desinunt: quæ de causâ res nunquam ad priorem dominum revertitur, nam*

*manus pro possessione dicitur mortua per antiphrasin pro immortalitate, &c. Petrus Bullugan in speculo Principum, fol. 76. Jus amortizationis est licentia capiendi ad manum mortuam: to the same read Cassan, de Consuet. Burgund. p. 348, 387, 1183, 1185, 1201, &c. Skene de verb. signif. saith, Dimittere terras ad manum mortuam est idem atque dimittere ad multitudinem sine universalitatem, quæ nunquam moritur, idque per antiphrasin, seu à contrario sensu, because commonalties never die. Cowell.*

William the Conqueror, demanding the cause why he conquered the realm by one battle, which the Danes could not do by many, Frederick, abbot of St. Albans, answered, that the reason was, because the land, which was the maintenance of martial men, was given and converted to pious employers, and for the maintenance of holy votaries; to which the conqueror said, that if the clergy were so strong, that the realm were enfeebled of men for war, and subject by it to foreign invasion, he would aid it. Therefore he took away many of the revenues of the abbot, and of others also. *Speed. 418 b. See 1 Inst. 2; 2 Inst. 75.*

The foundation of all the statutes of mortmain was *Magna Carta*. By c. 36. it is declared, "that it shall not be lawful for any to give his lands to any religious house, and to take the same land again to hold of the same house, &c. upon pain that the gift shall be void, and the land shall accrue to the lord of the fee." This statute is interpreted to extend to lands which a religious house kept in their own hands, though they gave them not back again to hold of the same house. *2 Inst. 75.*

But ecclesiastical persons found means to creep out of the statute, by purchasing lands holden of themselves, or by making leases for a long term of years, &c. wherefore by 7 *Edw. 1.* commonly called the statute of mortmain, or *de religiosis*, no persons, religious or others whatsoever, shall buy or sell any lands or tenements, or under the colour of any gift or lease or by reason of any other title, receive the same, or by any other craft shall appropriate lands in anywise to come into mortmain, on pain of forfeiture; and within a year after the alienation, the lord of the fee may enter; and if he do not, then the next immediate lord, from time to time, may enter in half a year; and for default of all the lords entering, the king shall have the lands so alienated for ever, and may enfeof others by certain services, &c.

As this statute extended only to gifts, alienations, &c. made between ecclesiastics and others, they found out an evasion also of this statute; for pretending a title to the land which they meant to gain, they brought a feigned action, against the tenant of the land, and he by consent and collusion was to make default, and thereupon they recovered the land, and entered by judgment of law; so that the statute, *West. 2. 13 Edw. 1. c. 32* was thought necessary by which it is to be inquired by the country whether the defendant had a just title to the

land; and if so, then he shall recover seisin; but if otherwise, the lord of the fee shall enter, &c.

And by 24 *Edw. 1. st. 3.* lands shall not be alienated in mortmain, where there are mean lords, without their consent declared under hand and seal; nor shall any thing pass where the donor reserves nothing to himself.

Notwithstanding all these statutes, ecclesiastical persons (not being able to get lands, by purchase, gift, lease, or recovery) procured lands to be conveyed by feoffment, or in other manners, to divers other persons and their heirs, to the use of them and their successors, whereby they took the profits. *2 Inst. 75.* To bar this, the 15 *Rich. 2. c. 5.* was made; which statute enacts, "that no feoffment, &c. of any lands and tenements, advowsons, or other possessions, to the use of any spiritual persons, or whereof they shall take the profits, shall be made without licence of the king, and of the lords, &c. upon pain of forfeiture." These statutes, 7 *Edw. 1.*; 13 *Edw. 1. c. 32*; 34 *Edw. 1. c. 3*; 15 *Rich. 2. c. 5*; extend to Ireland; but none of the statutes after mentioned are in force there. By 23 *Hen. 8. c. 10.* against superstitious uses, forfeitures, fines, recoveries, grants, devises, &c. of lands, in trust to the use of any parish church, or to have perpetual obits, or a continual service of a priest for ever, or for sixty years, &c. to the prejudice of the king and other lords, as in case of lands alienated in mortmain, shall be void; though this last act extends not to corporations, where there is a custom to devise lands in mortmain; as in London, a freeman that pays scot and lot, may devise all his lands in the city, in mortmain, without licence. *1 Rol. Abr. 556.*

And notwithstanding this, previous to the 9 *Geo. 2. c. 36.* any man might give lands, tenements, &c. to any persons and their heirs, for finding a preacher, maintenance of a school, reparation of churches, relief of the poor, &c. or for any like charitable uses; though it was said to be good policy on every such estate to reserve a small rent to the feoffor and his heirs, when the feoffees should be seised to their own use, and not to the use of the feoffor; or if a consideration of a small sum be expressed, the 23 *Hen. 8.* cannot by any pretence make void the use. *1 Rep. 24*; 11 *Rep. 70*; *Wood's Inst. 303*; but see *post*.

A more clear and concise account of the rise, progress, and effect of these statutes will be found to be contained in the following extract from the *Commentaries, vol. 2. c. 18.*

Alienation in mortmain is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses in consequence whereof the lands became perpetually inherent in one *dead hand*, this hath occasioned the general appellation of mortmain to such alienations: and the religious houses themselves to be principally considered in forming the statutes of mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal re-



straints on alienation were worn away; yet in consequence of these it was always and still is necessary for corporations to have a licence in mortmain from the crown to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants who can never be attainted or die. See *F. N. B.* 231. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest. *Sold Jm. Angl. l. 2* § 45. But besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles) for the alienations of the specific land; and if no such licence was obtained, the king or other lord might respectively enter on the lands so alienated in mortmain as forfeiture. The necessity of this licence from the crown was acknowledged by the *Constitutions of Clarendon*, c. 2. (A. D. 1164), in respect of advowsons, which the monks always greatly coveted, as being the ground-work of subsequent appropriations. Yet such were the influence and ingenuity of the clergy, that notwithstanding this fundamental principle, the largest and most considerable dotation of religious houses happened within less than two centuries after the Conquest. And when a licence could not be obtained, the contrivance seems to have been this: that as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture; and then by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands, in right of such their newly acquired seignior, as immediate lords of the fee. But when these dotations began to grow numerous, it was observed that the feudal services ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seignories, their escheats, wardships, reliefs, and the like; and therefore to prevent this, it was ordered by the 2d of King Henry the Third's great charters, and afterwards by that printed in our common statute-book, that all such attempts should be void, and the land forfeited to the lord of the fee. See 9 *Hen. 3. c. 36*.

But as this prohibition extended only to religious houses, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies found many means to creep out of this statute, by buying in lands that were *bonâ fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first in-

troduced those extensive terms for one thousand or more years, which are now so frequent in conveyances. This produced the statute *de religiosis*, 7 *Edw. 1*, which provided that no person, religious or other, whatsoever, should buy, or sell, or receive, under pretence of a gift or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or on his default for one year, the lords paramount, and in default of all of them, the king might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence; and thereby judgment was given for the religious house, which then recovered the land by sentence of law, upon a supposed prior title; and thus they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurance of the kingdom, under the title of *common recoveries*. But upon this the stat. *West. 2. 13 Edw. 1. c. 32*. enacted that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the same provision was made by the statute *1. Hen. 3. c. 33*, of the same statute, in case the tenants set up crosses on their lands (the badges of knights templars and hospitallers, in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this prince to prevent any future evasions, that when the statute of *quia emptores*, 18 *Edw. 1*. abolished all sub-infeudations, and gave liberty for all men to alienate their lands, to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. See 18 *Edw. 1. st. 1. c. 3*; 2 *Inst.* 501. And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum*, was marked out by 27 *Edw. 1. st. 2*. it was further provided by 34 *Edw. 1. st. 3*. that no such licence should be effectual without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses; thus distinguishing between the possession and the use, and receiving the actual profits, while the seisin of the lands remained in the nominal feoffee, who was held by

the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate; and it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But they did not long enjoy the advantage of their new device, for the 15 R. 2. c. 5 enacts, that the lands which had been so purchased to uses, should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses shall be subject to the statute of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of church-yards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws; and lastly, as during the times of popery, lands were frequently given to superstitious uses though not to any corporate bodies, or were made liable in the hands of heirs and devisees to the charge of obits, charities, and the like, which were equally pernicious in a well governed state, as actual alienations in mortmain; therefore at the dawn of the Reformation, the 23 Hen. 8. c. 10 declares, that all future grants of lands for any of the purposes aforesaid, for a longer term than twenty years, shall be void.

During all this time, however, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity, which prerogative is declared and confirmed by the 18 Edw. 3. st. 3. c. 3. But as doubts were conceived at the time of the Revolution, how far such licence was valid, since under the Bill of Rights, the king had no power to dispense with the statutes of mortmain, by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary (see *Co. Lit.* 99); and as by the gradual declension of mesne seignories, through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by 7 & 8 Wm. 3. c. 97. that the crown for the future, at its own discretion, may grant licences to aliene or take in mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under Henry VIII. though the policy of the next Popish successor affected to grant a security to the possessors of abbey lands, yet in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by 1 & 2 P. & M. c. 8; and during that time, any lands or tenements were allowed to be granted to any

spiritual corporation without any licence whatsoever.

By the 39 Eliz. c. 5 the gift of lands, &c. to hospitals is permitted without obtaining licences of mortmain. See title *Hospitals*.

Afterwards, for the augmentation of poor livings it was enacted by 17 Car. 2. c. 3 that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l.* per annum may be augmented by the purchase of lands, without licence of mortmain in either case, and the like provision hath been since made in favour of the governors of Queen Anne's bounty. 2 & 3 Ann. c. 11. § 4. See also 15 Car. 2. c. 17. as to the incorporation of commissioners for Bedford Level; and 22 Car. 2. c. 6. and other statutes for the sale of the fee-farms rents of the crown.

It hath also been held, that the 23 Hen. 8. c. 10. before-mentioned did not extend to any thing but *superstitious* uses, and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* use. 1 Rep. 24. But as it was apprehended from recent experience, that persons on their death beds might make large and improvident dispositions even for these good purposes, and that the political end of the statutes of mortmain; it is therefore enacted by 9 Geo. 2. c. 36. that no lands or tenements, or money to be laid out thereon, shall be given for or charged with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery, within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death); and unless such gift be made to take effect immediately, and be without power of revocation; and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act; but such exemption was granted with a proviso that no college should be at liberty to purchase more advowsons than were equal in number to one moiety of the fellows; or where there were no fellows, one moiety of the students upon the respective foundations. This restriction has, however, since been repealed. See *post*.

The words of the above statute 9 Geo. 2. c. 36. are "that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other *personal estate* whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, as signed, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charita-

ble uses whatsoever, unless such gift, appointment, conveyance, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be and are made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be inrolled in his majesty's High Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death); and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever for the benefit of the donor or grantor, or any person or persons claiming under him." § 1. And the second section declares all gifts and dispositions, settlements, incumbrances, &c. otherwise made, void.

The said st. 9 Geo. 2. c. 36. has been uniformly construed by our courts of law and equity, so as to give it its full force and effect; and by no means to give way to those subtleties which by degrees overturned the former mortmain acts; at the same time that all proper encouragement has been given to such gifts and bequests to charities, as did not manifestly appear to be against the policy of this statute.

The statute was not meant solely to restrain devises of land, or money to be laid out in lands, to charities; but has also been construed to the prohibition of any devise of lands to trustees, to sell them and convert the produce of the sale to such purposes; for this mode, though it does not seem so directly within the mischief intended to be provided against by the act, might open a door to much fraud and evasion. See 1 Ves. 108; 2 Ves. 52; and *Attorney-Gen. v. Tindal*, A. D. 1764, cited in *Highmore's Charitable Uses*.

A devise of a mortgage, or of a term of years, or of a rent-charge on lands, to a charity, is not good. It has been urged that the words of the statute, "that the lands shall not be conveyed or settled for any estate or interest whatsoever, or anyways charged or incumbered," relate merely to the case of a person charging his own lands for the benefit of a charity, and not to prevent the bequeathing a mortgage made to secure a personal debt: but it has been always held that the devise of a mortgage passeth the land so mortgaged, for the equity of redemption may ultimately vest in the mortgagee; but a charity is precluded from a right of foreclosure; and therefore the bequest of a real security to a charity is in its nature void. See *Cro. Car.* 37; *Atk.* 605; 2 Ves. 44, 547; 1 Bro. C. R. 271; and *Highmore's Char. Uses*; as to the indirect way in which this may be in some manner affected, by marshalling the assets, so

as to pay the debts out of the mortgage, and leave the personal estate free to answer the legacy to the charity; a matter in which the courts of equity are very nice and careful.

A testatrix, after charging her estate with the payment of an annuity, devised the same to G. S., *his heirs and assigns for ever*; expressing her wish and desire to be, that G. S. in his lifetime should convey the estate to some charitable uses, the choice of which was left entirely to his discretion; and, *subject to this, G. S. was to enjoy the estate to his own use for his life*. This was held to be void as to the devise in fee under the st. 9 Geo. 2. Under § 4. of that act, the estate given, and not merely the trust, is made void, and the legal estate, upon the death of the devisee for life, descended on the heir at law. By codicils to the will, certain legacies were bequeathed, charged upon the estate; and a power was given to G. S. (who was also named executor) to cut down timber to pay them; and interest was directed to be paid by him to legatees after the expiration of two years; but these personal charges were not construed to raise by implication the express estate for life given to G. S. into an estate in fee. 2 B. & A. 710.

Money for which there is a lien on real estate cannot be given in mortmain; therefore, where a testator had contracted to sell his real estate, and he bequeathed the purchase-money, which was unpaid, to a charitable use, it was determined that the bequest was void. 1 Russ. & M. 71.

Money left to repair parsonage-houses, or to build upon land already in mortmain, is held not to be within the statute. 1 Bro. C. R. 444; *Ambl.* 373, 651; and see 4 Russ. 342. But where a testator directed a sum of money to be laid out in building a chapel, the bequest was declared void; the settled rule of construction being, that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to land already in mortmain. 3 Russ. 456. So a legacy to the corporation of Queen Anne's bounty is void, as by the rules of the corporation it must be laid out in land. 1 Bro. C. R. 13, *in note*.

Although, however, the statute prohibits the gift of money or personal estate, to be laid out in lands, for charitable uses, yet as has been already hinted, money, &c. given generally, is not forbidden: so also the residue of a personal estate hath been decreed not to be within the act; and if money be given to be laid out "in lands or otherwise" to a charitable use, such devise is good; by reason of the option thereby given to lay it out in personal securities, which are not restrained by the statute, unless they are converted into land. See *Soresby v. Hollins*, A. D. 1740; *Grimmett v. Grimmett*, A. D. 1754; cited in *Highmore's Charitable Uses*.

The statute had the effect of making void many devises and bequests to the governors of Queen Anne's bounty, but this was remedied by the 43 Geo. 3. c. 107, which in substance



exempted the 2 & 3 *Ann.* c. 11, from its operation.

By the exception in the 4th section of the statute, in favour of the universities, any land, or personal estate to be laid out in building may still be disposed of in trust for their benefit, or for any colleges therein, as it might have been before the making of the act. But the extension to the colleges of Eton, Winchester, and Westminster, seems confined to any disposition "for the better support and maintenance of the school or any of those foundations," so that a devise to trust colleges for any other purpose would apparently be declared void. *Highm. Char. Uses.*

Section 5 of the statute was made to prevent successors in colleges from happening so rapidly, as that the elders might not be left either to govern the college or to succeed to the vacant benches. B. 15 *Geo. 3* c. 101 reciting "that the said restriction had been found by experience to operate to the prejudice of such colleges, by rendering the succession too slow," the said section of the said statute 9 *Geo. 2*. was repealed.

The concluding section of the statute excepts all estate real or personal in Scotland from the restrictions imposed on these in England. A case has occurred where an estate in Ireland was devised to charitable uses in Ireland. 1 *P. & C.* 27. There does not appear any case where estates either in Scotland or Ireland were devised to charities in England; though it may be concluded, if the charities were incorporated, and so become capable of taking such a devise, would be void. Upon the same principle a devise of lands, or of a rent charge on lands in the West Indies to a charity in England is good. Instances of the latter have actually occurred, and the executors or heirs at law never thought of contesting the devise against the charity. *Highm. Char. Uses.*

In the case of a legacy in South Sea annuities bequeathed for the maintenance of poor labourers in Edinburgh and towns adjacent, the Court of Chancery was of opinion, in no directions could be given there as to the distribution of the money, that belonging to another jurisdiction, viz. to some of the courts in Scotland; and therefore directed that the annuities should be transferred to such persons as the plaintiffs should appoint to be applied to the uses of the will. See *Ambl.* 256.

A Scotchman who resided in Montrose, made a journey to London to transact some business, and being suddenly taken ill, he there made his will, whereby he gave the residue of his personal estate to trustees (of whom some but not all, were resident in Scotland) on trust to lay out the same in purchase of lands or rents of inheritance, in fee simple, for the intent expressed in an instrument of same date with his will, by which instrument he directed the said trustees to pay the rents annually to certain other trustees, who were at all times to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of

the town—Held, that the bequest was void (under the Mortmain Act) on the ground that the will was made in England, in the English form, and said nothing as to laying out the money in Scotch purchases. *Attorney Gen. v. Jubb, 3 Russ.* 328, and see *Doe* 4 C. 394 S. C.

Courts of equity have by several decisions favoured devises if made for intended charities, though they were not *in esse* at the time of making the will. See *Highmore*.

An opinion prevailed that where a full and valuable consideration was given for lands purchased for charitable uses, it was unnecessary to comply with the requisitions of the 9 *Geo. 2*. c. 36, with respect to the sealing, attesting, and enrolling of the conveyance; whereas the provision in the statute on which the misapprehension arose, was only intended to prevent deeds from being avoided by the death of the grantor within twelve months afterwards. Many purchases were made under this belief, which are rendered valid by the 9 *Geo. 1* c. 85; but the act does not dispense with the prescribed formalities in deeds subsequently executed.

It is incident to every corporation to have a capacity to purchase lands for themselves and successors, and this is regularly true at common law. 10 *Rep.* 10. But they are excepted out of the statute of Wills 31 *Hen. 8* c. 5; so that no devise of lands to a corporation, except for charitable uses, by 13 *Eliz.* c. 4, which exception is again greatly narrowed by the above st. 9 *Geo. 2* c. 36. So that now a corporation, whether ecclesiastical or lay, cannot purchase without licence from the crown, though it at equity seems to be vested in them by the common law. And such charities which have not this licence, which is now granted by act of parliament charter of incorporation, or letters patent, are reduced to the necessity of choosing from among themselves certain persons to be trustees and to purchase in their names, and to take the lands in trust for charity; for if the fees were bought in the name of the institution, not being incorporated, they would instantly vest in the crown, as a forfeiture in mortmain. *Highmore on Charitable Uses.*

It frequently happens that a donor or testator is not readily furnished with the correct title of the hospital or institution to whose charitable designs he wishes to contribute; to obviate this difficulty, it appears that a statute was passed, 11 *Eliz.* c. 11 evidently made for the benefit of Christ's Hospital, St. Thomas's, and St. Bartholomew's, but including also all other hospitals, declaring "that all gifts and legacies, by will, feoffment, or otherwise, for relief of the poor in any hospital, then remaining and being *in esse*, shall be as valid, according to the true meaning of the donor, as if the said corporation had been rightly named." The same act then recites one preceding and explains "that the words *Master or Wardan* of any hospital mentioned therein, were intended and meant of all hospitals, *Maisons-dieus*, bead-houses, and other houses ordained for the sus-

tentation or relief of the poor; and shall be so expounded and taken for ever." It has been decided that the 13 *Eliz. c. 10*, to which this refers, extends to all manner of hospitals, whether incorporated by name of master or warden, or any other name; or whether a sole corporation, or aggregate of many. 5 *Co. 14, b.*; 11 *Co. 76, a.*; *Palmcr*, 216. See *Higlm. on Charitable Uses*.

By 43 *Geo. 3. c. 408*, for promoting the building and providing churches and chapels, and houses for ministers, and churchyards and glebes (in England and Ireland), proprietors of land may, by deed inrolled, or by will executed three months before death, give land not exceeding five acres, (or personalty not exceeding 500*l.*) for the purposes of the act. By 51 *Geo. 3. c. 115*, the king may vest lands in any person, for building any church, chapel, parsonage house, &c. And by § 2. of the same act, rectors or vicars may (with consent of the bishop) grant part of their glebe land (not exceeding one acre) for the site of a new church or churchyard. By 54 *Geo. 3. c. 117*, rectors and vicars in Ireland, are empowered (with consent of the bishop) to grant an acre of their glebe land for the site of a new church or churchyard. By 55 *Geo. 3. c. 147*, (which does not appear to extend to Ireland,) spiritual persons are enabled to exchange the parsonage or glebe houses, or glebe lands belonging to their tenecces, for others of greater value, or more conveniently situated, and also to purchase and annex lands to become glebe. By 56 *Geo. 3. c. 111* (which also appears to be confined to England) ecclesiastical corporations, or spiritual persons being a corporation sole, are empowered to sell lands adjoining to churchyards, for the purpose of enlarging them. By 58 *Geo. 3. c. 45*, (amended and rendered more effectual by 59 *Geo. 3. c. 131 & 3 H. 4. c. 61*) for building and promoting the building of additional churches in populous parishes (in England and Wales), the commissioners under the said act may accept sites for churches, churchyards, and residences of the clergy; and all persons and corporations are empowered to convey accordingly. See 533—39. &c. of the act. See further 7 & 8 *Geo. 4. c. 72*, and acts therein recited; also 1 & 2 *Will. 4. c. 38*; and tits. *Churches, Clergy*.

By an act of the 3 & 4 *Will. 4. c. 9*, for incorporating "the Seamen's Hospital Society," that corporation may purchase or accept by way of gift, or devise, if landed property, to the amount of 12,000*l.* per annum.

**MORTUARY, mortuarium, mortarium.]**

A gift left by a man at his death to his parish church for the recompense of his personal tithes and offerings not duly paid in his lifetime. A mortuary is not properly and originally due to ecclesiastical incumbents from any but those only of his own parish, to whom he ministers spiritual instruction, and hath right to their tithes. But by custom in some places of this kingdom they are paid to the parsons of other parishes, as the corpse passes through them.

*Mortuarium* (says *Landewode*) sic dictum est quia relinquitur ecclesiæ pro animâ de-

*functi*. Custom did so prevail, that mortuaries being held as due debts, the payment of them was enjoined as well by the statute *De circumspicte agatis*, 13 *Edw. 1. st. 4*, as by several constitutions, &c.

The 13 *Edw. 1. c. 4*, enacts, That a prohibition shall not lie for mortuaries in places where mortuaries used to be paid.

A mortuary was anciently called *saule-sceat*, which signifies *pecunia sepulchralis*, or *symbolum animæ*. After the Conquest it was called a *corse-present*, because the beast was presented with the body at the funeral, and sometimes a principal; of which see a learned discourse in the *Antiquities of Warwickshire*, fol. 679; and *Selden's Hist. of Tithes*, p. 287; *Lt. Canuti*, c. 13.

A mortuary seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *symbolum animæ*, or the *soul-shot*; which was required by the council of Ænham, and enforced by the laws of King Canute; and this was due to the church which the party deceased belonged to, whether he was buried there or not. 1 *Still*, 171.

There is no mortuary due by law, but by custom. 2 *Inst.* 491; see *Spelm. de Concl.* tom. 2. 390; *Pict.* lib. 2. c. 600, par. 30. See *Nuavium, Præcip.* In the Irish canons it is called *Pretium sepulchri*, and *sedatium*; viz. *Omne corpus solum habet in pre suo rancat et equum et vestimentum et ornamentum sui de Camera Hibernie lib. 19. c. 6*. And in another place, *Rotul. rancem lork*, (i. e. the bishop,) *ut basilica capis fiderit, de. et reddat annis pottum ejus et sedatium commune*.

The word *mortuarium* was sometimes used in a civil as well as an ecclesiastical sense, and was payable to the lord of the fee as well as to the priest of the parish. *Debeatur domino (i. e. manerii de Wrechwyke) nominibus heriotti et mortuarii duæ vacce pret. xii. sol.*—*Paroch. Antig.* 470. *Cowell*.

*Selden* says that the usage anciently was, bringing the mortuary along with the corpse when it came to be buried, and to offer it to the church as a satisfaction for the supposed negligence and omissions the defunct had been guilty of, in not paying his personal tithes; and from thence it was called a *corse-present*; a term which bespeaks it to have been once a voluntary donation. *Selden's History of Tithes*, 287. c. 10.

*Dr. Stillingfleet* makes a distinction between *mortuaries* and *corse-presents*; the mortuary, he says, was a right settled on the church upon the decease of a member of it; and a corse present was a voluntary oblation usually made at funerals. 1 *Still*, 172, 173.

Mortuaries are, in fact, a sort of ecclesiastical *heriots*, being a customary gift claimed by, and due to, the minister in very many parishes on the death of his parishioners. 2 *Comm. c. 28. p. 425*. They seemed originally to have been, like lay-heriots, only a voluntary bequest to the church; being intended, as above men-

tioned, and as Lindewode states from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes and other ecclesiastical duties which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken out, the second-best chattel was reserved to the church as a mortuary. *Co. Litt.* 185; *Lindew. Provinc. l. 1. tit. 3.*

In Bracton's time, so early as Henry III., this was riveted into an established custom, inasmuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels, and that the lord should have the best good left him as an heriot, and the church the second best as a mortuary. See *Bracton, l. 2. c. 26; Fleta, l. 2. c. 57.* See *Heriot*.

This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese, till abolished upon a recompense given to the bishop by 12 *Ann. st. 2. c. 6.* And in the archdeaconry of Chester a custom also prevailed that the bishop, who is also archdeacon, should have, at the death of every clergyman dying therein, his best horse or mare, bridle, saddle, and spurs; his best gown or cloak, hat, upper garment under his gown, and tippet; and also his best signet or ring. *Cro. Car.* 237. But by 28 *Geo. 2. c. 6.* this mortuary is directed to cease, and an equivalent is settled upon the bishop in its room.

The king's claim to many goods on the death of all prelates in England, seems to be of the same nature; though Coke apprehends that this is a duty due upon death, and not a mortuary; a distinction seemingly without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture; his cloak or gown and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *mula canum*, his mew or kennel of hounds. See 2 *Inst.* 491; 2 *Comm.* 426, 427.

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper, by 21 *Hen. 8. c. 6.* to reduce them to some kind of certainty. For this purpose it is enacted, "That all mortuaries, or corse-presents, to parsons of any parish, shall be taken in the following manner: viz. for every person who does not leave goods to the value of ten marks (6*l.* 13*s.* 4*d.*) nothing; for every person who leaves goods to the value of ten marks, and under 30*l.*, 3*s.* 4*d.*; if above 30*l.* and under 40*l.*, 6*s.* 8*d.*; if above 40*l.*, of what value soever they

may be, 10*s.* and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme covert; nor for any child; nor for any one of full age that is not a house-keeper; nor for any way-faring man, but such way-faring man's mortuary shall be paid in the parish to which he belongs.

"No person shall pay mortuaries in more places than one, or more than one mortuary; and no mortuary shall be demanded of any but in such places where mortuaries are due by custom, and have used to have been paid: also in places where mortuaries have been of less value than as aforesaid, no person shall pay any more than has been accustomed.

"If a parson, vicar, &c. take or demand more than is allowed by the statute for a mortuary, he shall forfeit all he takes beyond it, and 40*s.* more, to the party grieved, to be recovered by action of debt," &c.

Since this statute, whereby mortuaries are reduced to a certainty, and on which stands the law of mortuaries to this day, an action of debt will lie upon the said statute in the courts of common law for recovery of the sum due for a mortuary, being by custom as aforesaid, although before that statute they were recoverable only in the spiritual court; but as such actions have never been brought, it is said they are still recoverable in that court only. *Wats. Clergym. Law*, 475.

Where by custom a mortuary hath not been usually paid, if a person be libelled in the spiritual court, he shall have a prohibition by virtue of the statute 21 *Hen. 8. c. 6.* And upon a prohibition the custom may be tried, &c. 2 *Lutw.* 1066; 3 *Mod.* 268.

No suit in equity lies for a mortuary. 2 *Strange*, 715.

**MORTUARIUM.** A mortuary hath been sometimes used in a civil as well as ecclesiastical sense, being payable to the lord of the see. *Paroch. Antiq.* 470.

**MOSS-TROOPERS.** A rebellious sort of people in the North of England, that lived by robbery and rapine, not unlike the tories in Ireland, the buccaneers in Jamaica, or banditti of Italy. The counties of Northumberland and Cumberland were charged with a yearly sum, and a command of men to be appointed by justices of the peace, to apprehend and suppress them. See 4 *Jac. 1. c. 1*; 13 & 14 *Car. 2. c. 22*; 30 *Car. 2. c. 2*; 6 *Geo. 2. c. 37.* (all repealed.)

**MOTE**, *mota*, Sax. *gemote*.] *Curia, placitum, conventus*; as *mota de Hereford*, i. e. *curia vel placita comitatûs de Hereford*. In the charter of Maud the Empress, daughter of King Henry the First, we read thus: *Sciatis me fecisse Milonem de Gloucest. Comitem de Hereford, et dedisse ei motam Herefordiæ cum toto castello, &c.* Hence burgmote, *curia vel conventus burgi*; swainmote, *curia vel conventus ministrorum, scil. forestæ, &c.* From this also we draw our word *mote* and *moot*, to plead. The Scots say, to *mute*, as the Mute-hill at Scone, i. e. *Mons. placiti de Scona*. See *Fole-mote*.

The word *moot* was usually applied to that



arguing of cases used by young students in the Inns of Court and Chancery. In the charter of peace between King Stephen and Duke Henry, afterwards king, it is taken to signify a fortress, as *turris de London, mota de Windsor*; the tower of London and fortress of Windsor. *Mote* also signifies a standing pool of water to keep fish in.

It likewise signifies a great ditch encompassing a castle or dwelling-house. *Chart. Antiq.*

**MOTE-BELL**, or *Mot-bell*. The bell so called which was used by the English Saxons to call people together to the court, *Legg. ed Confess. c. 35.*

**MOTEER**. A customary service or payment at the mote or court of the lord, from which some persons were exempted by charter of privilege. *Rot. Chart. 4 Joh. m. 9.*

**MOTHERING**. A custom of visiting parents on Midlent-Sunday. See *Lactare, Jerusalem.*

**MOTIBILIS**. One that may be removed or displaced, or rather a vagrant. *Fleta, l. 6. c. 6.*

**MOTION IN COURT**. An occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court which becomes necessary in the progress of a cause. *3 Comm. 304.*

There are also other motions not necessarily connected with any action; as to set aside an annuity, and deliver up the securities to be cancelled, &c.

All rules moved for in court are denominated special rules, and they are either absolute in the first instance, or only *nisi*, to show cause, or, as they are commonly called, *rules nisi*, i. e. unless cause be shown to the contrary, which are afterwards moved to be made absolute.

Motions are of a civil or criminal nature. Of the latter kind is the motion for an attachment, which may be moved for on account of contemptuous words spoken of the court or its process; for a rescue; or disobedience to a subpoena or other process; against a sheriff for not returning the writ or bringing in the body; against an attorney for not performing his undertaking, or otherwise misbehaving himself; against other persons for non-payment of costs on the master's allocatur; for the non-payment of money generally; or not performing an award, &c.

An attachment for misbehaviour is commonly preceded by a motion for a rule to answer the matters of the affidavit; and the party being taken on the attachment, either remains in custody or puts in bail before a judge, (for he is not bailable before the sheriff,) to answer interrogatories to be exhibited against him; which interrogatories must be signed by counsel; and if judgment be not given the same term, the name of the cause should be inserted, in the list of motions appointed to come on, peremptorily in the ensuing term. *R. M. 34 Geo 3; 5 T R. 474; Tidd's Pract.*

It is not consistent with the nature of this work to give more than a general outline of

the cases in which motions are made for the obtaining of rules of court during the progress of a suit, or in other proceedings unconnected with any action; neither will any attempt be here made to specify what rules are absolute in the first instance and what are rules *nisi*; but the reader is referred to the various books of practice connected with the subject. See also tit. *Rule of Court.*

Motions of a civil nature are made on behalf of the plaintiff or of the defendant. On behalf of the plaintiff, they are either, 1. for something to be done in the common and ordinary course of the suit, as to increase issues; for a *concilium*; or judgment on demurrer, special verdict, or writ of error; for leave to enter up judgment on an old warrant of attorney; or *nunc pro tunc*; to enter up judgment and take out execution after an award, where a verdict has been taken for the plaintiff's security; or after a verdict for the plaintiff against one of several underwriters, where the rest have agreed to be bound by it; or to take out execution pending a writ of error; to amend the pleadings or other proceedings in the course of a suit; or to set aside a judgment of nonpros or of nonsuit; or a verdict or inquisition. Or, 2. they are for something to be done out of the common and ordinary course of the suit; as for the defendant to abide by his plea; to refer it to the master to assess the damages, without a writ of inquiry; for the execution of a writ of inquiry before a judge; for a trial at bar, or in an adjoining county; for a view in trespass or in other cases; for a special jury; to have witnesses examined on interrogatories; or for leave to inspect and take copies of books, court-rolls, &c. or to have them produced at the trial.

On behalf of the defendant motions may be considered as they arise and succeed one another in the course of the suit. Before declaration;—they are to quash the writ; justify bail; reverse an outlawry; or after several rules for time to declare, that the plaintiff declare peremptorily. After declaration;—they are, to set aside an interlocutory judgment for irregularity; as being signed contrary to good faith, or upon an affidavit of merits; to set aside or stay proceedings in actions upon bail-bonds, or in other actions if irregular or unfounded; and if the defendant is a prisoner, to discharge him out of custody upon common bail; or if the proceedings are regular, to stay them upon terms; to compound penal actions; change the venue; consolidate actions; for time to plead or reply, &c. under special circumstances; to plead several matters, or pay money into court, (see *Money into Court, payment of*); to withdraw the general issue and plead it *de novo*, with a notice of set-off; or upon paying money into court; to add or withdraw special pleas—all these are generally; but sometimes, to pay the issue money into court in a *qui tam* action, (see *Penal Action*); to put off a trial if the defendant is not ready; or if the plaintiff will not proceed to trial; or inquiry; or for judgment as in case of a nonsuit; in arrest of judgment; or for a suggestion

after verdict to entitle the defendant to costs; to set aside an execution and discharge the defendant; or restore to him the money levied or to return it to the sheriff's hands.

The defendant also, as well as the plaintiff may move for a *conclusion* or judgment on a demurrer, special verdict, or writ of error, to amend; for a trial at law or in an adjoining county; for a view or special jury; to have witnesses examined on interrogatories; or for leave to inspect and take copies of books, cart-rolls, &c. or have them produced at the trial; to set aside a verdict or inquisition; either parties may likewise move to make a judge's order, submission to arbitration, or order of *nisi prius*, a rule of court; to enlarge the time for making an award; to set aside an award or judge's order; for the master to make his report; or review his taxation.

There are some motions peculiar to the action of ejectment, such as for judgment against the casual ejector generally; but where there is any thing peculiar in the service of the declaration it should be mentioned to the court; and where the affidavit of service is defective, they will give leave to file a supplemental one;—that service on the tenant's son, daughter, &c. may be deemed good service; for the landlord to be admitted defendant instead of the tenant; or for leave to take out execution in such case against the casual ejector after the landlord has failed in his defence. See *Ejectment*.

An attachment for non-payment of costs, and against the sheriff for not returning the writ, may be moved for the last day of term. 1 *Burr.* 651; 5 *Burr.* 2686. But a motion to answer the matters of an affidavit cannot be made on that day; 4 *Burr.* 2502; or any motion which would operate as a stay of proceedings, unless it appear to the court that, under the circumstances, it could not have been made earlier.

By the general rules, H. T. 2 *Wm.* 4. (r. 6.) side-bar rules may be obtained on the last as well as on other days in term.

A motion is in general accompanied with an affidavit, and sometimes preceded by a notice. The affidavit should be properly intitled, and contain a full statement of all the circumstances necessary to support the application; and the rather as it is a rule not to receive any supplementary affidavit on showing cause. 2 *T. R.* 644. Motions and affidavits for attachments in civil suits, are proceedings on the civil side of the court, until the attachments issue, and are to be intitled with the names of the parties. 3 *T. R.* 253. But as soon as the attachments issue, the proceedings are on the crown side; and from that time the king is to be named as the prosecutor. 3 *T. R.* 133, 253. And where a submission to an award is made a rule of court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award, need not be intitled in any cause, but the affidavit in answer must. 3 *T. R.* 601. An affidavit sworn before the attorney in the cause cannot be read, except for

the purpose of holding the defendant to special bail. *Tidd*. And where an affidavit is made before a commissioner by a person who from his signature appears to be a literate, the commissioner taking the affidavit solemnly or state in the jurat, that it was read, in his presence, to the party making the same, who seemed perfectly to understand it and wrote his signature in the presence of the commissioner. *R. E.* 31 *Geo.* 3. 4 *T. R.* 284.

The notice of motion, though seldom necessary, is frequently given, in order to save time and expense; by affording the adverse party an opportunity of showing cause in the first instance, or by inducing the court to disallow the costs of proceedings taken after the notice, and before the motion.

The 14 *Geo.* 2. c. 17. required notice of motion for judgment as in case of a nonsuit; but in the Court of King's Bench the rule to show cause was deemed a sufficient notice. *Lefft.* 65. It was otherwise in C. B. See 1 *H. Black.* 527.

Now by *Reg. Gen. H. T.* 2 *W.* 4. a rule nisi for judgment as in case of a nonsuit may be obtained on motion without previous notice; but in that case it shall not operate as a stay of proceedings.

The rule to show cause is drawn up for a particular day in term, previous to which it should be duly served. To bring a party into contempt, a copy of the rule must be personally served, and the original at the same time showed to him; in other cases the same degree of strictness is not required in the service of the rule, but it is sufficient, without showing the original, to leave a copy of it with any person representing the party, at his dwelling-house or place of abode. 3 *T. R.* 351. And when a rule is obtained to set aside proceedings for irregularity, and to stay proceedings in the mean time, the proceedings are suspended for all purposes till the rule is discharged. 4 *T. R.* 176.

For the time when notices of rules and rules must be served, see tit. *Rule of Court*.

On the day appointed for that purpose, the counsel for the party called upon by the rule, may show cause against it, either upon or without an affidavit as circumstances require. But an office-copy must be first taken of the rule, and of the affidavit upon which it was granted; or otherwise counsel cannot be heard. Previous to showing cause, it is usual to deliver over the affidavit against the rule to the counsel for the rule, who has a right to make any objection appearing on the face of it; and if a doubt arises upon the statement of the facts contained in the affidavit, it is inspected by the judges, or read by the officer of the court; when an affidavit has been made use of, but not before, it may be filed, in order that, if it be not true, the party may be indicted for perjury. *Tidd's Pract.*

If cause be not shown on the day appointed, the counsel for the party obtaining the rule may move, the next day, to make it absolute; which is done as a matter of course if no cause be shown on an affidavit of service. But it frequently stands over by consent of the parties,

or for the accommodation of counsel, till a subsequent day, when the counsel on either side may bring it on by moving to make the rule absolute, or to discharge it; though if not brought on, or enlarged during the same term, it falls to the ground. When the counsel for the party obtaining the rule is not ready to support it, he may move to enlarge the rule till a future day in the same or next term, which is pretty much of course, when it is in his own delay; but otherwise the court will not enlarge the rule without consent, or some evident necessity; and they will never enlarge the plaintiff's rule when it would have the effect of continuing the defendant in custody. In like manner when the counsel for the party called upon by the rule is not prepared to show cause against it, he may apply to enlarge the rule till a future day, which is a matter of right if the rule was not served in time, so as to give the party an opportunity of answering it; but otherwise the court may impose upon him what terms they think proper, and they commonly require him to file his affidavits, so as to give the adverse party an opportunity of inspecting them, previous to the day appointed for showing cause. In cases of urgency, the court towards the end of the term will sometimes enlarge the rule till a day in the vacation, when it is to be brought on before a judge at chambers. *Tidd's Pract.*

And by the general rules, *H. T. 2 Wm. 4. (r. 97.)* a rule may be enlarged if the court think fit without notice.

On showing cause against the rule, the court either make it absolute or discharge it, and that either with or without the costs of the application; or such costs are directed to abide the event of the suit; according to the discretion of the court under all the circumstances of the case.

In hearing motions, the course formerly was, to begin every day with the senior counsel within the bar, and then to call to the next senior, in order, and so on as long as it was convenient to the court to sit, and to proceed again in the same manner upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter gone through, upon any one of the former days; so that the juniors were very often obliged to attend in vain, without being able to bring on their motions for many successive days. *1 Burr. 57.* This practice bearing hard upon junior counsel, Lord Mansfield introduced a different rule, which has ever been adhered to; of going quite through the bar, even to the youngest counsel, before he would begin again with the seniors, even though it should happen to take up two or more days before all the motions which were ready at the bar upon the first day could be heard. *1 Burr. 57.*

Particular days are appointed for certain business, as Tuesday and Friday, which are called paper days, for going through the paper of causes, wherein *concursums* have been moved for on the civil side; and Wednesday and Saturday for transacting business on the crown side. All motions or rules, in matters of length or consequence, are appointed for particular days,

and called on first. Special causes are to be argued in the same order they are entered in the paper, and not to be entered anew or put off without a special application to the court; and all enlarged rules must come on peremptorily during the first week of the term.

If a rule be made absolute or discharged by surprise, the court will open it; and if by mistake it be drawn up wrong, they will order it to be set right. See *Tidd's Pract.* and the various authorities there cited.

Monday is a special day for motions in B. R. by the ancient course; but they are made upon any day, as the business of the court will permit. *2 Lil. 208, 210.*

After motion in arrest of judgment, no motion shall be for a new trial; but after motion for a new trial, one may move in arrest of judgment. *2 Salk. 647.* See *Arrest of Judgment, Trial.*

In B. R. one ought not to move the court for a rule for a thing to be done, which by the common rules of practice may be done without moving the court; nor shall the court be moved for doing what is against the practice of the court; one ought not to move for several things in one motion; and where a motion hath been denied, the same matter may not be moved again by another counsel without acquainting the court thereof, and having their leave for the same. Every person who makes a solemn argument at the bar is allowed by the court a motion for his argument. *2 Lil. Abr. 209, 210.* But counsel cannot move for his argument in a matter of course in the paper, in B. R. *1 Wils. 76.*

If there be divers rules of court made in a cause, and the party intends to move thereon, he must produce the rule last made in the cause, and move upon that; but it is necessary to have all the rules and copies of the affidavits, to satisfy the court how the cause hath been proceeded in and how it stands in court; though the last rule is the most material; and where a motion is made to set aside a rule grounded on an affidavit, a copy of the affidavit must be produced, that the court may be informed upon what grounds the rule was made, and judge whether there be cause shown upon the motion sufficient to set aside the rule. *Pasch. 13 Car. B. R. Hil. 1649.*

If any thing be moved to the court upon a record, the record is to be in court, or the court will make no rule upon such motion. *Hil. 22 Car. B. R.*

For the reasons of the several motions arising from the progress of a cause through the courts from the commencement of the action to execution; which motions form the greatest part of the visible practice of courts of law; see *Eunomus, Dial. 2. § 26—40.* See *Practice, Rule of Court.*

In Chancery, during term, every Thursday is a day for hearing special motions before the chancellor (unless it happen to be the second day of the beginning, or the last day but one of the end of the term), as are the first and last days of the term, in vacation, only the general



seal days appointed by the lord chancellor are days of motion.

Previous to the 3 & 4 Wm. 4. c. 94. motions were only to be made before the lord chancellor; but by that act the master of the rolls is to hear motions. See further, *Orders*.

**MOVEABLES.** All sorts of things moveable are included under the name of things personal, or are personal estate, i. e. all those things which may attend a man's person wherever he goes. See 2 *Comm.* c. 24.

**MOULT.** An old English word for a mow of corn or hay; *mullo fœni*, &c. *Paroch. Antiq.* 401.

**MUFFULÆ.** Winter gloves made of ramskins. In *Leg. Hen.* 1. c. 70. they are called *musflua*, and sometimes *musfla*.

**MULCT, Mulcta.]** A fine of money set upon one for some fault or misdemeanor; fines laid on ships or goods by a company of trade, to raise money for the maintenance of consuls, &c. are called *mulcts*. *Merch. Dict.*

**MULIER.** As used in our law, seems to be a word corrupted from *melior*, or the Fr. *meilleur*; and signifies the lawful issue, born in wedlock, preferred before an elder brother born out of matrimony. See 9 *Hen.* 6. c. 11; *Smith's Repub. Angl. lib.* 3. c. 6. But by *Glanvil*, lawful issue are said to be *Mulier*, not from *melior*, but because begotten *ē muliere*, and not *ex concubinā*; for he calls such issue *filios mulieratos*, opposing them to bastards. *Glanv. lib.* 7. c. 1. It appears to be thus used in Scotland also; *Skene* saying, *mulieratus filius* is a lawful son, begotten of a lawful wife.

If a man hath a son by a woman before marriage, which is a bastard and unlawful, and after he marries the mother of the bastard, and they have another son, this second son is *mulier* and lawful, and shall be heir to his father, but the other cannot be heir to any man; and they are distinguished in our old books with this addition: *Bastard eignē*, and *mulier puisnē*. *Co. Lit.* 170, 243.

Where a man has issue by a woman, if he afterwards marries her, the issue is *mulier* by the civil law, though not by the laws of England. 2 *Inst.* 99; 5 *Rep.* 416. Of ancient time, *mulier* was taken for a wife, as it is commonly used for a woman, particularly one not a maid; and sometimes for a widow; but it has been held, that a virgin is included under the name *mulier*. See *Co. Lit.* 170, 243; 2 *Inst.* 434; 2 *Comm.* 248; and tit. *Bastard*.

**MULIERTY.** The being or condition of a *mulier*, or lawful issue. *Co. Lit.* 352, h.

**MULLONES FœNI.** Cocks or ricks of hay. *Paroch. Antiq.* p. 401. Hence in old English a *moult*, now a mow, of hay or corn. *Cowell*. See *Moult*.

**MULMUTIN LAWS.** See *Molmutian Laws*.

**MULNEDA.** A place to build a water-mill. *Mon.* ii. 281.

**MULTÆ, or MULTURA EPISCOPI.** Is derived from the Latin word *mulcta*, for that it was a fine given to the king, that the bishop might have power to make his last will and testament, and to have the probate of other men's,

and the granting administrations. 2 *Inst.* 491.

**MULTIPLE POINDING.** In Scotch law means a double distress, and gives name to an action which may be brought by a person possessed of money or effects liable to claims from different claimants. Thus, where the rents of an estate are claimed by different persons, the tenant may raise an action of multiple poinding, calling the different parties to dispute their preferences, and to have it proved that the tenant is liable once, and in a single payment only. *Scotch Dict.*

**MULTIPLICATION OF GOLD AND SILVER.** Was prohibited and declared to be felony by 5 *Hen.* 4. c. 4. Which statute was made on a presumption that persons skilful in chemistry could multiply or augment these metals by changing other metals into gold or silver; and the endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, and finding out the philosopher's stone, were found to be so prejudicial to the public, from the lavish waste of many valuable materials, and the ruin of many families by such useless expenses, that they occasioned the above statute. But the restraint thereby having no other effect, from the unaccountable vanity of those who fancied those attempts practicable, than to send them beyond sea to try their experiments with impunity in other countries; the 5 *Hen.* 4. c. 4. was at last repealed by 1 *W. & M.* c. 30. See *Dyer*, 88; 1 *Harok P. C.* c. 18. § 12.

This repeal, it is said, was obtained by the learned and celebrated Robert Boyle: who was himself an excellent chemist, and in some measure a favourer of what is called *Alchymy*, or the art of obtaining the *Philosophers' Stone*, for the transmutation of metals.

**MULTITUDE, Multitudo.]** According to some authors must be ten persons or more; but Sir *Edw. Coke* says, he could never find it restrained by the common law to any certain number. *Co. Lit.* 257. See *Riot*.

**MULTO FORTIORI, or A MINORI AD MAJUS.** Is an argument often used by *Littleton*, and is framed thus: "If it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right," &c. See *Co. Lit.* 253. See 260, a.

**MULTO, MUTILO, MOLTO, MUTO, MUTTO.** A mutton or sheep, or rather a wether, *quia testiculis mutilati*. *Cowell*.

**MULTONES AURI.** Pieces of gold money imprest with an *Agnus Dei*, a sheep or lamb on the one side, and from that figure called *Multones*. This coin was more common in France, and sometimes current in England, as appears by a patent, 33 *Edw.* 1. cited by *Spelman*; though he had not then considered the meaning of it. *Cowell*.

**MULTURE, molitura vel multura.]** The toll that the miller takes for grinding corn. *Cowell*.

**MULTURERS.** In the Scotch law, are the persons grinding at a mill; and, as the tenants and proprietors of some lands are bound by tenure, to use a particular mill, the lands so bound or restricted to the mill are termed the

*thirl* or *sucken*, (*soken*,) and the tenants, &c. so bound, are called the *In-sucken* multurers; while those who use the mill without being bound by tenure so to do, are termed the *out-town*, or *out-sucken* multurers.

**MUM.** A sort of beer or strong liquor brewed from wheat, oats, and ground beans. It was one of the articles subject to the regulation of the excise-laws. Brunswick is the most celebrated place for brewing this liquor.

**MUMMING**, from *Teuton. Mummen*, to mimic.] Antic diversions in the Christmas holidays, to get money and good cheer. Mummies to be imprisoned, 3 *Ann.* 8. c. 9.

**MUNDBRECH**, from Sax. *mund*, munitio, defensio, and *brice*, fractio.] This is mentioned among divers crimes as *pacis fractio, læsio majestatis*, &c. *Spelm. Gloss.*

Some would have *mundbrech* to signify an infringement of privilege; though of later times it is expounded *clausurarum fractionem*, a breach of mounds, by which name ditches and fences are called in many parts of England; and we say, when lands are fenced in and hedged, that they are mounded. See the next article.

**MUNDE.** Peace, hence *Mundebrece*, a breach of it. *Leg. Hen.* 1. c. 37.

**MUNDEBURDE**, *Mundeburdum*, from Sax. *mund*, i. e. *tutela*, and *bord* or *borh*, i. e. *fidejussor*.] A receiving into favour and protection. *Cowell.*

**MUNDICK.** See *Metal*.

**MUNICIPAL LAW.** Is defined by *Blackstone*, (1 *Comm. Introd.*) "a rule of civil conduct prescribed by the supreme power in a state;" and for this definition he gives his reasons at large, to which we refer the reader. See *Law*.

**MUNIMENT-HOUSE**, *Munimen*.] In cathedral and collegiate churches, castles, colleges, or public buildings, is a house or little room of strength; purposely made for keeping the seal, evidences, deeds, charters, writings, &c. of such church, college, &c. Such evidences of title to estates, whether of public bodies or private persons, being called *Muniments*, (corruptly *muniments*,) for *Munit*, to defend; because inheritances and possessions are defended by them. 3 *Inst.* 170; *Law Terms*; 5 *Rich.* 2. c. 8; 35 *Hen.* 6. c. 37.

**MUNIMENTS**, *Munimina*.] See the preceding article.

**MUNUS ECCLESIASTICUM.** The consecrated bread, out of which a little piece is taken for a communicant. *Mon. Angl.* ii. 838.

**MURAGE**, *Muragium*.] A reasonable toll, to be taken of every cart and horse coming laden through a city or town, for the building or repairing the public walls thereof, due either by grant or prescription; it seems to be a liberty granted to a town by the king for collecting of money towards walling the same. See 3 *Edw.* 1. c. 30; 2 *Inst.* 222. The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle, was called *murorum operatio*; and when this personal duty was commuted into money, the tax so gathered was

called *Murage*. *Paroch. Antiq.* 114. In the city of Chester, there are two ancient offices called *Murengers*, being two of the principal aldermen, yearly chosen to see the wells kept in good repair; for the maintenance of which they receive certain tolls and customs.

**MURALE.** The city wall. *Huntind. lib.* 8. p. 392.

**MURATIO.** A town or borough, surrounded with walls. *Bromp. Vit. K. Steph.*

**MURDER.** See *Homicide*, III. 3.

**MURORUM OPERATIO.** The service of work and labour done by inhabitants and adjoining tenants in building or repairing the walls of a city or castle. From which duty some were exempted by special privilege. So King Henry II granted to the tenants within the honour of Wallingford, *Ut quieti sint de operationibus castelorum et murorum*. *Paroch. Antiq.* 114. When this personal duty was commuted into money, the tax so gathered was called *Murage*. *Cowell.* See *Murage*.

**MUSCOVY COMPANY.** See *Russia Company*.

**MUSICIANS** The musicians of England were incorporated by King Charles II. anno, 1670. See *Minstrels*.

**MUSLINS.** See *Linen*.

**MUSSA**, *Lat.*] A moss or marsh ground; also a place where sedge grows; a place overrun with moss. *Cowell, Mon.* i. 426.

**To MUSTER**, from *Fr. Monstre*.] To show men, and their arms, that are soldiers, and enrol them in a book. *Terms de Ley.* See *Courts Martial, Soldiers*.

**MUSTER-MASTER GENERAL.** See *Master of the King's Musters*.

**MUTA CANUM**, *Fr. Meute de chiens*.] A kennel of hounds, one of the mortuaries to which the king was entitled at a bishop's and abbot's decease. See *Mortuary*.

**MUTARE.** To mew up hawks in the time of their molting or casting their plumes. In the reign of King Edward II. the manor of Broughton in Com. Oxon. was held—*Per serjeantiam mutandi unum hostrium domini regis*, &c. *Paroch. Antiq.* 500.

The Mews (*Muta Regia*) near Charing Cross, London, was formerly the falconry or place for the king's hawks.

**MUTATORIUS.** Change of apparel. *Mat. Par. Arn.* 1207.

**MUTATUS ACCIPITER.** A mewed hawk. *Cowell.*

**MUTE**, *Mutus*.] One dumb, who cannot or refuses to speak. And by our law a prisoner may stand mute two ways:

1. When he speaks not at all; in which it shall be inquired whether he stand mute out of malice, or by the act of God? and if by the latter, then the judge ought to inquire whether he be the same person, and of all pleas which he might have pleaded in his defence, if he had not been mute. 2. When the prisoner does not plead directly, or will not put himself upon the inquest to be tried; and a person feigning himself mad, and refusing to answer, shall be taken as one who stands mute. 2 *Inst. H. P. C.* 226.

If a prisoner on his trial peremptorily challenged above the number of jurors allowed by law, this being an implied refusal of a legal trial, he was formerly dealt with as one who stood mute. *H. P. C.* 259; *Kel.* 36; 2 *Hawk. P. C. c.* 30

And it was, indeed, long since clearly settled, that a prisoner thus perversely and obstinately offending, was, in high treason, *ipso facto* attainted. 2 *Hale*, 278; 4 *Comm. c.* 25. p. 325; *c.* 27. p. 354. And in felony the challenge was overruled. 2 *Hale*, 376.

Now by the 7 & 8 *Geo. 4. c.* 28. § 3. if any person indicted for treason, felony, or piracy, challenge peremptorily above the number allowed by law, every such challenge beyond the number allowed by law shall be void, and the trial proceed as if no such challenge had been made.

Regularly a prisoner was said to stand mute, when being arraigned for treason, or felony, he either, 1. made no answer at all; or, 2. answered foreign to the purpose, or with such matter as was not allowable, and would not answer otherwise; or, 3. upon having pleaded not guilty, refused to put himself upon the country. 2 *Hal. P. C.* 316. If he said nothing, it was the duty of the court *ex officio* to impanel a jury to inquire whether he stood obstinately mute, or whether he was dumb *ex visitatione Dei*. If the latter appeared to be the case, the judges of the court (who were to be of counsel for the prisoner, and to see that he had law and justice,) should proceed to the trial and examine all points as if he pleaded not guilty. But whether judgment of death could be given against such a prisoner, who had never pleaded, and could say nothing in arrest of judgment, was a point (says *Blackstone*) undetermined. See 2 *Hal. P. C.* 317; 9 *Hawk. P. C. c.* 30. § 7.

If he were obstinately mute (which a prisoner was held to be who cut out his own tongue: 3 *Inst.* 178.) then, if it were in an indictment for high treason, it was clearly settled that standing mute was equivalent to a conviction, and he should receive the same judgment and execution. 2 *Hawk. P. C. c.* 30. § 9; 2 *Hale, P. C.* 317, 332. And as in the highest crime, so in the lowest species of felony, *viz.* in petit larceny, and in all misdemeanors, standing mute was always equivalent to conviction.

But in other felonies, or petit treason, the prisoner was not by the ancient law looked upon as convicted, so as to receive judgment for the felony, but should for his obstinacy have received the terrible sentence of penance or *peine* (probably a corrupted abbreviation of *prisone forte et dure*).

Before this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger; and after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed, even though he was too stubborn to pray it. 2 *Hal. P. C.* 320, 321; 2 *Hawk. P. C. c.* 30. § 24. Thus tender was the law of inflicting this dreadful punishment; but

if no other means could prevail, and the prisoner (when charged with a capital felony) continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

The judgment of penance for standing mute was as follows:—that the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear; and more, that he have no sustenance, save only on the first day three morsels of the worst bread; and on the second day three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet, till he died, or (as anciently the judgment ran) till he answered. *Brit. c.* 4, 22; *Flet. lib.* 1. c. 34. § 33.

It has been doubted, whether this punishment subsisted at the common law, or was introduced in consequence of *West. 1.3 Edw. 1. c.* 13; which latter seems to be the better opinion. 2 *Inst.* 179; 2 *Hal. P. C.* 322; 2 *Hawk. P. C. c.* 30. § 13; *Staundf. P. C.* 149; *Barr.* 82. For not a word of it is mentioned in *Glanvil* or *Bracton*, or in any ancient author, case, or record (that hath yet been produced) previous to the reign of Edward I.; but there are instances on record in the reign of Henry III. where persons accused or felony, and standing mute, were tried in a particular manner by two successive juries, and convicted; and it is asserted by the judges in 8 *Hen. 4.* that by the common law, before the statute, standing mute on an appeal, amounted to a conviction of the felony. This statute of Edward I. directs such persons "as will not put themselves upon inquests of felonies, before the judges at the suit of the king, to be put into (or rather shall be sent back to) hard and strong prison, (*soient mys 2* (the best copies read *remys*) *en la prisone fort et dure*) as those which refuse to be at the common law of the land." And immediately after this statute, the form of the judgment appears in *Fleta* and *Britton* to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the sufferer; and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by *Horne*, in the *Mirror*, as a species of criminal homicide. *Mirr. c.* 1. § 9. It appears by a record of 31 *Edw. 3.* that the prisoner might then possibly subsist for forty days under this lingering punishment. It seems, therefore, that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 *Edw. 3.* and 8 *Hen. 4.* at which last period it first appears upon our books; being intended as a species



of mercy to the delinquent, by delivering him the sooner from his torment; and hence it seems also that the duration of the penance was then first altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressing. Year B. 8 Hen. 4. 1, 2.

The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this process, and a restitution of the ancient common law whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood, and the consequent escheat in felony had been removed, the judgment of *peine fort et dure* might perhaps have still innocently remained, as a monument of the rapacity with which the tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the lands, were saved in felony, and petit treason, though not the forfeiture of the goods, and, therefore this lingering punishment was probably introduced in order to extort a plea, without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures, always attended it as in other cases of conviction. 2 Hawk. P. C. c. 30. § 9. It was enacted by the 12 Geo. 3. c. 20. that every person who, being arraigned for felony or piracy, stood mute or not answer directly to the offence, should be convicted of the same; and the same judgment and execution (with all their consequences in every respect) should be thereupon awarded, as if the person had been convicted by verdict or confession of the crime.

Two instances occurred after the passing of the act, of persons who refused to plead, and who were in consequence condemned and executed, one at the Old Bailey for murder in 1778, the other for burglary at the summer assizes at Wells in 1792. See 4 Comm. c. 25, p. 324—329. and n.

Now by the 7 & 8 Geo. 4. c. 28 § 2. if any person arraigned upon, or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly, the court may order the officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same effect as if such person had actually pleaded the same.

The trial and safe custody of insane offenders not capable of pleading, or being mute by the visitation of God, are regulated by the 39 & 40 Geo. 3. c. 94, and 56 Geo. 3. c. 117. See further *Idiots and Lunatics*, VI.

Although this subject is now become matter of curiosity rather than of instruction, the following particulars as to this terrible punishment are preserved for the satisfaction of the inquiring student.

Hawkins, in his description of the *peine forte et dure*, says, that the manner of inflicting this punishment may be best found from the books of entries and other law books all of which generally agree, that the prisoner shall be remanded to the place from whence he came, and put into some low dark room, and there laid on his back without any manner of covering, except for the privy parts, and that as many weights be laid upon him as he can bear, and more, and that he shall have no manner of sustenance but the worst bread and water, and that he shall not eat the same day on which he drinks, nor drink the same day on which he eats, and that he shall so continue till he die. But that it is said that anciently the judgment was not, that he should continue until he should die, but until he should answer; and that he might save himself from the penance by putting himself upon his trial, which he cannot do at this day after judgment of penance once given. 2 Hawk. P. C. c. 30 § 16.

And as to the words in some low dark room, he says that this clause is omitted in *Keilw.* 70. a 4 *Edw.* 4. 11. pl. 18. but is mentioned in all the other books above cited, but with this difference, that 14 *Ed.* 1. 11. pl. 17. says only he shall be put in a chamber, without adding that it shall be low or dark.

And as to the words *there laid on his back*, &c. he says, that in this all the books above cited seem to agree. And 14 *Edw.* 4. 8. pl. 17; and *S. P. C.* 150; (E); and 2 *Inst.* 178; add, that he shall lie without any litter or other thing under him, and that one arm shall be drawn to one quarter of the room with a cord, and the other to another, and that his feet shall be used in the same manner. But that these clauses are wholly omitted in all the other books above cited except *H. P. C.* which takes notice of the latter of them only. And *Ra. Ent.* 385. pl. 2. adds, that an hole shall be made for the head. And *Keilw.* 70. a. says, that the head shall not touch the earth.

And as to the words, *that as many weights shall be laid upon him as he can bear*, and more, &c. he says, that in this all the books above cited agree.

And as to the word *bread*, he says that 14 *Edw.* 4. 8. pl. 17, *S. P. C.* 150 (E); and 2 *Inst.* 178, are, that he shall have three morsels of barley bread a day, *Keilw.* 76. a. that he shall have only rye bread. and *Ra. Ent.* 385. pl. 2. and 2 *Hen.* 4. 1. pl. 2, generally that he shall have the worst bread.

And as to the word *water*, he says, that in 14 *Edw.* 4. 8. pl. 17; *S. P. C.* 150 (E); 2 *Inst.* 178; and 8 *Hen.* 4. 1. pl. 2; and *Keilw.* 70. a; are, that he shall have the water next the prison, so that it be not current; but *Ra. Ent.* 385. pl. 5. is general that he shall have the worst water.

And as to the words, *not eat the same day on*

which he drinks, nor drink the same day on which he eats, &c. he says, that is omitted in *Keilw.* 70. a. and in *Hen.* 4. 1. pl. 2.

And as to the words *till he die*, he says, this is omitted in none of the books above cited, except 14 *Edw.* 4. 11. and *H. P. C.* 227. But that neither of these books give the whole judgment at large. 2 *Hawk. P. C. c.* 30.

The rack or question, to extort a confession from criminals, was a practice of a different nature: *this* having been only used to compel a man to put himself upon his trial, *that* being a species of trial in itself. See *Torture*.

To advise a prisoner to stand mute, is a high misprision, a contempt of the king's court, and punishable by fine and imprisonment. See *Misprision*.

**MUTILATION.** The depriving a man of any member, &c. See *Maim*.

For some offences the law punishes with mutilation, or dismembering, by cutting off the hand, or ears, &c. See *Judgment, Criminal, Misprision*.

**MUTINY.** See *Courts-Martial, Militia, Soldiers*.

**MUTUAL DEBTS.** See *Set-off*.

**MUTUAL PROMISE.** Is where one man promises to pay money to another, and he

in consideration thereof promises to do a certain act, &c. See *Assumpsit, Pleading*.

**MUTUATUS.** If a man oweth another 10*l.* and hath a note for the same, without seal, action of debt lies upon a *mutuatis*; but in this there might have been wager of law, which there might not be an action upon the case, on an implied promise of payment, &c. See *Debt*.

**MUTUO.** To borrow or lend. 2 *Sand* 291.

**MUTUS ET SURDUS.** Dumb and deaf. See *Deaf*.

**MUTUUM.** The contract by which things are given in loan, which cannot be used without their extinction or alienation, and which, therefore, imposes an obligation on the borrower to restore as much of the article borrowed of the same kind and value as he received. See *Bailment*.

**MYSTERY,** *Misterium*, from the Fr. *meistier, métier, ars, artificium*.] An art, trade, or occupation.

Among the additions required to be given to defendants in an indictment by the 1 *Hen.* 5. c. 5. are the addition of their "estate, or degree, or mystery."

Mystery means the defendant's trade, art, or occupation, such as merchant, mercer, tailor, parish clerk, schoolmaster, husbandman, labourer, or the like. 2 *Hawk. c.* 23. § 11.

# N.

## NAT

**NACELLA.** A skiff or boat. *Mat. Paris.*  
**NACKA, NACTA.** A small ship, yacht, or transport vessel. *Chartular, Abbat. Rading. MS. fol. 51.*

**NAM, or NAAM, namium;** from the Sax. *niman, capere.*] The taking or distraining another man's moveable goods. Lawful Naam, which is a reasonable distress, proportionable to the value of the thing distrained for, was anciently called either *vif* or *mort*, quick or dead, as it consisted of dead or quick chattels; and it is when one takes another man's beasts damage-feasant in his ground; or by reason of some contract made, as for default of payment of an annuity, it shall be lawful to distrain in such or such lands, &c. There is also a Naam unlawful mentioned in our books. *Horn's Mirror, lib. 2; Leg. Canut. c. 18; Spelm. Gloss.; this Dict. tit. Namium, Replevin.*

**NAMATION, namatio.**] A taking or distraining; and in Scotland it is used for impounding. *Namatus*, distrained. *Charta Hen. 2.* See *Namium, Vetitum, Withernam.*

**NAME, nomen, Fr. nosme or nom.**] By which any person is known or called. There is a name of persons, bodies politic, and places; and of baptism and surname; also names of dignity, &c. In some cases a name by reputation is sufficient; but it is not so of a thing, if the matter and substance be not right. *11 Rep. 21; 6 Rep. 65; 4 Rep. 170.* What foundation will support a name by reputation, see *Ld Raym. 301, 804; and tit. Msnomer.*

**NAMIUM VETITUM.** An unjust taking the cattle of another, and driving them to an unlawful place, pretending damage done by them. In which case the owner of the cattle may demand satisfaction for the injury, which is called *placitum de namio vitito*. *2 Inst. 140; 3 Com. 149.* See *Replevin, Withernam.*

**NARR.** An abbreviation of *narratio*; a declaration in a cause.

**NARRATOR, Lat.** A pleader or reporter. *Serviens narrator*, a serjeant at law; a serjeant-counter. *Fleta, lib. 2. cap. 37.*

**NASSE or NESSE.** From Sax. *Nase, Promontorium.*] The name of the port or haven of Orford, in Suffolk, mentioned in *4 Hen. 7. c. 21.* Hence also Sheerness.

**NATALE.** The state and condition of a man.

**NATHWYTE.** Seems to be derived from the Sax. *nath*, i. e. lewdness; and so to signify the same with *Lairwite*. See that title.

## NATIONAL DEBT.

**NATIONAL DEBT.** The money owing by Government, for which it pays interest, part to our own people, part to foreigners, and which forms our National Funds. After the Revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree; insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another, at any time and in any quantity. A system which seems to have had its original in the state of Florence, A. D. 1344, which government then owed about 60,000*l.* sterling; and being unable to pay it, formed the principal into an aggregate sum, called, metaphorically, a mount or bank, the shares whereof were transferable, like our stocks, with interest at 5*l.* per cent., the prices varying according to the exigencies of the state. This laid the foundation of what is called the national debt; for a few long annuities created in the reign of Charles II. will hardly deserve that name. And the example then set was so closely followed during the long wars in the reign of Queen Anne, and hitherto, that the capital of the national debt has by degrees increased to the wonderful sum of between 650 and 700 millions sterling, (for its present amount, see *post*), to pay the interest of which, and the charges for management, the extraordinary revenues of the kingdom (excepting only the land-tax and annual malt-tax) are in the first place mortgaged, and made perpetual by parliament; redeemable, however, by the same authority that imposed them: which, if at any time it can pay off the capital, will abolish those taxes which are raised to discharge the interest. See *1 Comm. c. 8.*



The following account and origin of the national debt is principally taken from *McCulloch's Commercial Dictionary*:—

The practice of borrowing money, in order to defray a part of the war expenditure, began, in this country, in the reign of William III. In the infancy of the practice it was customary to borrow upon the security of some tax, or portion of a tax, set apart as a fund for discharging the principal and interest of the sum borrowed. This discharge was, however, very rarely effected. The public exigencies still continuing, the loans were, in most cases, either continued, or the taxes were again mortgaged for fresh ones. At length the practice of borrowing for a fixed period, or, as it is commonly termed, upon terminable annuities, was almost entirely abandoned, and most loans were made upon interminable annuities, or until such time as it might be convenient for government to pay off the principal.

In the beginning of the funding system, the term fund meant the taxes or funds appropriated to the discharge of the principal and interest of loans; those who held government securities, and sold them to others, selling, of course, a corresponding claim upon some fund. But after the debt began to grow large, and the practice of borrowing upon interminable annuities had been introduced, the meaning attached to the term fund was gradually changed; and, instead of signifying the security upon which loans were advanced, it has, for a long time, signified the principal of the loans themselves.

Owing partly, perhaps, to the scarcity of disposable capital at the time, but far more to the supposed insecurity of the revolutionary establishment, the rate of interest paid by government in the early part of the funding system was comparatively high. But as the country became richer, and the confidence of the public in the stability of government increased, ministers were enabled to take measures for reducing the interest, first in 1716, and again in 1749.

During the reigns of William III. and Anne, the interest stipulated for loans was very various. But in the reign of George II. a different practice was adopted. Instead of varying the interest upon the loan according to the state of the money market at the time, the rate of interest was generally fixed at three, or three and a half per cent.; the necessary variation being made in the principal funded. Thus suppose government were anxious to borrow, that they preferred borrowing in a three per cent. stock, and that they could not negotiate a loan for less than four and a half per cent., they effected their object by giving the lender, in return for every 100*l.* advanced, 150*l.* three per cent. stock; that is, they bound the country to pay him, or his assignees, 4*l.* 10*s.* a year, in all time to come, or, otherwise, to extinguish the debt, by a payment of 150*l.* In consequence of the prevalence of this practice, the principal of the debt now existing amounts to nearly two-fifths more than the sum actually advanced by the lenders.

Some advantages are, however, derivable, or

supposed to be derivable, from this system. It renders the management of the debt, and its transfer, more simple and commodious than it would have been, had it consisted of a greater number of funds bearing different rates of interest; and it is contended, that the greater field for speculation afforded to the dealers in stocks bearing a low rate of interest, has enabled government to borrow, by funding additional capitals, for a considerably less payment, on account of interest, than would have been necessary, had no such increase of capital been made.

Were this a proper place for entering upon such discussions, it would be easy to show that the advantages now referred to are really of very trifling importance; and that the method of funding, by an increase of capital, has been a most improvident one, and most injurious to the public interests. But it would be quite foreign from the objects of this work, to enter into an examination of such questions: our readers will, however, find them fully investigated in an article in the ninety-third Number of the *Edinburgh Review*. Here we have merely to consider funded property, or government securities, as transferable or marketable commodities.

The following is an account of the progress of the national debt of Great Britain, from the Revolution to the present time:

	Principal.	Interest.
	£	£
Debt at the Revolution, in 1689....	564,263	89,865
Excess of debt contracted during the reign of William III., above debt paid off.....	15,730,439	1,271,087
Debt at the accession of Queen Anne, in 1702.....	16,394,702	1,310,942
Debt contracted during Queen Anne's reign.....	37,150,661	2,040,416
Debt at the accession of George I., in 1714.....	54,145,363	3,351,358
Debt paid off during the reign of George I., above debt contracted	2,053,125	1,133,807
Debt at the accession of George II., in 1727.....	52,092,238	2,217,551
Debt contracted from the accession of George II., till the peace of Paris in 1763, three years after the accession of George III....	86,773,192	2,634,500
Debt in 1763.....	138,865,430	4,854,051
Paid during peace.....	10,281,795	380,480
Debt at the commencement of the American war, in 1775.....	128,583,635	4,471,571
Debt contracted during the American war.....	121,267,993	4,980,201
Debt at the conclusion of the American war, in 1784.....	249,851,628	9,451,772
Paid during peace, from 1784 to 1793.....	10,501,380	243,277
Debt at the commencement of the French war, in 1793.....	239,350,148	9,208,495
Debt contracted during the French war.....	608,932,329	24,645,971
Total funded and unfunded debt, 5th of January, 1817, when the English and Irish exchequer were consolidated.....	1,348,282,477	33,485,466

Since 1817 a deduction has been made of about sixty millions from the principal of the debt, and about five millions from the annual charge on its account. This diminution has been principally effected by taking advantage of the fall in the rate of interest since the peace, and offering to pay off the holders of different stocks, unless they consented to accept a reduced payment; and had it not have been for the highly objectionable practice, already adverted to, of funding large capitals at a low rate of interest, the saving in this way might have been incomparably large.

The total funded and unfunded debt, on the 5th of January, 1833, was 781,378,549*l.* 10*s.* 2½*d.*; and the annual charge thereon, 28,351,352*l.* 18*s.* 1½*d.*

We shall now subjoin some account of the different funds, or stocks, forming the public debt.

### I. *Funds bearing Interest at Three per Cent.*

1. *South Sea Debt and Annuities.*—This portion of the debt, amounting on the 5th of January, 1833, to 10,144,584*l.*, is all that now remains of the capital of the once famous, or rather infamous, South Sea Company. The company has, for a considerable time past, ceased to have any thing to do with trade; so that the functions of the directors are wholly restricted to the transfer of the company's stock, and the payment of the dividends on it; both of which operations are performed at the South Sea House, and not at the Bank. The dividends on the old South Sea annuities are payable on the 5th of April, and 10th of October; the dividends on the rest of the company's stock are payable on the 5th of January, and 5th of July.

2. *Debt due to the Bank of England.*—Until recently consisted of the sum of 14,686,800*l.* lent by the bank to the public, at three per cent.; dividends payable on the 5th of April, and 10th of October. It must not be confounded with the Bank capital of 14,553,000*l.*, on which the stockholders divide. Under the provisions of the 3 & 4 W. 4. c. 98. renewing the Bank Charter, one-fourth of the above debt was to be repaid, which has been accomplished by the Bank agreeing to accept in lieu thereof 4,080,000*l.* three per cent. reduced annuities. See 4 & 5 W. 4. c. 80.

3. *Bank Annuities created in 1726.*—The civil list settled on George I. was 700,000*l.* a year; but having fallen into arrear, this stock was created for the purpose of cancelling exchequer bills, that had been issued to defray the arrear. "The capital is irredeemable; and being small, in comparison with the other public funds, and a stock in which little is done on speculation, the price is generally at least one per cent. lower than the three per cent. consols." (Cohen's edit. of *Fairman on the Funds*, p. 40.)

4. *Three per Cent. Consols, or Consolidated Annuities.*—This stock forms by much the largest portion of the public debt. It had its origin in 1751, when an act was passed, con-

solidating (hence the name) several separate stocks, bearing an interest of three per cent. into one general stock. At the period when the consolidation took place, the principal of the funds, blended together, amounted to 9,137,821*l.*; but, by funding of additional loans, and parts of loans, in this stock, it amounted, on the 5th of January, 1833, to the immense sum of 347,458,931*l.*

The consolidated annuities are distinguished from the three per cent. reduced annuities by the circumstance of the interest upon them never having been varied, and by the dividends becoming due at different periods. The stock is, from its magnitude, and the proportionably great number of its holders, the soonest affected by all those circumstances which tend to elevate or depress the price of funded property. And on this account, it is the stock which speculators and jobbers most commonly select for their operations. Dividends payable on the 5th of January, and 5th of July.

5. *Three per Cent. Reduced Annuities.*—This fund was established in 1757. It consisted, as the name implies, of several funds which had previously been borrowed at a higher rate of interest; but, by an act passed in 1749, it was declared that such holders of the funds in question, as did not choose to accept in future of a reduced interest of three per cent., should be paid off,—an alternative, which comparatively few embraced. The debts that were thus reduced and consolidated amounted, at the establishment of the fund, to 17,571,574*l.* By the addition of new loans, they now amount to 123,029,913*l.* And see *ante*, 2. Dividends payable on the 5th of April and 10th of October.

### II. *Funds bearing more than Three per Cent. Interest.*

1. *Annuities at three and a half per Cent.*, 1818.—This stock was formed in 1818, partly by subscription of three per cent. consolidated, and three per cent. reduced annuities, and partly by a subscription of exchequer bills. It was made redeemable at par any time after the 5th of April, 1829, upon six months' notice being given. Dividends payable on the 5th of April and 10th of October. The capital of this stock amounts to 12,350,802*l.*

2. *Reduced three and a half per Cent. Annuities.*—This stock was created in 1824, by the transfer of stock bearing interest at four per cent. (old four per cents.) It is redeemable at pleasure. Dividends payable on the 5th of April and 10th of October. Amount, on the 5th of January, 1833, 63,453,824*l.*

3. *New three and a half per Cent. Annuities.*—This stock was formed by the act of 11 Geo. 4. c. 13, out of the stock known by the name of new four per cents.; amounting on the 5th of January, 1830, to 154,331,212*l.* The holders of this four per cent. stock had their option, either to subscribe into the new three and a half per cent. annuities, or into a new five per cent. stock, at the rate of 100*l.* four per cents. for 70*l.*, five per cents. Dissentients to be

paid off. Only 467,713*l* new five per cent. stock was created under this arrangement. The sum required to pay dissentients was 2,610,000*l*. The new three and a half per cent. that was thus created amounted on the 5th of January 1833, to 137,614,820*l*. Dividends payable 5th of January and 5th of July.

4. *Four per Cent. Annuities created in 1826*. By virtue of the 7 *Geo. 4. c. 39* 3,000,000 of exchequer bills were funded, at the rate of 10*l* four per cent. annuities for every 100 bills. In 1829, 10 *Geo. 4. c. 31* three additional millions of exchequer bills were funded in this stock, at the rate of 10*l* 10*s* stock for every 100 bills. Dividends payable 5th of April and 10*th* of October. Amount 5th of January, 1833, 10,796,340*l*. A considerable sum was transferred from this stock for the purchase of annuities, under the 10 *Geo. 1. c. 21*.

By an act of the 1 & 5 *W. 4. c. 31* these four per cent. annuities were reduced, and added to the above new three and a half per cent. annuities. This stock thus created, is not to be redeemed before the 5th of January, 1840. Dissentients (who are understood to be numerous) are to be paid off.

5. *New five per Cent.*—Amount, 5th of January, 1833, 462,737*l*. (See above, 3, New three and a half per Cent. Annuities).

### III. Annuities.

1. *Long Annuities.*—These annuities were created at different periods, but they all expire together in 1860. They were chiefly granted by way of premiums, or douceurs, to the subscribers to loans: payable on the 5th of April, and 10th of October.

2. *Annuities under 4 Geo. 4. c. 22.* This annuity is payable to the Bank of England, and is commonly known by the name of the "dead weight" annuity. It expires in 1867. It is equivalent to a perpetual annuity of 470,317*l*. 10*s*.

3. *Annuities under 48 Geo. 3. c. 142, &c.; and 10 Geo. 4. c. 24.*—The 48 *Geo. 3. c. 142* was the first act that authorized the granting of life annuities, and that statute was followed by various others, whereby its provisions were amended and extended, all of which were repealed by the 9 *Geo. 4. c. 16*; but this latter act did not affect annuities that had then been granted. By the 10 *Geo. 4. c. 24*, the commissioners for the reduction of the national debt, were once more empowered to grant annuities for terms of years, and life annuities, accepting in payment either money or stock, according to rates specified in tables, to be approved by the lords of the treasury. No annuities are granted on the life of any nominee under fifteen years of age, nor in any case not approved by the commissioners. Annuities for terms of years not granted for any period less than ten years. These annuities are transferable, but not in parts or shares. Those for terms of years, payable 5th of January and 5th of July; and those for lives, 5th of April and 10th of October. See also 2 & 3 *W. 4. c. 59.* and 3 & 4 *W. 4. c. 24*.

The annuities for terms of years, granted under the above acts, amounted, on the 10th of October 1830, to 772,758*l*; being equal to a perpetual annuity of 431,058*l*. The life annuities amounted, at the same period, to 666,111*l*; being equal to a perpetual annuity of 266,071*l*. (*Parl. Paper, No. 174, Sess. 1831.*)

*Irish Debt.*—It seems unnecessary to enter into any details with respect to the public debt of Ireland. The various descriptions of stock of which it consists, and their amount, are specified above. The dividends on the Irish debt are paid at the Bank of Ireland, and in order to accommodate the public, stock may be transferred, at the pleasure of the holders, from Ireland to Great Britain, and from the latter to the former.

*Exchequer Bills.*—Are bills of credit, issued by authority of parliament. They are for various sums, and bear interest (at present at the rate of one and a half per diem, per 100*l*.) according to the usual rate at the time. The advances of the Bank to government are made upon exchequer bills; and the daily transactions between the Bank and the government are principally carried on through their intervention. Notice of the time at which outstanding exchequer bills are to be paid off is given by public advertisement. Bankers prefer vesting in exchequer bills to any other species of stock, even though the interest be for the most part comparatively low; because the capital may be received at the treasury at the rate originally paid for it; the holders being exempted from any risk of fluctuation. Exchequer bills were thus issued in 1696; and have been annually issued ever since. The amount outstanding, and unprovided for, on the 5th of January, 1833, was 27,279,000*l*. By the 4 & 5 *W. 4. c. 3*, the commissioners of the treasury may issue exchequer bills to the amount of 14,000,000*l*., for the service of the year 1834.

*India stock and India bonds* are also quoted in the lists of the prices of the public funds. The stock, on which the East India Company divide, is, 6,000,000*l*., the dividend on which has been, since 1793, ten a half per cent. See the provisions for its payment under the 3 & 4 *W. 4. c. 85. tit. East India Company. II.* India bonds are generally for 100*l*. each, and bear at present two and a half per cent. interest; payable 31st of March, and 30th of September. In selling them, the interest down to the day of sale is, with the premiums, added to the amount of the bills; the total being the sum to be paid by the purchaser. The premium, which is, consequently, the only variable part of the price, is influenced by the circumstances which influence the price of stocks generally, the number of bonds in circulation, &c.

The price of stocks is influenced by a variety of circumstances. Whatever tends to shake or to increase the public confidence in the stability of government, tends at the same time to lower or increase the price of stocks. They are also affected by the state of the revenue; and, more than all, by the facility of obtaining supplies of disposable capital, and the interest



which may be realised upon loans to responsible persons.

From 1730, till the rebellion of 1745, the three per cents. were never under 89; and were once, in June, 1737, as high as 107. During the rebellion, they sunk to 76; but, in 1749, rose again to 100. In the interval between the peace of Paris, in 1763, and the breaking out of the American war, they averaged from 80 to 90; but towards the close of the war they sunk to 54. In 1792 they were, at one time, as high as 96. In 1797 the prospects of the country, owing to the successes of the French, the mutiny in the fleet, and other adverse circumstances, were by no means favourable; and, in consequence, the price of three per cents. sunk, on the 20th of September, on the intelligence transpiring of an attempt to negotiate with the French Republic having failed, to 47½; being the lowest price to which they have ever fallen.

The commissioners for auditing the public accounts, in the year 1786, strongly recommended the adoption of some effectual plan for the reduction of the national debt itself; and various measures were taken accordingly towards accomplishing this purpose.

In the first place, a sinking fund, of one million, payable at the exchequer quarterly in every year, was created in the year 1786, (see 26 *Geo. 3. c. 31*); to which certain annuities were directed to be added, upon the expiration of the terms for which they were respectively granted, and the whole was vested in commissioners for the reduction of the national debt; these sums were afterwards directed to be paid out of the consolidated fund, (27 *Geo. 3. c. 13. § 19*); and such annuities for lives as should remain unclaimed for three years, were added to the same sinking fund; which was, nevertheless, to operate no longer as a sinking fund, at compound interest, whenever the moneys annually paid to the account of the commissioners, including the original million, should amount to the sum of four millions. From this period, the annual sum of four millions was still to be applied to the same purpose, but the interest of the debt purchased thereby and the annuities which might afterwards expire, were to remain at the disposition of parliament.

In the year 1792, a further provision was made; (by 32 *Geo. 3. c. 55*); that when the interest of any redeemable stock is reduced, or the capital paid off by money raised at a lower interest, a sum equal to the interest so saved should be issued quarterly from the consolidated fund, and placed to the account of the commissioners; the operation of this fund at compound interest was, by this act, directed to cease, whenever the moneys annually paid to the commissioners on this account, as well as on those above stated, should amount to three millions, exclusive of the original million, or of any additions which parliament may direct to be made thereto, or of any sinking fund which may be created in consequence of new loans. From this period, the annual sum of four millions, so constituted, was also to be applied as before directed. By the same act it was also enacted,

"for the more effectually preventing the inconvenient and dangerous accumulation of debt thereafter, in consequence of any further loans;" that an annual sum, equal to one hundredth part of the capital stock created by any such loans, should be paid to the Bank, and placed to the account of the commissioners for the reduction of the national debt, without any limits to its operation short of redeeming the whole of the stock created by such loans respectively.

To accelerate the effect of all the preceding measures, parliament, in every year, from 1792 to 1802, uniformly granted, and applied the sum of 200,000*l.*; pursuing the principle laid down in times of peace, even through a period of war, notwithstanding the necessary increase of public burdens.

In order that the public might have a continual view of the state of the national debt, and also of its progressive reduction, it is further provided that an account of each shall be laid before both Houses annually. By 27 *Geo. 3. c. 13. § 72*. it was enacted that there shall be presented, within fourteen days after the commencement of every session, an account of all additions which shall have been made to the annual charge of the public debt by the interest or annuities for, or on account of, any loan made after the passing of that act, and within ten years next preceding the date of such account; together with an account of the produce, within the year next preceding, of any duties which shall have been imposed, or of any additions which shall have been made to the revenue for the purpose of defraying the increased charge occasioned by every such loan respectively.

By 48 *Geo. 3. c. 142*. the chief baron of the court of exchequer, in England, (or, in his absence, one of the puisne barons), was added to the commissioners for the reduction of the national debt.

By 56 *Geo. 3. c. 98*. (for uniting and consolidating into one fund all the public revenues of Great Britain and Ireland, and to provide for the application thereof to the general service of the united kingdom, &c.) § 1 and 13 so much of any existing acts as appoints commissioners for the reduction of the national debt in Ireland is repealed; and the British commissioners are declared commissioners for the reduction of the national debt of the united kingdom, produced by the consolidation of the national debt of Great Britain and Ireland.

By 58 *Geo. 3. c. 66. § 1*. three commissioners are empowered to act in all cases.

Various other statutes were subsequently passed relating to the management and reduction of the national debt, prior to the 10 *Geo. 4. c. 27* (amended by the 3 & 4 *W. 4. c. 24*); which, in effect abolished the sinking fund, by enacting that the sum to be thenceforth applicable should consist of the actual surplus revenue.

NATIONAL EDUCATION. Notwithstanding the attention that has been attracted of late years to the subject of education, and al-

though the necessity of establishing a national system for the instruction of the lower classes is now generally admitted, no legislative measure has yet been passed, recognizing this important duty of a government, with the exception of an act passed in the session before the last, (3 & 4 W. 4. c. 103), usually called the Factory Act; which renders it compulsory on the employers of children engaged in factories, to allow them to attend some school for two hours, at least six days in the week.

**NATIVI DE STIPITE.** In the survey of the duchy of Cornwall, there is mention of *nativi de stipite*, and *nativi conventionarii*. the first were villeins or bondmen, by birth or stock; the other, by contract or agreement *LL. Hen. 1. cap. 76.* And in Cornwall it was a custom, that a freeman marrying *nativam*, if he had two daughters, one of them was free, and the other villein. *Bract. lib. 4. c. 21, 22.*

**NATIVITY**, *nativitas*.] Birth, or the being born in a place. The casting the nativity, or by calculation seeking to know how long the queen should live, &c. was made felony by 23 Eliz. c. 2.

*Nativitas* (*Neisty*) was anciently taken for the servitude, bondage, or villeinage, of women. *Leg. Wil. 1.*

**NATIVO HABENDO.** A writ that lay to the sheriff for a lord who claimed inheritance in any villein, when his villein was run away, for the apprehending and restoring him to the lord: and the sheriff might seize the villein, and deliver him unto his lord, if he confessed his villeinage; but if he alleged that he was a freeman, then the sheriff ought not to seize him, but the lord was to sue forth a *pone* to remove the plea before the justices of C. B. &c. And if the villein purchased a writ *de libertate probanda* before the lord had taken out the *pone*, it was a *supersedas* to the lord, that he proceeded not on the writ of *nativo habendo*. *Reg. Orig. 7, 8; F. N. B. 77; New Nat. Brev. 171, 172.*

This writ *nativo habendo* was in nature of a writ of right, to recover the inheritance in the villein; upon which the lord was to pursue his plaint, and declare thereupon, and the villein to make his defence so as the freedom was to be tried. *New Nat. Br. 171, 173. See Villein.*

**NATIVUS.** He who was born a servant, and so differed from him who suffered himself to be sold, of which servants there were three sorts, bondmen, natives, and villains; bondmen were those who bound themselves by covenants to serve, and took their name from the word *bond*; natives we spoke of just before; and villains were such who, belonging to the land, tilled the lord's demesnes, nor might depart thence without the lord's license. *Spelman's Gloss. See Chart. R. 2; Quia omnes manumittit a bondagio in com. Hertf. Walsingham, p. 254. Cowell. See Villain.*

**NATURAL-BORN SUBJECTS.** By the 4 Geo. 2. c. 21. (made to explain the third section of the 7 Ann. c. 5. relative to children of the natural-born subjects of this kingdom) children of natural-born subjects, born out of the

allegiance of the crown, are declared to be natural-born subjects; but by § 2. this is not to extend to the issue of persons attainted of treason, or in the service of foreign princes in enmity with the crown.

By the 13 Geo. 3. c. 21. these benefits are further extended to persons born out of the allegiance of the crown, whose fathers were by the former statute entitled to the rights of natural-born subjects. See *Alien, I.*

**NATURAL AFFECTION**, *naturalis affectio*.] Is a good consideration in a deed; and if one, without expressing any consideration, covenant to stand seized to the use of his wife, child, or brother, &c. here the naming them to be of kin, implies the consideration of natural affection, whereupon such use will arise. *Carl. 138. See Consideration.*

**NATURALIZATION.** See *Alien, II. III.*

**NATURÆ Pudenda**, Privities. *Leg. Hen. 1. c. 83.*

**NAVAGIUM.** A duty incumbent on tenants, to carry their lord's goods in a ship. *Mon. Angl. i. 922.*

**NAVAL STORES.** See *Public Stores.*

**NAUFRAGE.** A sea term for shipwreck. *Merch. Dict.*

**NAVIGABLE RIVERS.** See *Rivers.*

**NAVIGATION.** Is the art of sailing at sea, also the manner of trading; and a navigator is one who understands navigation, or imports goods in foreign bottoms.

## NAVIGATION ACTS.

These statutes, which form an important branch of our maritime code, comprise the enactments that have been passed for regulating the commercial intercourse of this kingdom and its colonies with other countries; by what vessels it shall be carried on; and generally the mode in which it is to be conducted.

The prominent objects of the old navigation acts were—first, the securing to our own shipping, as far as circumstances would safely admit, the carrying trade, as the great source of our naval strength; secondly, the confining our trade, as much as possible, without exciting jealousy in our neighbours, to the capital of our own merchants by excluding foreigners, who were not the subjects of the countries of which the articles are the growth, produce, or manufacture, from becoming the intermediate negotiators; and thirdly, the encouragement of our own manufactures, by checking, through the means of absolute prohibitions or high duties, the introduction into the same market of such articles of foreign manufactures as might rival our own; especially those in a progressive state of improvement.

The origin of the navigation laws of England may be traced to the reign of Richard II. or perhaps to a still more remote period. But, as no intelligible account of the varying and contradictory enactments framed at so distant an epoch could be pressed within any reasonable space, it is sufficient to observe, that in the reign of Henry VII. two of the leading princi-

ples of the late navigation law were distinctly recognized, in the prohibition of the importation of certain commodities, unless imported in ships belonging to English owners, and manned by English seamen. In the early part of the reign of Elizabeth (5 *Eliz. c. 5*) foreign ships were excluded from our fisheries and coasting trade. The republican parliament gave a great extension to the navigation laws by the act 1650, which prohibited all ships, of all foreign nations whatever, from trading with the plantations in America, without having previously obtained a license. These acts were, however, rather intended to regulate the trade between the different ports and dependencies of the empire, than to regulate our intercourse with foreigners. But in the following year, (9th of October, 1651,) the republican parliament passed the famous act of navigation. This act had a double object. It was intended not only to promote our own navigation, but also to strike a decisive blow at the naval power of the Dutch, who then engrossed almost the whole carrying trade of the world, and against whom various circumstances had conspired to incense the English. The act in question declared, that no goods or commodities whatever of the growth, production, or manufacture of Asia, Africa, or America, should be imported either into England or Ireland, or any of the plantations, except in ships belonging to English subjects, and of which the master and the greater number of the crew were also English. Having thus secured the import trade of Asia, Africa, and America, to the English ship-owners, the act went on to secure to them, as far as that was possible, the import trade of Europe. For this purpose, it further enacted, that no goods of the growth, production, or manufacture of any country in Europe should be imported into Great Britain except in British ships, or in such ships as were the real property of the people of the country or place in which the goods were produced, or from which they could only be, or most usually were, exported. The latter part of the clause was entirely levelled against the Dutch, who had but little native produce to export, and whose ships were principally employed in carrying the produce of other countries to foreign markets. Such were the leading provisions of this famous act. They were adopted by the regal government which succeeded Cromwell, and form the basis of the act of the 12 *Car. 2. c. 18*, which continued to a very recent period to be the rule by which our naval intercourse with other countries was mainly regulated, and has been designated the *Charta Maritima* of England.

In the 12 *Car. 2. c. 18*, the clause against importing foreign commodities, except in British ships, or in ships belonging to the country or place where the goods were produced, or from which they were exported, was so far modified, that the prohibition was made to apply only to the goods of Russia and Turkey, and to certain articles since well known in commerce by the name of enumerated articles, leave being at the same time given to import all other

articles in ships of any description. But this modification was of very little importance in commerce, as timber, grain, tar, hemp and flax, potashes, wines, spirits, sugar, &c. Parliament seems, however, to have very speedily come round to the opinion that too much had been done in the way of relaxation; and in the 14th of Charles II. a supplemental statute was passed, avowedly with the intention of obviating some evasions of the statute of the preceding, which, it was affirmed, had been practised by the Hollanders and Germans. This, however, seems to have been a mere pretence to excuse the desire to follow up the blow aimed, by the former statute, at the carrying trade of Holland. And such was our jealousy of the naval and commercial greatness of the Dutch, that in order to cripple it, we did not hesitate totally to proscribe all trade with them; and to prevent the possibility of fraud or of clandestine or indirect intercourse with Holland, we went so far as to include the commerce with the Netherlands and Germany in the same proscription. The 14 *Car. 2.* prohibited all importation from these countries of a long list of enumerated commodities, under any circumstances, or in any vessels, whether British or foreign, under the penalty of seizure and confiscation of the ships and goods. So far as it depended on us, Holland, the Netherlands, and Germany, were virtually placed out of the pale of the commercial world; and though the extreme rigour of this statute was subsequently modified, its principal provisions remained in full force until the late alterations. See *McCulloch's Com. Dict.* 817.

The changes in the navigation laws were effected partly by the bills introduced by Mr. (now Lord Wallace) in 1821, and Mr. Huskisson in 1825, and partly by what has been called the Reciprocity System. By the 6 *Geo. 4. c. 109*, the intercourse of all European countries in amity with this country was placed on the same footing.

That statute was amended by several subsequent enactments; and for the purpose of consolidating the law into one act, the 3 & 4 *Wm. 4. c. 54*, was passed.

*Ships in which only enumerated goods of Europe may be imported.*—The several sorts of goods hereinafter enumerated, being the produce of Europe; (that is to say,) masts, timber, boards, tar, tallow, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, wine, brandy, tobacco, wool, shumac, madders, madder roots, barilla, brimstone, bark of oak, cork, oranges, lemons, linseed, rape seed, and clover seed, shall not be imported into the united kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.—§ 2.

*Places from which only goods of Asia, Africa, or America, may be imported.*—Goods, the produce of Asia, Africa, or America, shall not be imported from Europe into the united kingdom, to be used therein, except the goods hereinafter mentioned; (that is to say,)



Goods, the produce of the dominions of the Emperor of Morocco, which may be imported from places in Europe within the Straits of Gibraltar:

Goods, the produce of Asia or Africa, which (having been brought into places in Europe within the Straits of Gibraltar, from or through places in Asia or Africa within those Straits, and not by way of the Atlantic ocean) may be imported from places in Europe within the Straits of Gibraltar:

Goods, the produce of places within the limits of the East India Company's charter, which (having been imported from those places into Gibraltar or Malta in British ships) may be imported from Gibraltar to Malta:

Goods taken by way of reprisal by British ships:

Bullion, diamonds, pearls, rubies, emeralds, and other jewels or precious stones.—§ 3.

*Ships in which only goods of Asia, Africa, or America, may be imported.*—Goods, the produce of Asia, Africa, or America, shall not be imported into the united kingdom, to be used therein, in foreign ships, unless they be the ships of the country in Asia, Africa, or America, of which the goods are the produce, and from which they are imported, except the goods hereinafter mentioned; (that is to say,)

Goods, the produce of the dominions of the Grand Seigneur, in Asia or Africa, which may be imported from his dominions in Europe, in ships of his dominions:

Raw silk and mohair yarn, the produce of Asia, which may be imported from the dominions of the Grand Seigneur in the Levant seas, in ships of his dominions:

Bullion.—§ 4.

*Manufacture deemed produce.*—All manufactured goods shall be deemed to be the produce of the country of which they are the manufacture.—§ 5

*From Guernsey, &c.*—No goods shall be imported into the united kingdom from the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.—§ 6.

*Exports to Asia, &c. and to Guernsey, &c.*—No goods shall be exported from the united kingdom to any British possession in Asia, Africa, or America, nor to the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.—§ 7.

*Coastwise.*—That no goods shall be carried coastwise from one part of the united kingdom to another, except in British ships.—§ 8.

*Between Guernsey, Jersey, &c.*—No goods shall be carried from any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other of such islands, nor from one part of any of such islands to another part of the same island, except in British ships.—§ 9.

*Between British possessions in Asia, &c.*—No goods shall be carried from any British possession in Asia, Africa, or America, to any other of such possessions, nor from one part of any of such possessions to another part of the same, except in British ships.—§ 10.

*Imports into British possessions in Asia, &c.*—No goods shall be imported into any British

possessions in Asia, Africa, or America, in any foreign ships, unless they be the ships of the country of which the goods are the produce, and from which the goods are imported.—§ 11.

*No ship British, unless registered and navigated as such, &c.*—No ship shall be admitted to be a British ship unless duly registered and navigated as such; and every British registered ship) so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship) shall be navigated during the whole of every voyage (whether with a cargo or in ballast,) in every part of the world by a master who is a British subject, and by a crew, whereof three-fourths at least are British seamen; and if such ship be employed in a coasting voyage from one part of the united kingdom to another, or in a voyage between the united kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the united kingdom, or any of the said islands, then the whole of the crew shall be British seamen.

*Exceptions as to registry.*—Provided that all British-built vessels under fifteen tons burden, wholly owned and navigated by British subjects, although not registered as British ships, shall be admitted to be British vessels, in all navigation in the rivers and upon the coasts of the united kingdom, or of the British possessions abroad, and not proceeding over sea, except within the limits of the respective colonial governments within which the managing owners of such vessels respectively reside: and that all British built vessels wholly owned and navigated.—§ 13.

long as such boats or vessels shall be solely so fish boats or vessels, although not registered, so within the said limits, shall be admitted to be British vessels within the same, or in trading coastwise, or on the north of Cape Canso, or of the Brunswick, adjacent to the gulf of Saint Lawrence, or on the banks and shores of the and shores of Newfoundland, and of the parts and employed solely in fishing on the banks tons, and not having a whole or a fixed deck, gated by British subjects, not exceeding thirty

*Honduras ships.*—All ships built in the British settlements at Honduras, and owned and navigated as British ships, shall be entitled to the privileges of British registered ships in all direct trade between the united kingdom or the British possessions in America and the said settlements; provided the master shall produce a certificate under the hand of the superintendent of those settlements, that satisfactory proof has been made before him that such ship (describing the same) was built in the said settlements, and is wholly owned by British subjects; Provided also, that the time of the clearance of such ship from the said settlements for every voyage shall be endorsed upon such certificate by such superintendent.—§ 14.

*Ships of any foreign countries.*—No ship

shall be admitted to be a ship of any particular country, unless she be of the built of such country; or have been made prize of war to such country; or have been forfeited to such country under any law of the same, made for the prevention of the slave trade, and condemned as such prize or forfeiture by a competent court, of such country; or be British-built (not having been a prize of war from British subjects to any other foreign country); nor unless she be navigated by a master who is a subject of such foreign country, and by a crew of whom three-fourths at least are subjects of such country; nor unless she be wholly owned by subjects of such country usually residing therein, or under the dominion thereof: Provided always, that the country of every ship shall be deemed to include all places which are under the same dominion as the place to which such ship belongs.—§ 15.

*Master and seamen, when British seamen.*—No person shall be qualified to be a master of a British ship, or to be a British seaman within the meaning of the act, except the natural-born subjects of his majesty, or persons naturalized by any act of parliament, or made denizens by letters of denization; or except persons who have become British subjects by virtue of conquest or cession of some newly acquired country, and who shall have taken the oath of allegiance to his majesty, or the oath of fidelity required by the treaty or capitulation by which such newly acquired country came into his majesty's possessions; or persons who shall have served on board any of his majesty's ships of war in time of war for the space of three years: Provided always, that the natives of places within the limits of the East India Company's charter, although under British dominion, shall not, upon the ground of being such natives, be deemed to be British seamen; Provided always, that every ship (except ships required to be wholly navigated by British seamen) which shall be navigated by one British seaman, if a British ship, or one seaman of the country of such ship, if a foreign ship, for every twenty tons of the burden of such ship, shall be deemed to be duly navigated, although the number of other seamen shall exceed one-fourth of the whole crew.—§ 16.

*Foreigners serving two years on board his majesty's ships during war.*—His majesty, by his royal proclamation during war, may declare that foreigners, having served two years on board any of his majesty's ships of war in time of such war, shall be British seamen within the meaning of the act.—§ 17.

*British ship not to depart from British port unless duly navigated, &c.*—No British registered ship shall be suffered to depart any port in the united kingdom, or any British possession in any part of the world, (whether with a cargo or in ballast,) unless duly navigated. Provided that any British ships, trading between places in America, may be navigated by British negroes; and ships trading eastward of the Cape of Good Hope within the limits of the East India Company's charter, may be navigated

by Lascars, or other natives of countries within those limits.—§ 18.

*If excess of foreign seamen, penalty 10*l.* for each, &c.*—If any British registered ship shall at any time have, as part of the crew in any part of the world, any foreign seaman not allowed by law, the master or owners of such ship shall for every such foreign seaman forfeit ten pounds: Provided, that if a due proportion of British seamen cannot be procured in any foreign port, or in any place within the limits of the East India Company's charter, for the navigation of any British ship; or if such proportion be destroyed during the voyage by any unavoidable circumstance, and the master of such ship shall produce a certificate of such facts under the hand of any British consul, or of two known British merchants, if there be no consul at the place where such facts can be ascertained, or from the British governor of any place within the limits of the East India Company's charter; or, in the want of such certificate, shall make proof of the truth of such facts to the satisfaction of the collector and controller of the customs of any British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, the same shall be deemed to be duly navigated.—§ 19.

*Proportion of seamen may be altered by proclamation.*—If his majesty shall, at any time by his royal proclamation, declare that the proportion of British seamen necessary to the due navigation of British ships shall be less than the proportion required by this act, every British ship navigated with the proportion of British seamen required by such proclamation shall be deemed to be duly navigated, so long as such proclamation shall remain in force.—§ 20.

*Goods prohibited only by navigation law may be imported for exportation.*—Goods of any sort or the produce of any place, not otherwise prohibited than by the law of navigation hereinbefore contained, may be imported into the united kingdom from any place in a British ship, and from any place not being a British possession in a foreign ship of any country, and however navigated, to be warehoused for exportation only, under the provisions of any law in force for the time being, made for the warehousing of goods, without payment of duty upon the first entry thereof.—§ 21 See Warehousing.

*Forfeitures.*—If any goods be imported, exported, or carried coastwise, contrary to the law of navigation, all such goods shall be forfeited, and the master of such ship shall forfeit the sum of one hundred pounds.—§ 22.

The duties payable upon goods and articles imported into, or exported out of this country are closely connected with the present subject. These duties are generally known by the name of the customs; and have already been treated of under that title. Subsequent, however, to the printing off of that portion of this work, the 6 G. 4. c. 106. and various subsequent acts, relative to the customs, have been repealed, by

the 3 & 4 W. 4. c. 50. with a view to their amendment and consolidation.

The 3 & 4 W. 4. c. 51. embodies the provision for the management, and the 3 & 4 W. 4. c. 52. those for the general regulation of the customs; and the latter act contains tables of goods prohibited to be imported or exported, and of articles that may be imported, subject to certain restrictions, or prohibited from exportation by the royal proclamation.

By § 105. of c. 52. all trade, from one part to another of the united kingdom, or from any part to another in the Isle of Man, is to be deemed coastwise.

The 3 & 4 W. 4. c. 56. grants the new duties of customs, which are specified with the drawbacks allowed on certain articles in the tables annexed to the act.

By § 3. his majesty, with the advice of his privy council, by order of council, may, from time to time, direct the levying of an additional duty, not exceeding one-fifth of any existing duty, upon goods or merchandize, the growth or manufacture of any country, which shall levy higher or other duties upon any article, the growth or manufacture of any of his majesty's dominions, than upon the like article, the growth or manufacture of any other foreign country; and, in like manner, impose such additional duties upon goods when imported in the ships of any country which shall levy higher or other duties upon any goods when imported in British ships, than when imported in the national ships of such country; or which shall levy higher or other tonnage or port or other duties upon British ships, than upon such national ships; or which shall not place the commerce or navigation of this kingdom upon the footing of the most favoured nation in the ports of such country; and either prohibit the importation of any manufactured article, the produce of such country, in the event of the export of raw material, of which such article is wholly or in part made, being prohibited from such country to the British dominions; or impose an additional duty, not exceeding one-fifth, as aforesaid, upon such manufactured article; and also impose such additional duty, in the event of such raw material being subject to any duty upon being exported from the said country to any of his majesty's dominions.

Formerly various bounties or premiums were offered and paid by government to the producers, exporters, or importers of certain articles, or to those who employed ships in certain trades.

Bounties on production were most commonly given with a view to encourage the establishment of some new branch of industry, or to foster and extend an old branch that was considered of great importance to the national prosperity.

The linen manufactory throughout the united kingdom was stimulated and encouraged by a variety of bounties, both as regarded its production and exportation, for a long series of years, down to 1830, when the premiums on its exportation, as well as on other articles,

ceased. And by the 4 & 5 W. 4. c. 14. all acts authorizing the appropriation of sums of money for the encouragement of the raising and dressing of flax were repealed.

The whale fishery was likewise for many years protected by large bounties, which were gradually reduced and abolished in 1824; as were also those granted for the encouragement of the herring fishery in 1830.

The bounty granted on the exportation of corn was repealed in 1815.

See further *Ships, Smuggling*.

**NAVIS ECCLESIAE.** The nave or body of the church, as distinguished from the choir, and wings, or isle; it is that part of the church where the common people sit. *Du-Cange*.

**NAVIS, NAVICULA.** A small dish to hold frankincense before put into the *thuribulum*, censor, or smoking pot; and seems to have its name from the shape, resembling a boat or little ship we have several of the boat-cups in silver, &c. for various uses. *Paroch. Antiq.* 598.

**NAVITHALAMUS.** A ship or barge that noblemen use for pleasure, with fine chambers and other stately ornaments. *Law Lat. Dict.*

## NAVY.

The fleet or shipping of a prince or state; or an armament at sea.

- I. *Of the Navy of England, and its Jurisdiction to the British Seas.*
- II. *Of raising and paying the Mariners, and of the Laws made for their protection.* [As to their prize-money, see also tit. *Admiralty*]
- III. *Of their Discipline, under the Articles of War and Naval Courts Martial.*

I. THE NAVY OF ENGLAND, it has been observed, excels all others for three things, viz. beauty, strength, and safety; for beauty our ships of war are so many floating palaces; for their strength so many moving castles; and for safety, they are the most defensive walls of the land; and as our naval power gains us authority in the most distant climates, so the superiority of our fleet above other nations, renders the British monarch the arbiter of Europe.

The kings of England in ancient times commanded their fleets in person; and king Arthur vindicated the dominion of the seas, making ships of all nations salute our ships of war by lowering the topsail, and striking the flag, as in like manner they shall do the forts upon land; by which submission they are put in mind that they are come into a territory, wherein they are to own a sovereign power and jurisdiction, and receive protection from it; and this duty of the flag, which hath been constantly paid to our ancestors, serves to imprint reverence in foreigners, and adds new courage to our seamen; and reputation abroad is the principal support of any government at home.

King Edgar, successor to Arthur, stiled himself *sovereign of the narrow seas*; and having



fitted out a fleet of four hundred sail of ships, in the year 937, sailing about Britain with his mighty navy, and arriving at Chester, was there met by eight kings and princes of foreign nations, come to do him homage; who, as an acknowledgment of his sovereignty, rowed this monarch in a boat down the river Dee, himself steering the boat; a marine triumph which is not to be paralleled in the histories of Europe.

Canute, Edgar's successor, laid the ancient tribute called *danegeld*, for guarding the seas, and sovereignty of them; with the following emblem expressed, viz. Himself sitting on the shore in his royal chair while the sea was flowing, speaking, *Tu meæ ditionis es, et terra in quâ sedeo est, &c.*

Egbert, Althred, and Elthred kept up the dominion and sovereignty of their predecessors; nor did the succeeding princes or the Norman race waive this great advantage, but maintained the right to the four adjacent seas surrounding the British shore; the honour of the flag king John challenged, not barely as a civility, but a right to be paid *cum debita reverentiâ*, and the persons refusing he commanded to be taken as enemies; and the same was ordained not only to be paid to whole fleets, bearing the royal standard, but to those ships of privilege that wear the prince's ensigns or colours of service; this decree was confirmed and bravely asserted by a fleet of five hundred sail, in a royal voyage to Ireland, wherein he made all the vessels which he met with in his way, in the eight circumfluent seas, to pay that duty and acknowledgment, which has been maintained by our kings to this day, and was never contested by any nation unless by those who attempted the conquest of the entire empire.

Trade gave occasion to the bringing mighty fleets to sea, and on the increase of trade, ships of war were necessary in all countries for the preservation of it in the hands of the just proprietors.

In ancient times the several counties of England were liable to a particular taxation for building ships of war and fitting out fleets, every one in proportion to their extent and riches; so that the largest counties were each of them to furnish a first-rate man of war, and the others every one to build one in proportion; but this method has been long disused, and fitting out our navy for many ages has been always thrown into the public charge.

King Edward III. in his wars with France, had a fleet of ships before Calais, so numerous that they amounted to seven hundred sail; but these were only very small vessels.

Notwithstanding that the fleets of Great Britain have been remarkable for several ages past, for the great and signal victories obtained from time to time over their enemies, and that in the reigns of some of our ancient kings there have been greater numbers of ships fitted out at different times, upon certain expeditions, than have been of late years, yet that of a royal navy was never properly established until by Henry VIII. in the fourth year of his reign,

*anno* 1512; at which time, that king taking umbrage at the mighty naval preparations of France, made an augmentation of twenty-five large ships of war to those already in being; he likewise erected an office for the navy, and established a certain number of commissioners, to whom the charge of the navy was committed, and whose duty it was to inspect into the state and condition of the king's ships, and to make a report thereof to the lord high admiral, in order to their being repaired or rebuilt, and supplied with every thing necessary for the public service, according as the case required it; for till that time, the establishment of the naval forces of this kingdom seems to have been upon an auxiliary dependency of the sea ports and maritime towns, who were under certain conditions of furnishing their respective quotas of ships for the king's use, upon previous notice given to them in that behalf; after which, they all came to the appointed rendezvous, and were then disposed of by the king's order upon the services intended. Upon this augmentation, the king's fleet at that time consisted of no more than forty-five ships, with which that of the French was soon overcome. Of those towns which furnished ships for the public service, the cinque ports were the most noted, and whose privileges still subsist on account of the services which they obliged themselves in particular to perform to the crown. See *Cinque Ports*.

There are lists of the fleet of Queen Elizabeth, which make it appear there was but one private gentleman a captain, all the rest being lords and knights; so high was the esteem for service at sea in those days, when our princes ruled with the most consummate glory; but the opinion of serving at sea in late times having been very much lessened, it has since been declined by the nobility and gentry.

The navy of England is at present divided into three squadrons, distinguished by the different colours of the several flags, viz. red, white, and blue; the principal commander whereof bears the title of admiral, and each has under him a vice-admiral, and a rear-admiral, who are likewise flag officers. There are belonging to his majesty's navy six great yards, Chatham, Deptford, Woolwich, Portsmouth, Sheerness, and Plymouth; fitted with several docks, and furnished with store of timber, masts, anchors, cables, &c. And for the management of the royal navy, there are several officers of trust and authority, besides the commissioners of the admiralty: as the treasurer, controller, surveyor, commissioners of the navy, commissioners of the victualling office, &c. the principal whereof hold their offices by patent under the great seal.

By a late act, 2 W. 4. c. 40. in case his majesty shall revoke the patents of the commissioners of the navy and the commissioners for victualling, &c. the powers, duties, and authorities vested in them by any acts of parliament shall be vested in the lords commissioners of the admiralty; and by § 2. after the revocation of the patents, all lands, buildings, &c. vested

in the commissioners of the navy and the commissioner for victualling, are to be transferred to and vested in the lords commissioners of the admiralty; and by § 3. all contracts, covenants, and agreements entered into with the commissioners of the navy and the commissioners for victualling, &c. shall be transferred to and vested in the lords commissioners of the admiralty. By § 4. all the duties of the treasurer of the navy are to be transferred to the lords commissioners of the admiralty, except receipts and payments of money, and the management of the Greenwich out-pensioners.

The maritime state, says *Blackstone*, though nearly related to the military, is much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength, the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty; and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground of all their marine constitutions, was confessedly compiled by our king Richard I. at the isle of Oleron, on the coast of France, then part of the possessions of the crown of England. 4 *Inst.* 144. And yet so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of Queen Elizabeth, Sir *Edward Coke* thinks it matter of boast that the royal navy of England then consisted of thirty-three ships. The present condition of our marine has been thought to be in a great measure owing to the salutary provisions of the old Navigation Acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. See *Navigation Acts*.

At the same time that the good economy of the royal navy is displayed, it seems necessary to take some notice of that which affords it an opportunity of appearing in more magnificent grandeur than can be represented by the ablest writer in the world, the ocean on which it is borne; especially as there is a peculiar sovereignty and property inherent therein to the monarchs of Great Britain; the preservation of which, for several ages past, has not a little conduced to increase the glory of the nation, and to gain it such a reputation abroad as must justly make our fleets seem as formidable to strangers as they are to us, who know their real strength. This right is so ancient and undeniable, that even the most haughty of our neighbours dare not pretend to control it by any public act, however they may presume to contradict it by bare words; neither was any thing ever written against it until it was undertaken by *Hugh Grotius*, in his book called *Mare Liberum*; which was answered by *Selden*, in his treatise *Mare Clausum, or Right and Dominion of the Sea*, 1635, translated into

English, 1652. The duty of the flag, which is an acknowledgment of the British dominion on the sea, is as old as king John, and has been constantly asserted by his successors. This mark of respect had always been acknowledged as our right by foreigners so that it was never inserted as a stipulation in a treaty till 1654. The refusal of the Dutch admiral to strike the flag in compliance with the signal of the English admiral was the immediate cause of the commencement of war at that time, and the Dutch admitted they had ever before paid that mark of respect to the English flag. See *Bac. Ab. tit. Court of Admiralty, note, 7th ed.*

The boundaries properly said to encompass what are called the British Seas are thus accounted under the distinction of the four cardinal points of the compass; taking it for granted in general that all the seas which surround Great Britain, Ireland, and the other islands appertaining to the crown, are called the British Seas; but as to particulars they stand thus:—On the south is the British Channel, which separates England from France, the boundaries of which extend to the opposite shores of France, and to those of Spain, as far as Cape Finisterre. From that cape it extends on the west in an imaginary line running in twenty-three degrees of west longitude from London, to the latitude of sixty-three degrees north, which last is called the Western Ocean of Britain. From the aforesaid latitude of sixty-three degrees it extends in another line, (supposed to be drawn) in that parallel of latitude, to the middle point of the land, Van Staten, on the coast of Norway, which is the northern boundary; and from that point it extends along the shores of Norway, Denmark, Germany, and the Netherlands, to the channel first mentioned; which last boundary comprehends what is called the Eastern Ocean of Britain.

There being no lands lying on the west and north sides of the British dominions nearer than the continent of America, the island of Newfoundland, and Greenland, and the king of Great Britain having possessions in the two first places; the boundaries of his maritime empire cannot be said to be strictly limited on that side. Moreover, as to Greenland, it was at first discovered in the reign of Edward the Sixth, by Sir Hugh Willoughby, for the use of the crown of England; and still again to the northward there is some foundation for extending this sovereignty a great deal farther, on account of the acquisitions of King Arthur, a record of which is to be found in *Hackluyt*, 205, translated from the Latin original there quoted from *Geoffrey of Monmouth's Hist.*

According to this ancient right, the British dominion on the North Sea is very extensive; and so far from being questioned, or the trade of the British subjects in those parts obstructed, that on the contrary, (without regard to the above relation concerning King Arthur,) Britain has a prior right even to Denmark and Norway in the Greenland fishery and Davis's Straits; these places being unknown to them and the rest of Europe till John Davis's voyage

for discovery of the north-west passage in the year 1585, though it seems that the Danes afterwards demanded toll for our fishing at Greenland, but it was refused to them. See an incomplete note on this subject, 1 *Inst.* 107, a. n. 6.

A temporary act, 43 *Geo.* 3. c. 16. was passed for inquiring into irregularities and abuses in the admiralty and other naval departments, and into the business of prize agency. This act expired at the end of the session, 46 *Geo.* 3.

By the 54 *Geo.* 3. c. 159. regulations are made for the better security of his majesty's naval arsenals, by empowering the lords of the admiralty to prohibit vessels from entering the ports and harbours which they shall specify in the London Gazette, with gunpowder on board; and authorizing them to appoint places where vessels not belonging to the royal navy shall unlade and deposit all gunpowder exceeding five pounds weight, which they may have on board.

This act contains a variety of other provisions with respect to the royal dock yards and arsenals, and the harbours of the united kingdom.

II. Many laws have been made for the supply of the royal navy with seamen, for their regulation when on board, and to confer privileges and rewards on them during and after their service.

As to their supply, the power of impressing seamen, though one of the most invidious, has ever been found one of the most certain means. It has been a matter of some dispute, and submitted to not without a national reluctance; it is now, however, established by the law of the land beyond question, and from the spirit of the constitution the exercise of it resides in the crown. See *Impressing Seamen*.

But besides this method of impressing, (which, after all, is only defensible from absolute public necessity, to which all private considerations must give way) other ways have from time to time been adopted, and many of them still continue to be that tend to the increase of seamen and manning the royal navy. Among these deserves to be noticed the provision that every foreign seaman, who during a war shall serve two years in any man-of-war, merchantman, or privateer, is naturalized, *ipso facto*, 13 *Geo.* 2. c. 3; and serving three years may be employed as a British mariner, 34 *Geo.* 3. c. 68; and by various statutes, sailors, having served the king for a limited time, are free to use any trade or profession in any town in the kingdom without exception.

For the furnishing of mariners for the fleet, an act of parliament, 7 & 8 *W.* 3. c. 21. was passed; by which it was enacted, that all seamen, watermen, &c. above the age of eighteen years, and under fifty, capable of sea service, who should register themselves voluntarily for the king's service in the royal navy, to the number of thirty thousand, should have paid to them the yearly sum or bounty of forty shillings, be sides their pay for actual service, and that

whether they were in service or not; and none but such mariners, &c. as were registered should be capable of preferment to any commission, or be warrant officers in the navy; and such registered persons were exempted from serving on juries, parish offices, &c. also from service abroad after the age of fifty-five years, unless they went voluntarily; and when by age, wounds, or other accidents, they were disabled for future service at sea, they were to be admitted into Greenwich Hospital, and there be provided for during life; and the widows of such seamen as should be slain or drowned, not of ability to provide for themselves, should be likewise admitted into the hospital, and their children educated, &c. But if any registered seaman should withdraw himself from the king's service, in his ships or navy, or if any such mariner relinquished the service without consent of the commissioners of the admiralty, he was for ever to lose the benefit of the act, and be compelled to serve in his majesty's fleet six months without pay. This registry being by experience proved to be ineffectual, as well as oppressive, was abolished, and the above statute repealed, by 9 *Ann.* c. 21. § 64.

In consequence, however, of the strong feeling entertained throughout the country against impressment, the plan of endeavouring to dispense with its necessity by establishing a registry of seamen is again in agitation, and in all probability will be adopted.

By 4 *Anne*, c. 19 § 18. watermen plying on the Thames between Gravesend and Windsor, on notice given by the commissioners of the admiralty to the company of watermen, are to appear before the said company, to be sent to his majesty's fleet, or on refusal they shall suffer one month's imprisonment, and be disabled working on the Thames, for two years.

The 2 & 3 *Anne*, c. 6. provides, that poor boys whose parents are chargeable to the parish, may, by churchwardens and overseers of the poor, with consent of two justices of peace, be placed out apprentices to the sea service, until the age of twenty-one years, they being thirteen years of age at the time of their placing forth; these apprentices shall be protected from being impressed for the first three years (if they are not more than eighteen years old; 4 *Anne*, c. 19. § 17); and if they are impressed afterwards, the master shall be allowed their wages. And all masters and owners of ships, from thirty to fifty tons burthen, are required to take one such apprentice, one more for the next fifty ton, and one more for every hundred ton above the first hundred, under the penalty of ten pounds. Masters of apprentices placed out by the parish, may, with the consent of two justices, turn over such apprentices to masters of ships.

Of more modern statutes, the following deserves particular notice:

By 35 *Geo.* 3. c. 5. § 9. 19. and 29; and 36 *Geo.* 3. c. 115 a number of men were raised for the navy according to a certain proportion imposed on every county and port in Great Britain. The execution of this act was intrusted to the justices of the peace and magistrates of



corporations, and the expense defrayed by rates made upon every parish, out of which bounties were paid to volunteers entering.

To further the urgent demand for sailors, the 35 *Geo. 3. c. 34.* was passed to enable magistrates to levy for his majesty's navy in their several jurisdictions, "all able-bodied idle, and disorderly persons, who could not on examination prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their maintenance." The execution of this act was by a clause therein allowed to be suspended and revived according to necessity, by his majesty's proclamation or notice from the admiralty.

By various acts, private militia-men having served in the navy, were allowed to be discharged from the militia in order to re-enter into the navy, to a certain extent. See the latest act, 43 *Geo. 3. c. 62. 76.* By 43 *Geo. 3. c. 50. § 7.* no seafaring man shall be a militia-man.

To encourage seamen to enter voluntarily into the service of his majesty, to ensure them their wages, to protect their persons, to provide for their families, and to secure them from impositions, in relation to their prize-money and other advantages, several acts of parliament have from time to time been passed. The first of these was the stat. 31 *Geo. 2. c. 10.*

From the year 1758, the period of passing the above act, when Mr. Grenville so ably filled the office of first lord of the admiralty, down to Mr. Dundas's time, scarcely any parliamentary regulation appears to have been applied to disbursements on account of the navy, and these increasing with the expense of our marine, to an amount beyond all former example, had opened a wide door to imposition on our seamen.

Incapable as sailors are of taking care of their property, beyond every other description of men, they were, in numberless instances, either by forgeries committed upon them, or from their own credulity, defrauded of their wages and deprived of rewards due to them for a long and laborious service. This evil had arisen to its greatest height towards the close of the war, which ended in 1783, and was practised by the lowest orders of the community, who watching the necessities, and encouraging the vices and follies of the inexperienced sailor, supplied him with small sums of money, and in the hour of intoxication induced him to grant instruments which in one moment robbed him of all he had acquired, as well as of what he might afterwards be entitled to receive as a recompence for his toils and gallantry in the service. In other instances, less scrupulous as to the means, the same unprincipled set of men (always selecting for the objects of their spoil such names as appeared to have the largest sums due to them) forged at once the authorities under which they pretended to act, and with great facility deprived of a just inheritance the widows and orphan children of those who had unhappily lost their lives in their country's cause.

The remedy for these evils was first applied

in the year 1786, by an act introduced by Mr. Dundas (afterwards Lord Melville.) By this act, 26 *Geo. 3. c. 63.* modes were prescribed for executing all wills and instruments of delegated authority, which, by making the superior officers of our ships (and other persons above the reach of corruption) necessary witnesses to all such deeds, struck at the root of forgery. Every sort of guard was meant to be provided by it (as far as human nature in the character of a British seaman can be guarded) to protect the thoughtless and ignorant, or at least to insure that the act of the sailor, thus legalized, was not done under the influence of fear, false pretences, or intoxication.

Mr. Dundas's attention was in the next place directed to the protection of that property which devolved upon widows and other representatives of seamen dying in the service, and leaving arrears of wages due to them.

This portion of the sailor's reward seldom reached the door of his disconsolate widow and helpless children. The same class of people who had theretofore defrauded him, being no longer able, from the operations of the above-mentioned act, to interfere with his property while he continued in the service, now turned their designs upon intercepting that part of it which he should leave behind him in the event of his death. This was principally effected by the means of wills made in their own favour, and which, under false pretences, they easily procured from the unsuspecting sailor; and there is reason to believe that no less than one-half of the arrears due at the end of the war before-mentioned, was obtained by such impositions, or by entire forgeries of wills, which were not at that time directed to be attested and executed under sufficient regulations.

Against these infamous practices an act of parliament was passed (32 *Geo. 3. c. 34.*), which was framed with great ingenuity.

By the above and another act, all those protections and privileges which had hitherto been enjoyed exclusively by the seamen, were extended to our marines, a most useful and meritorious part of our navy; and in the same session, the benefits arising from them were also extended to persons residing in Ireland, who were also admitted to participate in the benefit of 3 *Geo. 3. c. 16.* with respect to the pensioners of Greenwich hospital.

By the 55 *Geo. 3. c. 60.* the acts of 26 *Geo. 3. c. 63.* and 32 *Geo. 3. c. 34.* and also so much of any other acts in force as related to letters of attorney and wills of petty officers, seamen, and marines, were repealed, and new provisions enacted upon the like principles, but with such more effectual powers as experience had shown to be necessary.

With respect to the forgery of wills, &c. see *Forgery, IV.*

But notwithstanding so much had been done for the seaman, and every assistance had been extended to his widow and other representatives, something still was wanting, while his wife and family remained in poverty and distress during his absence. No effectual scheme

had hitherto been proposed, none even thought of, to grant them assistance: and it was reserved for Mr. Dundas to establish a system of remittance and supply, so extensive as to convey relief into every corner of the kingdom to the scattered families of our brave defenders. Provisions were made by an act of parliament, which he procured to be passed in 1795, 35 Geo. 3. c. 28 (explained and enforced by 37 Geo. 3. c. 53; 46 Geo. 3. c. 127; 49 Geo. 3. c. 108; 58 Geo. 3. c. 60; 57 Geo. 3. c. 20; 1 & 2 Geo. 4. c. 49); for a regular monthly supply to be paid to the wife and each child, or to the parent of every seaman who was willing, upon representation being made to him, to allow a portion of his pay to be appropriated to the support and comfort of his family during his absence.

The advantages of this act, 35 Geo. 3. c. 28. were, by another of a similar nature, extended to non-commissioned officers and their families. See 35 Geo. 3. c. 95. And the government of Ireland afterwards applied for the provisions of both to be extended to that country, in order to enable their seamen to receive their united benefits. The numerous list of persons relieved by this benevolent regulation, was a convincing proof of its national importance not less than 30,000 families of seamen, in different parts of the three kingdoms, being from time to time supported by the voluntary application of that portion of their wages which sailors were formerly induced to squander, in a most unprofitable manner, either at seaport towns, or in London during their attendance at the navy pay office.

The higher classes of the service, as well as the lower, felt the good effects of Mr. Dundas's measures. In the session of 1795, he obtained an act, 35 Geo. 3. c. 94. (amended by 57 Geo. 3. c. 20.) by which naval officers, who were not in affluent circumstances, were enabled to accept commands, or to undertake other services, without pecuniary embarrassment. For this purpose the arrears which were due to an officer from his half-pay, and three months of his full pay, were paid him in advance, as soon as his appointment took place. A fund was also provided for those who might wish to receive a part of their pay whilst employed upon foreign service; and the principle of remittance was extended to every one desirous to avail himself of its advantages.

For the purpose of consolidating and amending the laws relating to the pay of the royal navy, the above and various other subsequent statutes were repealed by the 11 Geo. 4. and 1 Wm. 4. c. 20. which contains a variety of provisions, embodying former enactments with such improvements as had been suggested by time and experience. Several of these provisions have been altered and extended by the 3 & 4 Wm. 4. c. 25.

The following is an abstract of the principal clauses of both acts:

1. *Of the advances made to Volunteers and others, and Time of Payment of their Wages, &c.*

By the 11 Geo. 4. and 1 Wm. 4. c. 20. § 2. volunteers are to receive certificates of their time of entry, to entitle them to wages, conduct-money, and two months' pay in advance; and every seaman and able-bodied landman entered on the books of any ship as a supernumerary, and who shall not be borne for wages on the books of any other ship, shall be entitled to wages on the books of the first ship in which he shall serve as part of the complement thereof or as a supernumerary for wages: provided the lord high admiral, or the commissioners for executing the office of lord high admiral, may authorize the payment of such advance to supernumeraries and others who may have entered themselves after the ship on board which they shall be serving shall have proceeded to sea.

By the 4 & 5 Wm. 4. c. 25. boatswains, gunners, carpenters, second masters, and petty officers, are also entitled to receive two months' wages in advance.

§ 3. From time to time a certain portion of the pay due to such warrant and petty officers (not entitled to draw bills for their pay, as thereinafter provided), and also to such seamen and others as may be desirous of receiving it, shall be issued to them at the expiration of every month, or as soon after as the convenience of the service will admit, in such proportions per month as hath been or shall be for that purpose directed by the lord high admiral or the commissioners for executing the office of lord high admiral; and to this end the captain shall make out a complete list of the names of the men, with their respective numbers on the ship's books, desirous of receiving a portion of their pay; and the purser shall then draw, for the amount of the said portion of pay so to be issued, a bill of exchange at three days sight upon the commissioners of the navy, in the accustomed form, or such other form as shall be supplied to the ship.

§ 7. Whenever any petty officer, seaman, or marine, shall be turned over from one ship to another, in any port of the united kingdom, or on the coast thereof, he shall, on the arrival of the ship to which he shall be removed at any port having an establishment of clerks of the treasurer of the navy, and before such ship shall proceed to sea, be paid all the wages due to him upon pay lists made out and signed by the captain and proper signing officers of the ship from which he shall be turned over, except in urgent cases, when the lord high admiral, &c. shall otherwise direct; and in such cases he shall be paid whenever the ship shall return to any port where there shall be a commissioner or other authorized officer of the navy to control such payment: provided no petty officer or seaman turned over from one ship to another shall be rated in a lower degree than that in which he was rated in the books of his former ship.

§ 8. In case the ship to which any person shall be so turned over be abroad, the captain shall, previous to his removal, cause to be made out a ticket, to be called a foreign remove ticket, which shall be delivered to the party to enable him to receive payment of his wages.

§ 9. When any petty officer, &c. shall be sent sick to any hospital or sick quarters at home or abroad, a ticket, to be called a sick ticket, shall in like manner be made out by the captain and sent with him, which upon his being thence discharged back to his own ship, he shall leave with the surgeon or agent; but if discharged to any other ship not to rejoin his own ship, the said ticket shall be sent with him, and be paid conformably with the established regulations of the navy; and in case he shall be discharged from the said hospital or sick quarters as unseviceable, a certificate of his discharge shall be delivered to him with the said sick ticket, to enable him to receive his wages; provided that all petty officers, &c. wounded in action with the enemy, shall receive the full amount of their wages and allowances until their wounds shall be healed, or if declared incurable, until they shall receive a pension or be admitted into the royal hospital at Greenwich; but no other petty officers, &c. discharged from hospitals or sick quarters at home, either to a ship or from the service, shall be allowed wages for more than thirty days of the time they remain in such hospital or sick quarters.

§ 10. When a petty officer, &c. shall by wounds or infirmity be disabled, the captain shall represent the same to the commander-in-chief or senior officer, who shall cause a survey according to the practice of the navy; and if upon such survey, such petty officer, &c. be found unfit for further service, he shall be discharged, and the captain shall thereupon make out and sign a ticket, to be called an unseviceable ticket, for the wages due to such unseviceable man.

§ 12. When any petty officer, &c. shall die in the service of his majesty, the captain of the ship to which he shall belong shall thereupon make out a ticket, to be called a dead ticket, for the wages due to the deceased for his service on board the same; which ticket, signed by the captain and the proper signing officers of the ship, shall be transmitted by the captain to the commissioners of the navy, in order that payment thereof may be made to the legal representative of the deceased; the deceased's clothes or other effects shall be publicly sold at the mast, and the sums for which the same shall be sold, charged in the ship's books against the wages of the respective purchasers, but no person shall purchase beyond the amount of the net wages then due to him; an account specifying the articles sold, &c. shall be transmitted to the commissioners of the navy, annexed to the dead ticket; and in case the deceased shall not have left any clothes or effects, the captain shall certify on the dead ticket to that effect.

§ 13. When any petty officer, &c. shall be promoted abroad to any rank above the rank of petty or non-commissioned officer, the captain shall cause to be delivered to him a ticket, to be called a promotion ticket, for the wages due to him, certifying that he has been actually promoted to the station therein mentioned,

which ticket shall consist of the same particulars prescribed in regard to foreign remove tickets, and shall be transferable by indorsement of the party in whose favour it is made out, and be payable to the indorsee thereof.

By § 14. No ticket, except the promotion ticket, is to be transferable.

§ 22. Deserters are to forfeit their wages; but the admiralty may authorize the payment of their wages in certain cases.

§ 27. When any petty officer or seaman, non-commissioned officer of marines, or marine, shall be discharged for any cause from any ship of his majesty, the captain shall cause to be made out and sign a certificate describing the period of such discharged person's service on board the ship, his number on the ship's books, and his stature, complexion, and age, which shall be delivered to the party at the time of his discharge; and no petty officer, seaman, non-commissioned officer, or marine shall be entitled to receive his wages, prize-money, or other allowances, unless he shall produce such certificate at the time the same are claimed, or unless he shall be identified by one or more of the commission or warrant officers who belonged to the vessel during some part of the period for which he may so claim.

§ 68. Payment may be made of orders under 107., executed by seamen.

§ 70. Moneys due to lunatic officers or men made payable to persons having the care of them.

§ 80. It shall not be lawful for any person to arrest or take out of his majesty's service any petty officer, seaman, non-commissioned officer of marines, or private marine, belonging to any ship of his majesty, by any warrant, process, or writ of execution whatever, to be issued either in the united kingdom or in any other part of his majesty's dominions, for any debt, unless such debt shall have been contracted by such officer, &c. when he did not belong to his majesty's service, and unless before the issuing of such process or execution the plaintiff in the suit, or some person on his behalf, shall make affidavit that the debt justly due and owing to the plaintiff, over and above all costs, was contracted by the defendant at a time when he did not belong to the service of his majesty, a memorandum of which oath shall be marked on the back of such process or execution, and of the warrant issued in pursuance thereof.

## 2. Of Allotments of Wages by Seamen for the Maintenance of their Wives and Families, &c.

§ 32. Every boatswain, gunner, carpenter petty officer (not entitled to draw bills for pay) seaman, landman (boys excepted), and non-commissioned officer and private of marines, being part of the complement of a ship, or borne on the books as a supernumerary, for wages and victuals, may make an allotment of a certain portion, not exceeding one moiety, of his monthly wages, in favour or for the maintenance of the following relatives only (that is to say,) wife, father, mother, child or children being un-



der the age of fourteen years, or labouring under any bodily infirmity; and all the moneys hereafter allotted shall, at the expiration of every calendar month (the first payment to be reckoned from the first day of the month subsequent to the date of the declaration of allotment, and not to include the period between that date and the first of the ensuing month), be paid to the parties entitled to receive the same; but no payment shall be made at any one time for a shorter period than a calendar month, and whenever any increase or decrease shall take place in the rate of allotment by promotion, disrating, or otherwise, payment of the same shall commence from the ending of the last preceding payment.

By the 4 & 5 Wm. 4. c. 25. § 4. allotments are extended to a brother, sister, grandfather, grandmother, mother-in-law, and child or children of the age of eighteen years or upwards, and to trustees for the support of any child under that age; and the next clause empowers the admiralty to fix from time to time the amount of the allotment, but which is never to exceed one moiety of the monthly wages. By § 6, allotments may be stopped until debts due to the public on the ship's books are cleared.

By 11 Geo. 4. and 1 Wm. 4. c. 20 § 33. whenever any person entitled to make an allotment shall declare his intention so to do, the captain shall cause such person to subscribe his name or mark to a declaration or to a list of declarations for that purpose, which shall be transmitted to the commissioners of the navy, in order that they may take the necessary measures for causing allotment bills to be made out thereon, and payment to be made of the portion of wages so allotted.

§ 34. specifies how allotment bills are to be made out and paid.

By § 35. if the wife of any person by whom an allotment has been made, shall die, or desert her family, &c. payment may be stopped, or made to some other person.

§ 36. Allotments may be revoked by the person making the same, if the commissioners of the navy are satisfied with his reasons.

§ 37. Or by commissioners in cases of death or desertion.

By § 38 so soon as it shall come to the knowledge of the minister or of any churchwarden or elder of the parish, that any person resident therein, and entitled to receive payment of an allotment bill, is dead, such minister, &c. shall immediately give notice thereof, by letter, to the commissioners of the navy, or to the officer of the revenue, or clerk to the treasurer of the navy, by whom such allotment is payable, who shall immediately indorse the date of the receipt of such notice upon such allotment bill, and transmit the same to the navy office, and from that time all payments thereunder shall be discontinued.

§ 39. Payments of allotments made by collectors of customs and excise, to be refunded every three months.

§ 44. The party to whom allotment bills

are payable, is to appear personally, and may be required to take an oath.

§ 15. If payment of allotment is not demanded within six months, the bill to be returned; but it may be renewed.

### 3. *Of Remittances of Wages by Seamen for the Benefit of their Wives and Families, &c.*

§ 40. Whenever a ship, not being in any port of the united kingdom, or on the coast thereof, shall have been twelve calendar months in sea pay, and so from time to time at the end of every six months, the captain shall, at the next subsequent muster of the ship's company, cause to be read over the names of the petty officers, seamen, non-commissioned officers and privates of marines, and cause each to answer to his name; and if any of them who have not made any allotment of their pay shall declare their desire that the whole or any part of their pay, except for the last six months, shall be paid either to a wife, child or children above the age of eighteen years, father, mother, grandfather, grandmother, brother, or sister, the captain shall cause to be transmitted to the commissioners of the navy a list of such persons, containing their names, their numbers on the ship's books, and the names and residence of the parties to whom they shall desire the same to be paid; and the commissioners shall cause the requisite steps to be taken for making out the necessary remittance bills in the form heretofore used, or in such other form as shall be found most convenient, to be signed by a commissioner of the navy, and to be addressed to the same persons and in the same manner as allotment bills are by the act required to be addressed.

By § 41. every warrant officer not authorized to draw bills, and every petty officer, seaman, non-commissioned officer, or marine, entitled to the payment of any wages, or the wife of any such warrant officer (being legally empowered to receive her husband's wages), shall, if present at the place where such wages are paid, be at liberty in like manner to make a remittance thereof, or of any part thereof, to any person within the united kingdom, or if not present, but resident more than seven miles from the place of payment, shall, upon transmitting to the commissioners of the navy a regular certificate of discharge from the service, or other satisfactory proof of identity, be entitled to a remittance bill (but payable to the party only) in any part of his majesty's dominions where naval payments are usually made; and payment may in like manner be made to the executors and administrators of any such deceased warrant officer, if they shall desire it.

But by 4 & 5 Wm. 4. c. 25. § 7. any petty officer, seaman, non-commissioned officer of marines, or marine, notwithstanding he may have made an allotment of his pay, may cause to be paid by remittance in the manner thereby provided, any further portion of his pay which may remain due to him, except for the last six months, and any such remittance of wages may

be made payable either to any of the relatives mentioned in the above act, or to any child or children of the age of eighteen years or upwards of the party making the allotment, or if under that age then to a trustee on the behalf of such child or children; or any such petty officer, seaman, non-commissioned officer of marines, or marine, may authorize any such part of his pay to be invested for his benefit in such savings bank, and under and subject to such rules and regulations as the admiralty shall establish for that purpose.

#### 4. *Of Advances and other Payments to Officers, &c.*

§ 23. Any commission or warrant officer, on being appointed to any ship of his majesty in commission, he being entitled to half pay, and there being no imprest standing against him, upon application to the commissioners of the navy, and on the production of the affidavit usually required from half pay officers, and a certificate of the date of his commencing sea pay, may receive the arrears of half pay due to him up to that date; and every such officer who shall have been on half pay for three months next before his appointment to any ship, and shall have no imprest outstanding against him, shall, on joining his ship, upon like application to the said commissioners, be entitled to receive the amount of three months personal sea pay in advance: provided in case any such officer shall be again put on half pay before the expiration of three lunar months from the time of such appointment, the amount of the three months wages so paid in advance, or for such part of the time as he shall not serve, shall be placed as an imprest against his future half pay.

§ 24. Every flag officer, commission officer, master (such commission officer or master not being in the command of a ship, or not having accounts to pass), secretary to a flag officer or commodore, physician, chaplain, second master, and assistant surgeon (not acting as surgeon), who shall be actually in the naval service of his majesty, and entitled to full pay in the fleet, may, at the expiration of every three, six, or twelve lunar months, or of any longer period, draw a bill of exchange, or a set of bills, of the same tenor and date, upon the commissioners of his majesty's navy for the net balance of the personal wages due to him; which bill or set of bills shall be made payable to himself or to his order at ten days sight, and shall state the rate or description and name of the ship to which he shall belong, and his station or rank on board the same, and also the full amount of the personal wages then due to him, and the period for which the same accrued, together with the amount of such charges and deductions as shall appear on the ship's books against him, and the net residue of the personal wages due to him, for which residue and no more the bill shall be drawn.

§ 25. Every captain, lieutenant, or master commanding a ship, surgeon, purser, and assistant surgeon, acting as surgeon, may draw

bills of exchange in like manner and under similar regulations, for three-fourths, and no more, of their net personal pay; and every mate, midshipman and master's assistant, who shall have passed his examination for a lieutenant, master, or second master respectively, and every schoolmaster secretary's clerk, and captain's clerk, may draw bills in like manner and under similar regulations, at the end of every six or twelve, but not for a shorter period than six lunar months, for the net personal pay due to him: provided that no person who shall have received three month's advance shall be permitted to draw any such bill for the first three months after he shall have joined his ship.

By the 4 & 5 Wm 4. c. 25. § 2. the officers who under the above clause could only claim for three-fourths of their pay, are now authorized to draw for the whole: provided that all bills for personal pay to be drawn under the authority either of the above act or that act, shall be drawn for such periods of time, and up to such periodical days in the year as the admiralty shall fix. And by § 1. every mate, midshipman, and master's assistant, although any such person shall not have passed his examination, and also every volunteer of the first class, and every engineer and assistant engineer belonging to any steam vessel of his majesty, at the end of every six or twelve months, but not for a shorter period than six months, may draw bills periodically upon the accountant-general of the navy for the net personal pay then due to him: provided always, that no person authorized to make any allotment of his wages, or entitled to receive monthly pay, under the provisions of the 11 Geo. 4. and 1 Wm. 4. c. 20. shall be allowed to draw any such bill as aforesaid for any period during which any such allotment shall be in force or in the course of payment, or during which he shall be in the receipt of such monthly pay.

By § 30. any officer fraudulently drawing any such bill for pay, when there shall not be pay to the amount so drawn for owing to him, shall forfeit all pay and other allowances to which he shall be then entitled, and moreover, upon, being convicted thereof by court martial, shall be cashiered and rendered incapable of holding any office, civil or military, in his majesty's service: provided that no officer whose duty it shall be to transmit any logs, journals, returns, or other documents, either to the admiralty office or to the navy office, shall be entitled to receive any pay due at the time of his discharge, or any half pay afterwards to accrue due, until he shall have duly transmitted such logs, &c., or unless he shall have obtained a dispensing order from the lord high admiral, &c.

§ 31. Whenever any officer who is required to pass accounts to entitle him to the balance of his pay, shall have cleared his accounts for the period during which he shall have been on full pay, to the satisfaction of the commissioners of the navy and victualling respectively, he shall be entitled to a bill usually called a general certificate, specifying the net balance

due to him, which shall be payable by the treasurer of the navy, and be negotiable like other bills.

§ 42. Any officer of the royal navy or royal marines entitled to half pay or to a pension, and also any person entitled to any money or allowance from the compassion fund of the navy, or to his majesty's most gracious bounty given to the relatives of persons slain in fight with the enemy; or to a pension as the widow of an officer of the navy, and any petty officer, seaman, non-commissioned officer, or private marine entitled to a pension or allowance in respect of his services or wounds, shall be at liberty to receive such pay, allowance, bounty, or pension by means of a remittance bill as aforesaid.

§ 46. Naval officers and widows entitled to half pay or pensions, may draw on the navy board or be paid by extract.

By § 47. all assignments or sales and contracts by any person entitled to any marine half pay, or by any person entitled to an allowance from the compassionate fund, or to any pension as the widow of an officer, or of in relation to such half pay, allowance, or pension respectively, and all assignments or sales and contracts of or relating to any wages, half pay, prize money, pension, gratuities, and other allowances payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines or marine, shall be null and void.

§ 54. all wages, pay, and other allowances payable for the service of any commission or warrant officer of his majesty's navy shall be paid to the officer himself, if present, at the pay table, or to his lawful attorney, upon the production of the usual certificates; but if he shall have assigned or sold his pay, the same shall be paid to the assignee, being duly authorized to receive the same; and if there shall be more assignments than one, they shall be satisfied according to priority of date; but the treasurer of the navy shall not pay regard to any assignment which shall not be presented at the pay table, accompanied by the usual certificates and papers, at the time the wages or pay are appointed to be paid, and unless a true copy of such assignment be left at the same time with the said treasurer, nor shall he be liable to pay under any assignment conveying generally any annual or other periodical wages or allowance to grow due, but only under such assignments of wages, pay, or other allowances due, as shall be made to secure payment of any sum advanced by the assignee, which shall be truly set forth in such assignment, and for the amount of which, and no more, the wages, pay, and other allowances payable to the officer shall be liable.

§ 71. All pensions to which the widows of officers of the royal navy are entitled, shall be paid in the same manner as other pensions for services in the royal navy are payable; and the admiralty may make regulations for the payment of marine half pay, &c.

### 5. *Of Wills, &c. and Letters of Attorney made by Seamen.*

§ 48. No will made by any petty officer or seaman, non-commissioned officer of marines or marine, before his entry into his majesty's service, shall be valid to pass any wages, prize money, or other moneys payable in respect of services in his majesty's navy; and no letter of attorney made by any such person who shall be or shall have been in the said service, or by the widow, next of kin, executors, or administrators of any such person, shall be valid or sufficient to entitle any person to receive any wages, prize money, or other allowance of money of any kind for the service of any such person in his majesty's navy, unless such letter of attorney shall be therein expressed to be revocable; and no such letter of attorney shall be valid or sufficient to entitle any person to receive any such wages or other monies; nor shall any will made or to be made by any petty officer or seaman, non-commissioned officer of marines, or marine, who shall be or shall have been in the naval service of his majesty, be valid or sufficient to pass any such wages, prize money, or other moneys, unless such letter of attorney or will respectively shall contain the name of the ship to which the person executing the same belonged at the time or to which he last belonged, nor unless such letter of attorney, if made by an executor or administrator, shall contain the name of the ship to which his or her testator or intestate last belonged, and also in every case a full description of the degree of relationship or residence of the person or persons to whom or in whose favour, either as attorney or attorneys, executor or executors, the same shall be made, and also the day of the month and year and the name of the place when and where the same shall have been executed, nor shall any such letter of attorney or will be valid for the purposes aforesaid unless the same respectively shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned; (that is to say,) in case any such letter of attorney or will shall be made by any such petty officer or seaman, non-commissioned officer of marines or marine, while belonging to and on board of any ship of his majesty as part of her complement, or borne on the books thereof as a supernumerary or as an invalid, or for victuals only, the same shall be executed in the presence of and be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation the absence of the captain at the time, and the occasion thereof; and in case of the inability of the captain, by reason of wounds or sickness, to attest any such will or letter of attorney, then the same shall be executed in the presence of and be attested by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same, and the cause thereof; and if made in any of his majesty's hospital ships, or in any naval or other hospital, or at any sick



quarters either at home or abroad, the same shall be executed in the presence of and be attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters, or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such hospital ship, or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital or other sick quarters, or one of them; and if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain in his majesty's navy, or some commission officer or chaplain belonging to his majesty's land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in his majesty's naval or military service, if any such shall be then on board, or by the master or first mate thereof; and if made after he shall have been discharged from his majesty's service, or if such letter of attorney be made by the executor or administrator of any such petty officer or seaman, non-commissioned officer of marines or marine, if the party making the same shall then reside in London or within the bills of mortality, the same shall be executed in the presence of and be attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; or if the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his majesty's service are paid, the same shall be executed in the presence of and be attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such letter of attorney or will shall then reside at any other place in Great Britain or Ireland, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man, the same shall be executed in the presence of and be attested by one of his majesty's justices of the peace, or by the minister or officiating minister or curate of the parish or place in which the same shall be executed; or if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of his majesty, or any settlement within the charter of the East India Company, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain of his majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his majesty's naval yards, or a minister of the Church of England or Scotland, or a magistrate or principal officer residing in any of such places respectively; or if the party making the same shall then reside at any place not within his majesty's dominions, or any of the places last mentioned, the same shall be executed in the presence of and be attested by the British consul or vice consul, or some offi-

cer having a public appointment or commission, civil, naval, or military, under his majesty's government, or by a magistrate or notary public of or near the place where such letter of attorney or will shall be executed; nor shall any will of any petty officer, seaman, non-commissioned officer of marines or marine, be deemed good or valid in law, to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment with a power of attorney: provided, that if it shall appear to the satisfaction of the treasurer of his majesty's navy, in the case of any will or letter of attorney executed on board any of his majesty's ships, that in the attestation thereof the captain's signature hath by accident or inadvertence been omitted, and that in all other respects the execution has been conformable to the provisions and to the intent and meaning of this act, it shall be lawful for the inspector of seamen's wills and powers to pass the same as valid and sufficient.

§ 49. Provided, that every letter of attorney or will, which hath been or which hereafter shall be made by any petty officer or seaman, non-commissioned officer of marines or marine, while a prisoner of war, shall be valid, provided it shall have been executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, or chaplain of the army or navy, or by any notary public; but so as not to invalidate or disturb any payment which hath been already made under any letter of administration, certificates, or otherwise, in consequence of the rejection of any such wills by the inspector of seamen's wills for want of the due attestation thereof according to the directions of any former act of parliament.

§ 50. Wills, &c. to be noted in the muster book.

§ 51. Letters of attorney and wills to be examined by the inspector.

§ 52. No letter of attorney of any petty officer or seaman, non-commissioned officer of marines or marine, which shall not have been made or executed on board the ship to which the party shall have belonged, in the manner required by the act, shall be passed, stamped, or allowed by the said inspector until a certificate shall have been produced to him, under the hand of the captain, specifying the period of the party's service on board under the command of such captain, and a description of his height, complexion, and age, unless reasonable cause shall be shown to and allowed by the said treasurer or inspector for dispensing with such certificate.

§ 53. The treasurer of the navy shall not be bound to pay regard to any power of attorney, or check of any power, under which any wages may be claimed as due to any officers, seamen, or marines, unless such power or check of power, as the case may be, shall be actually produced at the time payment is claimed, and,

in the case of an officer's pay, unless the power or a copy of the power be left with the proper officer of the said treasurer, accompanied with the usual certificates and papers; and in cases of the wages of a seaman or marine being claimed by any master under any indenture of apprenticeship, every such master shall, before he shall be entitled to receive the same, adduce satisfactory proof to the officer of the said treasurer that the indenture to be produced by him was in full force during the period for which such wages are claimed, and that the apprenticeship was, at the time of the execution of the indenture, under the age of eighteen years, and had not previously used the sea; but in case the indenture shall not be produced at the pay table when the wages shall be demanded, and such proof as aforesaid shall not be given, such wages shall be paid to the apprentice, and not to the master.

§ 55. specifies the mode by which executors are to obtain probate of such wills as therein before mentioned.

§ 56. enacts the mode of obtaining administration where no will has been made.

§ 59. When any probate or letters of administration shall have been so obtained, the proctor employed therein shall immediately send the same to the treasurer of the navy, with a copy of the will (in the case of probate), and an account of his charges; and upon receipt thereof the inspector shall issue a check, containing the heads of such probate or letters of administration, and shall note thereon the amount of the proctor's charges and the address of the claimant; and so soon as the wages and prize money due to the deceased shall have been calculated in the proper departments, the amount shall be noted on the check, and, after abating the proctor's charges, the balance shall be paid to the party personally, or by means of a remittance bill, in the manner and under similar regulations as therein-before provided with respect to other remittances of wages, and the check shall then be delivered to the party, to stand instead of probate or letters of administration, to enable him to receive whatever other sums may become payable to the deceased's estate.

§ 60. If any proctor, registrar, or other officer of any ecclesiastical court shall deliver any letters of administration, probate of will, or letters of administration with will annexed, to any other person than the treasurer of the navy or the said inspector, he shall forfeit one hundred pounds; and if any agent for prizes shall pay any prize money due to a petty officer or seaman, non-commissioned officer of marines or marine, under any authority whatever, other than the inspector's check directed by the act, such payment shall be null and void, and the agent shall forfeit a sum equal to the amount of the prize money paid.

§ 61. limits the expense of probate, &c. to the sums specified in the schedule to the act.

§ 63. directs the manner of proceeding in case of executors, &c. dying before the receipt of wages.

By § 64. regulations are made for preventing fraudulent claims by pretended creditors of seamen and marines.

But (§ 65.) creditors to be paid if there are no executors or administrators.

By § 69. sums not exceeding 20*l.* due to deceased petty officers, &c. are to be paid on certificate; extended by 4 & 5 *Will. 4. c. 25. § 3.* to 32*l.*

#### 6. *Provisions for the Passage Home and Maintenance of Unserviceable or Shipwrecked Sailors.*

§ 11. In case there shall be no opportunity of a passage by a king's ship, every man discharged abroad, either from a ship or from any hospital or sick quarters, shall be sent home by the first convenience of a merchant vessel, the master of which is thereby required (under 50*l.* penalty) to afford a passage to and subsist all such men, not exceeding four men to every 100 tons burthen of his ship, for which such allowance per day shall be made as shall be authorized by the lord high admiral, and except in cases when the man so discharged shall perform the duty of one of the crew of the vessel, and for which he may be entitled to receive wages from the owner.

§ 32. The governors, ministers, consuls, and other officers of his majesty in foreign parts, and in places where there shall be no such, then any two British merchants there residing, shall send for and provide for all such seafaring men and boys, being subjects of the United Kingdom, who shall by shipwreck, or by any other means, or from any cause whatever, be driven to or cast away or left or be in distress at any such foreign parts or places, or who shall have been discharged from any of his majesty's ships, and subsist all such seafaring men and boys, and for so doing they shall be allowed so much per day as hath been or shall be authorized by the admiralty, for the amount of which disbursements they shall send bills, together with proper vouchers, to the commissioners of the navy, in order that, after due examination of such vouchers, payment of the amount thereof may be made to them; and the said governors, &c. shall cause such men and boys to be put or sent on board the first or any ship or vessel belonging to any subjects of his majesty which shall be bound from thence or from the neighbourhood to any part of the United Kingdom, and shall be in want of men to make up their complement; and if there shall be no such ship in want of men within a convenient time, then they shall provide and order a passage home for such seafaring men and boys in the first ship or vessel of his majesty's subjects bound to any part of the said United Kingdom; and every master or other person having the charge of any such ship or vessel thereby required (under 100*l.* penalty) to receive and afford a passage, and subsistence during the voyage, to all such seafaring men and boys as shall be so sent on board his ship, not exceeding four for every 100 tons of his ship's burthen; and every such master, on the

production to the commissioners of the navy of a certificate under the hands of any such governors, &c. specifying the number and names of the men and boys, and the time when they were so received on board, and upon making oath as to the number of days they were subsisted, and that he did not during that period want of his own complement of men, or if he did want any, then the number he so wanted of his complement, and for what time he shall be entitled to receive from the said commissioners an allowance in respect of the subsistence and passage of each such man and boy (exceeding the number so wanting of his complement), according to such rate per day in that behalf authorized by the admiralty. And see 6 Geo. 4. c. 87. § 18.

7. *Of Forgeries, &c. under the Act.*

§ 83. If any person shall forge, or offer, utter, dispose of, or put off, knowing the same to be forged, any ticket, certificate, or document whatever authorized or required by the act, shall be guilty of felony, and be liable to be transported for life or for not less than seven years, or to be imprisoned not exceeding four years nor less than two years.

§ 84. If any person shall falsely and deceitfully personate any officer, or seaman, or commission or non-commissioned officer of marines or marine, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, &c. or other allowance for money due or payable to any such officer, &c. with intent to defraud any person whomsoever, shall be guilty of felony, and be liable to the like punishment. And see 5 Geo. 4. c. 107 § 5.

§ 85. If any person shall fraudulently and deceitfully take a false oath, in order to obtain probate of any will or letters of administration of the effects of any deceased officer, or seaman, or commission or non-commissioned officer of marines or marine; or shall fraudulently receive or demand any wages, &c. or any allowance of money whatever, payable or supposed to be payable in respect of the services of any such officer, &c. or from the compassionate fund of the navy, or any pension to the widow of an officer, by virtue of any probate of a will or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases to defraud any person whomsoever, every such offender shall be guilty of felony, and be liable to the same punishment.

§ 86. If any person shall subscribe any false petition or application to the treasurer of his majesty's navy, or to the paymaster of royal marines, representing herself or himself therein to be the widow, executor, nearest or one of the nearest of kindred of any deceased officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines or marine, or shall utter or

publish any such petition or publication, knowing the same to be false, in order to procure, or to enable any other person to procure, a certificate from the said inspector of seamen's wills or from the paymaster of royal marines as hereinbefore respectively provided, thereby to obtain, or to enable any other person to obtain, without probate or letters of administration, payment of any wages, &c. payable in respect of the services, &c. of any officer in the royal navy, or thereby to obtain, or to enable any other person to obtain, probate of the will or administration of the effects of any deceased petty officer, seaman, non-commissioned officer of marines or marine; or if any person shall receive or demand any wages, &c. thereof, or any other allowance due or payable in respect of the services of any commission or warrant officer of the navy, or commission officer of royal marines, or of any petty officer, seaman, non-commissioned officer of marines or marine, by virtue of any certificate of the inspector of seamen's wills or paymaster of royal marines respectively as aforesaid, knowing any such certificate to have been obtained by any false representation or pretence; every such offender shall be guilty of felony, and be liable to be transported beyond the seas for not exceeding fourteen and not less than seven years, or to be imprisoned for not exceeding three years nor less than one year.

§ 87. If any person shall forge, or shall utter, offer, or exhibit, knowing the same to be forged, any paper writing purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, baptism, or burial, in order to sustain any claim to any wages, prize money, or other moneys due or payable in respect of the services of any officer, seaman, or marine in his majesty's navy, or to sustain any claim to any half-pay payable to an officer of the royal navy or marines, or to any pension as the widow of an officer, or to any payment or allowance from the compassionate fund of the navy, or to any gratuity or bounty of his majesty given to the relatives of persons slain in fight with the enemy; or if any person shall make any false affidavit, or utter or exhibit any false affidavit, certificate, or other voucher or document, in order fraudulently to procure any person to be admitted a pensioner as the widow of an officer of the royal navy, or in order to sustain any claim to any wages, prize money, or other moneys, or to any half-pay or pension, or arrears thereof, or any allowance from the compassionate fund of the navy, or to any gratuity or bounty as aforesaid, with intent to defraud any person whomsoever; every person in any of the said cases offending shall be deemed guilty of felony, and be liable to be transported for not exceeding fourteen and not less than seven years, or to be imprisoned for not exceeding three years nor less than one year.

§ 88. In the case of every offence made felony by the act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree; and every accessory



after the fact to any such felony shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and that where any person shall be convicted of any offence punishable under the act for which imprisonment shall or may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also direct him to be kept in solitary confinement for the whole or any portion or portions of such imprisonment.

§ 89. If any petty officer or seaman, non-commissioned officer of marines or marine, shall obtain or attempt to obtain his pay, or any part thereof, upon or by means of any false or forged certificate purporting to be a certificate of service in or discharge from any of his majesty's ships, or from any hospital or sick quarters, every person so offending shall be deemed guilty of a misdemeanor, and be liable to such pains and penalties as persons convicted of wilful and corrupt perjury are by law liable to.

§ 90. If any person shall take a false oath or make false affirmation in any case wherein an oath or affirmation is authorized or required by the act to be taken or made, and for which no punishment is otherwise by the act provided, every such person, being thereof duly convicted, shall be liable to such pains and penalties as persons guilty of wilful and corrupt perjury are by law subject to.

#### 8. *The General Provisions of the Statute.*

§ 15. All tickets, certificates, pay lists, and other vouchers for wages to be made out as aforesaid, shall be in the forms theretofore established and in use in his majesty's naval service, or in such other forms as the lord high admiral, &c. shall from time to time authorize; and if any officer or other person shall make out, sign, or issue any ticket, &c. other than in the form and under the regulations therein prescribed, he shall forfeit 50*l.* and if belonging to his majesty's naval service shall moreover be liable to such punishment and forfeiture of wages as a court-martial shall adjudge.

§ 43. Any collector, clerk, &c. delaying payment or taking any fee, is liable to a penalty of 50*l.*

§ 62. If any officer, proctor, or other person shall take more than the sums allowed in the schedule, he shall forfeit 50*l.* with full costs of suit; or if any registrar, proctor, or other officer of any ecclesiastical court shall be aiding or assisting in procuring probate of any will or letters of administration, whereby any person may be enabled to claim any wages, pay, prize money, or allowance of money of any kind for the services of any such petty officer or seaman, non-commissioned officer of marines or marine, otherwise than in the manner prescribed by the act, he shall forfeit 500*l.* and shall moreover forfeit his office and be rendered incapable of acting in any capacity in any court of admiralty or ecclesiastical jurisdiction.

§ 66. recites that "by an act of the 54th year of the reign of his late majesty, for regu-

lating the payment of navy prize money, agents for prizes are prohibited from paying any prize money or bounty money to any person upon any order made within the distance of five miles of the place where the same shall be payable, (such prize money or bounty money being in course of distribution at the time of making such order,) under the penalty therein mentioned;" it is enacted, "that if any agent licensed by the treasurer of his majesty's navy, or if any other person, shall insert in any order for payment of prize money or bounty money payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines or marine, in his majesty's navy, the name of any captured ship, vessel, fortress, or place, the proceeds of which or the bounty money payable in respect whereof shall be then in course of distribution within six miles of the place where such name or names shall be inserted, and where such order shall be intended to be attested under the provisions of the said last-mentioned act, or shall utter any such order with the name or names of any such captured ship, &c. inserted therein, for the purpose of demanding or receiving payment of any prize money or bounty money for or in respect of such captured ship, &c. such prize money or bounty money being then in course of distribution or payment within six miles of the place where such order shall have been made or drawn and attested, every such person so offending shall forfeit 50*l.*

§ 72. Wages, pay, prize money, &c. not claimed within six years, are declared forfeited; but the admiralty may authorize payment notwithstanding.

§ 73. Letters to and from the treasurer to go free.

As also (§ 74) letters to and from certain other officers to go free.

And by § 75. letters relating to the business of the commissioners of the navy or the victualling department to go free: persons sending letters other than those permitted shall forfeit 100*l.*

§ 78. exempts from stamps all bills and documents made out under the act.

By § 81. the act is to extend to the royal marines.

§ 92. Treasurer and commissioners of the navy may act as justices.

In pursuance of the same plan, for the comfort and relief of the defenders of their country, it had been provided by several previous acts, the last 46 *Geo. 3. c. 92.* that letters to and from non-commissioned officers, seamen, and privates, in any departments of the army, navy, or militia, shall be subject only to one penny postage.

See also 47 *Geo. 3. st. 1. c. 52*; 51 *Geo. 3. c. 105.* for establishing and supporting the Royal Naval Asylum for the education of orphans of officers and men of the navy and marines.

By the 6 *Geo. 4. c. 26.* the Royal Naval Asylum was consolidated with Greenwich Hospital, and the governors of the latter are empowered to make rules for its superintendence.

Acts are usually passed during war, for regulating the payment of prize money. See 54 *Geo.* 3. c. 93; 55 *Geo.* 3. c. 160; 59 *Geo.* 3. c. 56; and 1 *Geo.* 4. c. 85. *ad ante*, 8.

The pay and wages of one man in a hundred, of every ship of war, and value of his victuals, shall be applied for relieving poor widows of officers of the navy, 6 *Geo.* 2. c. 25.

By the 3 & 4 *Wm.* 4. c. 53. justices might have sentenced persons convicted of smuggling to serve on board the royal navy for five years, but this was repealed by the 4 & 5 *Wm.* 4. c. 13.

III. THE treasurer, comptroller, surveyor, and clerk of the acts, and commissioners of the navy, &c. have power to examine and punish all persons who make any disturbance, fighting or quarrelling in the yards, and offices, &c. of the navy, and on pay days, by fine and imprisonment, and to bind the offenders to good behaviour, and to answer at the assizes of sessions.

The method of ordering seamen in the royal fleet, and keeping up discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the Restoration, but since new modelled and altered. In the thirteenth year of King Charles II. an act passed for the regulating the government of the fleet, 13 *Car.* 2. st. 1. c. 9. which was repealed by 22 *Geo.* 2. c. 23. explained and amended by 19 *Geo.* 3. c. 17. These two latter statutes contain not only the thirty-six articles of war, in which almost every possible offence is explicitly set down, and the punishment thereof annexed or left to the discretion of a court martial; but also sundry clauses of express rules and orders for assembling and holding courts for the trial of any of the offences specified therein.

By the 39 & 40 *Geo.* 3. c. 100. whereby his majesty was authorized to grant commissions for natives of Holland to serve on board certain Dutch ships of war which had surrendered, the articles of war were directed to be translated into Dutch, and the crews of the ships were made subject thereto.

The following are the ARTICLES of WAR above alluded to.

1. Officers are to cause public worship, according to the liturgy of the church of England, to be solemnly performed in their ships, and take care that prayers and preaching by the chaplains be performed diligently, and that the Lord's Day be observed.

2. Persons guilty of profane oaths, cursing, drunkenness, uncleanness, &c. to be punished as a court martial shall think fit.

3. If any person shall give or hold intelligence to or with an enemy without leave, he shall suffer death.

4. If any letter or message from an enemy be conveyed to any in the fleet, and he shall not in twelve hours acquaint his superior officer with it, or if the superior officer, being acquainted therewith, shall not reveal it to the commander-in-chief, the offender shall suffer

death; or such punishment as a court martial shall impose.

5. Spies and persons endeavouring to corrupt any one in the fleet, shall suffer death, or such punishment as a court martial shall impose.

6. No person shall relieve an enemy with money, victuals, or ammunition, on like penalty.

7. All papers taken on board a prize shall be sent to the Court of Admiralty, &c. on penalty of forfeiting the share of the prize, and such punishment as a court martial shall impose.

8. No person shall take out of any prize any money or goods, unless for better securing the same, or for the necessary use of any of his majesty's ships, before the prize shall be condemned; upon penalty of forfeiting his share and such punishment as shall be imposed by a court martial.

9. No person on board a prize shall be stripped of his clothes, pillaged, beaten, or ill-treated, upon pain of such punishment as a court martial shall impose.

10. Every commander who, upon signal or order of fight, or sight of any ship which it may be his duty to engage, or who, upon likelihood of engagement, shall not make necessary preparations for fight, and encourage the inferior officers and men to fight, shall suffer death; or such punishment as a court martial shall deem him to deserve. And if any person shall treacherously or cowardly yield or cry for quarter, he shall suffer death.

11. Every person who shall not obey the orders of his superior officer, in time of action, to the best of his power, shall suffer death; or such punishment as a court martial shall deem him to deserve.

12. Every person who, in time of action, shall withdraw or keep back, or not come into the fight, or do his utmost to take or destroy any ship which it shall be his duty to engage, and to assist every ship of his majesty or his allies, which it shall be his duty to assist, shall suffer death or other punishment. See *post*, and 19 *Geo.* 3. c. 17. § 3.

13. Every person who, through cowardice, &c. shall forbear to pursue the chase of any enemy, &c. or shall not assist or relieve a known friend in view, to the utmost of his power, shall suffer death, or other punishment. See *post*.

14. If any person shall delay or discourage any action or service commanded, upon pretence of arrears of wages, or otherwise, he shall suffer death; or such punishment as a court martial shall deem him to deserve.

15. Every person who shall desert to the enemy, or run away with any ship, ordnance, &c. to the weakening of the service, or yield up the same cowardly or treacherously to the enemy, shall suffer death.

16. Every person who shall desert, or entice others so to do, shall suffer death; or such punishment as a court martial shall think fit. If any commanding officer shall receive a deserter, after discovering him to be such, and shall not with speed give notice to the captain of

the ship to which he belongs, or, if the ship is at a considerable distance, to the secretary of the admiralty, or commander-in-chief, he shall be cashiered. [See also 44 *Geo. 3. c. 13.* by which petty officers or seamen, taken out of the navy for any civil or criminal matter, shall be kept in custody till discharged from such suit, and shall then be conveyed and delivered to some officer of the navy to continue their service therein. This act was passed to prevent desertion, under colour of false actions or prosecutions.

17. Officers and seamen of ships appointed for convoy of merchant ships, or of any other, shall diligently attend upon that charge according to their instructions; and whosoever shall not faithfully perform their duty, and defend their ships in their convoy, or refuse to fight in their defence, or run away cowardly and submit the ships in their convoy to hazard, or exact any reward for conveying any ship, or misuse the master or mariners, shall make reparation of damages, as the Court of Admiralty shall adjudge; and be punished criminally by death, or other punishment, as shall be adjudged by a court martial. See *Insurance*.

18. If any officer shall receive or permit to be received on board any goods or merchandise, other than for the sole use of the ship, except gold, silver, or jewels, and except goods belonging to any ship which may be shipwrecked, or in danger thereof, in order to the preserving them for the owners, and except goods ordered to be received by the lord high admiral, &c. he shall be cashiered, and rendered incapable of further service.

19. Any person making or endeavouring to make any mutinous assembly shall suffer death. Any person uttering words of sedition or mutiny shall suffer death; or such punishment as a court martial shall deem him to deserve. If any officer, mariner, or soldier, in or belonging to the fleet, shall behave himself with contempt to his superior officer, being in the execution of his office, he shall be punished according to the nature of his offence, by the judgment of a court martial.

20. Any person concealing any traitorous or mutinous practice or design, shall suffer death; or such punishment as a court martial shall think fit. Any person concealing any traitorous or mutinous words, or any words, practice, or design, tending to the hinderance of the service, and not forthwith revealing the same to the commanding officer; or, being present at any mutiny or sedition, shall not use his utmost endeavours to suppress the same, shall be punished as a court martial shall think he deserves. [See the 37 *Geo. 3. c. 71.* for restraining intercourse with the crews of certain ships in a state of mutiny and rebellion; and for the suppression of such mutiny and rebellion; and 37 *Geo. 3. c. 70.* making it felony without clergy to attempt to seduce seamen (or soldiers) from their duty. This last act, and the Irish act, 37 *Geo. 3. c. 40.* for the same purpose are made perpetual by 57 *Geo. 3. c. 7.*]

21. Any person finding cause of complaint

of the unwholesomeness of victuals, or upon other just ground, he shall quietly make the same known to his superior, who, as far as he is able, shall cause the same to be presently remedied; and no person upon any such or other pretence shall attempt to stir up any disturbance, upon pain of such punishment as a court martial shall think fit to inflict.

22. Any person striking any his superior officer, or drawing or offering to draw or lift up any weapon against him, being in the execution of his office, shall suffer death. And any person presuming to quarrel with any his superior officer, being in the execution of his office, or disobeying any lawful command of any his superior officer, shall suffer death, or such other punishment as shall be inflicted upon him by a court martial.

23. Any person quarreling or fighting with any other person in the fleet, or using reproachful or provoking speeches or gestures, shall suffer punishment as a court martial shall impose.

24. There shall be no wasteful expense or embezzlement of any powder, shot, &c. upon penalty of such punishment as by a court martial shall be found just.

25. Every person burning or setting fire to any magazine, or store of powder, ship, &c. or furniture thereunto belonging, not then appertaining to an enemy, shall suffer death.

26. Care is to be taken that through wilfulness or negligence no ship be stranded, run upon rocks or sands, or split or hazarded; upon pain of death, or such punishment as a court martial shall deem the offence to deserve.

27. No person shall sleep upon his watch, or negligently perform his duty, or forsake his station, upon pain of death, or such punishment as, &c.

28. Murder; And,

29. Buggery or sodomy, shall be punished with death.

30. Robbery shall be punished with death, or otherwise as a court shall find meet.

31. Every person knowingly making or signing, or commanding, counselling, or procuring the making or signing, any false muster, shall be cashiered and rendered incapable of further employment.

32. Provost marshal refusing to apprehend or receive any criminal, or suffering him to escape, shall suffer such punishment as a court martial shall deem him to deserve. And all others shall do their endeavours to detect and apprehend all offenders, upon pain of being punished by a court martial.

33. If any flag-officer, captain, commander, or lieutenant, shall behave in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming his character, he shall be dismissed.

34. Every person in actual service and full pay, guilty of mutiny, desertion, or disobedience, in any part of his majesty's dominions on shore, when in actual service relative to the fleet, shall be liable to be tried by a court martial, and suffer the like punishment as if the offence had been committed at sea.



35. Every person in actual service and full pay, committing upon shore, in any place out of his majesty's dominions, any crime punishable by these articles, shall be liable to be tried and punished as if the crime had been committed at sea.

36. All other crimes not capital, not mentioned in this act, shall be punished according to the laws and customs used at sea. No person to be imprisoned for longer than two years. Court martial not to try any offence (except under the fifth, thirty-fourth, and thirty-fifth articles) not committed upon the main sea, or in great rivers beneath the bridges, or in any haven, &c. within the jurisdiction of the admiralty, or by persons in actual service and full pay, except such persons as mentioned in fifth article; nor to try a land officer or soldier on board of a transport-ship. The lord high admiral, &c. may grant commissions to any officer commanding in chief any fleet, &c. to call courts martial, consisting of commanders and captains. And if the commander-in-chief shall die or be removed, the officer next in command may call courts martial. No commander-in-chief of a fleet, &c. of more than five ships, shall preside at any court martial in foreign parts, but the officer next in command shall preside. If a commander-in-chief shall detach any part of his fleet, &c. he may empower the chief commander of the detachment to hold courts martial during the separate service. If five or more ships shall meet in foreign parts, the senior officer may hold courts martial and preside thereat. Where it is improper for the officer next to the commander-in-chief to hold or preside at a court martial, the third officer in command may be empowered to preside at, or hold, the same. No court martial shall consist of more than thirteen, nor less than five persons. Where there shall not be less than three, and yet not so many as five of the degree of a post-captain or superior rank, the officer who is to preside must call to his assistance as many commanders under the degree of a post-captain, as together with the post-captains shall make up the number five, to hold the court martial.

Proceedings shall not be delayed, if a sufficient number remain to compose the court, which shall sit from day to day (except Sunday) till sentence be given.

The judge advocate, and all officers constituting a court martial, and all witnesses, shall be upon oath. Persons refusing to give evidence may be imprisoned. Sentence of death within the narrow seas (except in case of mutiny) shall not be put in execution till a report be made to the lord high admiral, &c. Sentence of death beyond the narrow seas, shall not be put in execution but by order of the commander-in-chief of the fleet, &c. Sentence of death in any squadron detached from the fleet, shall not be put in execution (except in case of mutiny) but by order of the commander of the fleet, or lord high admiral, &c. And sentence of death passed in a court martial, held by the senior officer of five or more ships met in foreign parts, except in case of mutiny,) shall not be put in execution but by order of the

lord high admiral, &c.

The powers given by the said articles shall remain in force with respect to crews of ships wrecked, lost, or destroyed, until they be discharged or removed into another ship, or a court martial shall be held to inquire of the causes of the loss of the ship. And if upon inquiry it shall appear that all or any of the officers and seamen did their utmost to save the ship, and behaved obediently to their superior officers, their pay shall go on; as also shall the pay of officers and seamen taken by the enemy, having done their best to defend the ship, and behaved obediently. If any officer shall receive any goods on board, contrary to the eighteenth article, he shall further forfeit the value of such goods, or 500*l.* at the election of the informer; half to the informer, and half to Greenwich Hospital. See *Seamen, Ships*.

By 31 *Geo. 2. c. 10. s. 33.* a competent number of printed copies of the above articles of war are to be delivered to the captain or commander of every ship or vessel; who is to cause them to be hung up and affixed to the most public places of the ship, and to have them constantly kept up and renewed, so that they may be at all times accessible to the inferior officers and seamen on board; and likewise to observe that such abstract be audibly and distinctly read over, once in every month, in the presence of the officers and seamen, immediately after the articles of war are read. And by 32 *Geo. c. 67.* abstracts of the several acts relating to the pay, &c. of the seamen are to be hung up on board all ships, &c. in like manner as the articles of war.

The offences comprehended and specified in the above articles of war may be classed under four general heads:—1. Those immediately against God and religion, contained in the first and second articles, *viz.* neglecting public worship, and being guilty of swearing, drunkenness, &c., the punishment of which is left to the discretion of the courts martial.—2. Such as affect the executive power of the state, or concern the criminal neglect of the established rules of discipline; these offences are specified in articles 3, 4, 5, 15, 16, 19, 20, 22, 24, 25, 27, and 31, *viz.* holding intelligence with an enemy or rebel; concealing letters or messages from, or relieving them; deserting to an enemy; running away with ships, stores, &c. or yielding the same to an enemy; desertion from the service, or entertaining deserters; waste or embezzlements of stores; mutinous assemblies; seditious or mutinous words; concealing any traitorous or mutinous designs, &c. striking, quarreling or disobeying the orders of a superior officer; sleeping upon the watch; neglecting duty or forsaking a station allotted; and knowingly signing false muster-books.—3. Such as violate or transgress the rights and duties which are owing to individuals or fellow-subjects: under which may be classed murder, robbery, &c. See articles 28, 29, 30. 4.—Offences in themselves strictly military, and such as are peculiarly the object of martial law. These are

recited in articles 10, 11, 12, 13, 14, and 17. The 12th and 13th articles as they formerly stood, by restraining the power of a court martial to the positive inflicting the punishment of death in the cases therein mentioned of cowardice, negligence, or disaffection in time of action, &c. were deemed too severe, and attended with peculiar inconveniences; one instance of which was the case of the unfortunate Admiral Byng. These articles were therefore explained and amended by § 3. of 19 Geo. 3. c. 17. whereby it is now lawful for a court martial to pronounce sentence of death, "or to inflict such other punishment as the nature and degree of the offence therein recited shall be found to deserve." See *M'Arthur on Naval Courts Martial*.

It is already mentioned under *Courts Martial*, that desertion from the king's armies in time of war is made felony by 18 Hen. 6. c. 19. It may here be added that by 5 Eliz. c. 5. § 27. this penalty extended to mariners and gunners serving in the navy.

The ground of the jurisdiction of naval courts martial depends on nearly the same reasoning as relates to those of the army; as to which see *Courts Martial*. The theory and general principles of courts of inquiry and courts martial in both services also rest upon the same basis. Some observations, however, more peculiarly applicable to the latter, are here introduced, chiefly from *M'Arthur on Naval Courts Martial*, and the authorities referred to by him.

It is to be observed, that though in this as in the ordinary course of the criminal judicature of the kingdom, the king has the prerogative of pardoning or remitting punishment; yet he can no more alter the sentence of a court martial than he can a judgment of any other court. At the same time it is unquestionable that the royal prerogative may be exercised on all occasions in dismissing officers from the service, even though acquitted by a court martial.

Among many reasons urged against naval courts martial, the most cogent and constitutional, at the first glance, is that of the inferior officers and seamen not being tried by their peers; for by the statute, no courts martial shall consist of more than thirteen or less than five persons, to be composed of such flag-officers, captains, or commanders, then present, as are next in seniority to the officer who presides at the court martial. This objection, however, is (we may say completely) obviated by the necessity of subordination, which could not be preserved by admitting those as jurymen, who certainly would have too great a fellow-feeling in the fate of the culprit; besides that, it would open a dangerous door to confederacies that might destroy the whole discipline of the navy.

To institute one inferior or divisional court martial, subject to appeal in the navy, analogous to the regimental courts in the army, would not be adequate to remedy some other evils complained of; for according to the ancient practice of the sea, and as established by the

fourth article of the general printed instructions, a captain or commander of any of his majesty's ships or vessels has the power of inflicting punishment upon a seaman in a summary manner, for any faults or offences committed contrary to the rules of discipline and obedience established in the navy; such punishment not to exceed twelve lashes for any one fault.

All courts martial are to be held, and offences tried, in the forenoon, and in the most public part of the ship, where all who will may be present; and the captains of all his majesty's ships in company who take post, have a right to assist thereat. *Instr. art. 4.*

Under the 22 Geo. 2. c. 33. no member of any court martial, after the trial commenced, could go on shore, or leave the ship in which the court martial should first assemble, until sentence was given; but it having been found that this restraint and confinement might, in many cases, be attended with great inconvenience, and even prejudice to the health of the members, this clause was repealed by § 1, 2, of 19 Geo. 3. c. 17, under which all the members are now at liberty to retire upon every adjournment.

The jurisdiction of naval courts martial extends to the trial of all offences specified in the articles of war, which may be committed upon the main sea, or on great rivers only, beneath the bridges of the said rivers nigh to the sea, or in any haven, river, or creek within the jurisdiction of the admiralty; and which shall be committed by persons then in actual service and full pay in the fleet or ships of war of his majesty. 22 Geo. 2. c. 33. § 4. Likewise to the trial of all spies, and all persons whatsoever who shall come and be found in the nature of spies, as specified in the fifth of the above articles of war; as well as to the trial of every person who shall be guilty of mutiny, desertion, or disobedience to any lawful command, any part of his majesty's dominions on shore, when in actual service, relative to the fleet; and for crimes committed on shore by such persons, in any places out of his majesty's dominions as are more fully specified in the thirty-fourth and thirty-fifth of the said articles.

Murders are cognizable by courts martial only in cases where the stroke or poison is given on board ship, and the person dies in consequence thereof on board; but in order to prevent any failure of justice, it is enacted by the 9 Geo. 4. c. 31. by which the former act (2 Geo. 2. c. 24) is repealed, that if any person be stricken or poisoned at sea or abroad, and die in England, or being stricken or poisoned in England, die at sea or abroad, the murderer and accessories are to be given up to the civil powers, and may be indicted and tried in the county where the stroke, poison, or death happened. See *Homicide*, III. 3.

Naval courts martial can likewise take cognizance of crimes committed by warrant officers or men belonging to ships in ordinary; that is, stationed for particular purposes in the

several dock-yards of the kingdom, and not in active public service. But they cannot take cognizance of offences committed by masters, mates, or seamen belonging to navy transports, as they are persons not subject to naval discipline. They are entitled to be discharged in time of war or peace, on their own application. The articles of war are never stuck up or read on board these navy transports; though the officers and men receive their wages quarterly at the dock-yards, in the same manner as the officers and men of his majesty's ships in ordinary.

By § 23 of the said 22 Geo. 2. c. 33. it is enacted, that no person, not flying from justice, shall be tried or punished by a court martial for any offence, unless the complaint of such offence be made in writing, or (and?) unless a court martial to try such offender shall be ordered within three years after the offence shall be committed; or within one year after the return of the ship into any of the ports of Great Britain or Ireland.

Pardons, when extended to a criminal tried by a naval court martial, are sent to the lords commissions of the admiralty, who immediately transmit (as secret) their order of reprieve or pardon to the commander-in-chief or senior officer of the place for the time being, where the execution would take place; signed by the lords under the admiralty seal, signifying his majesty's royal clemency, and directing the commander-in-chief to keep the whole of the order extremely secret, until the offender is, on the day appointed for execution, brought out upon deck, and every thing prepared for his execution, agreeable to the custom of the navy; and then only to make known to him his majesty's pleasure, and to release him from his confinement. *M'Arthur*.

As to conditional pardons to persons under sentence of naval courts martials, by which the transportation of such offenders is authorized, see 24 Geo. 3. st. 2. c. 56; 37 Geo. 3. c. 140, 55 Geo. 3. c. 156; and 56 Geo. 3. c. 5.

Some doubts having been entertained in the time of William III. whether the commissioners of the admiralty had the same power to issue commissions to a court martial to try a prisoner, as the lord high admiral was allowed to have; this and all the other powers of a lord high admiral were vested in such commissioners, by 2 W. & M. st. 2. c. 2. See *Admiral*.

It is hinted under title *Courts Martial*, (ante, vol. i.) that members of courts martial are liable to answer, in damage, to the party injured, for the consequences of any unjust sentence. A remarkable instance of this occurred in the case of Lieutenant Frye, of the marines, who, in the year 1743, was sentenced to fifteen years' imprisonment by a court martial. He brought an action against the president Sir Chaloner Ogle, and recovered 1000*l.* damages; and the judge informing him that he was at liberty to bring his action against any of the members, he proceeded against Rear-Admiral Mayne, and Captain Rentone, who were arrested by a *capias*

from the Court of Common Pleas, at the breaking up of the court martial on Admiral Lescock, where the former<sup>d</sup> presided, and the latter sat as member. This was much resented by that court martial, who passed some resolutions on the subject, reflecting in intemperate language on the chief justice of the court, (Sir John Willea,) and these were laid by the lords of the admiralty before the king: upon this the chief justice caused every member of the court to be taken into custody; and was proceeding in legal measures to assert and maintain the authority of his office, when a stop was put to the process by a public written submission, signed by all the members of the court, transmitted to the lord chief justice, received and read in the Court of Common Pleas, registered in the Remembrancer's office, and inserted in the Gazette of November 15, 1746. "A memorial (as the chief justice observed) to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." See the case stated in *M'Arthur on Courts Martial*, vol. i. appendix xiii.; see further, *Ships*.

NAVY BILLS. As to counterfeiting, forging, or stealing them, see *Forgery*, *Larceny*.

NE ADMITTAS. A writ directed to the bishop for the plaintiff or defendant, where a *quare impedit* or assize of *darrein presentment* is depending, when either party fears that the bishop will admit the other's clerk during the suit between them; it ought to be brought within six calendar months after the avoidance, before the bishop may present by lapse; for it is in vain to sue out this writ when the title to present is devolved unto the bishop. *Reg. Orig.* 31; *F. N. B.* 37. Assizes of *darrien presentment* are however now abolished by the 3 & 4 Wm. 4. c. 27.

Writ of *ne admittas* doth not lie, if the plea be not depending in the king's court by *quare impedit*, or *darrien presentment*; therefore there is a writ in the register directed to the chief justice of C. B. to certify the king in the chancery, if there be any plea before him and the other judges between the parties, &c. So that the writ should not be granted until that be done; but yet it may be had out of the chancery before the king is certified that such plea of *quare impedit* is depending: and then the party grieved may require the chief justice to certify, &c. *New Nat. Br.* 83, 84. The writ runs, *Prohibemus vobis, ne admittas, &c.*

Immediately on the suing out of a *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk pending the suit he (or the defendant *vice versa*) may have this prohibitory writ of *ne admittas*, which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been



found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias*. 2. *Sid.* 94. And he shall have a special action against the bishop, called a *quare incumbravit*, to recover the presentation; and also satisfaction in damages for the injury done him by incumbering the church with a clerk pending the suit, and after the *ne admittas* received. *F. N. B.* 48. But if the bishop has incumbered the church by instituting the clerk, no *quare incumbravit* lies; for the bishop hath no legal notice till the writ of *ne admittas* is served upon him. The patron is therefore left to his *quare impedit* merely, which, since the stat *Westm.* 2. lies as well upon a recent usurpation within six months past, as upon a disturbance without usurpation had. See 3 *Comm.* c. 16. p. 248, 9.

NEAT, or NET. Is the weight of a pure commodity alone, without the cask, bag, dross, &c. *Merch. Dict.*

NECESSARY INTROMISSION. Is when a husband or wife continues in possession of the other's goods, after their decease, for preservation. *Scotch Dict.*

NECESSITY. The law charges no man with default where the act is compulsory, and not voluntary, and where there is not a consent and election; therefore if there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as, in presumption of law, he cannot overcome, such necessity carries a privilege in itself. See *Bac. Elem.* 25—29.

Compulsion and inevitable necessity are considered, by *Blackstone*, among those causes from whence arises a defect of will, and under which, therefore, an action is not to be considered as criminal which would otherwise be so.

These he states to be a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Of this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest; as when a legislature establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientia*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, is a question not determinable by municipal law, though among the casuists it will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff who

burnt Latimer and Ridley, in the days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an offence; being justified by the commands of the then existing magistracy.

As to persons in private relations, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband; for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment even for capital offences; as to which see title *Baron and Feme*, VII.

Another species of compulsion or necessity, is what our law calls *duress per minas*; as to which see *Duress*.

There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear, being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to an action, which, without such obligation, would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive than active, or if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority; it is here justifiable, and even necessary, to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue; for the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public, and therefore excuse the felony which the killing would otherwise amount to. 1 *Hal. P. C.* 53; see 4 *Comm.* 27—31.

As to homicide justifiable by necessity, see *Homicide*, I.

In an action founded in tort against a master of a ship for throwing goods overboard, it is a good defence for him to prove that they were cast into the sea from necessity, to prevent the vessel from sinking. 2 *Bulstr.* 280.

The evidence of persons interested is admitted from necessity, in cases where, from the nature of the subject of inquiry, it is exceedingly improbable that individuals not interested should possess any knowledge of the facts. Thus it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master. 4 *T. R.* 590. So it has been held, that an apprentice is a competent witness, to prove money has been overpaid by mistake. *Str.* 647. So in an action against

a carrier for not delivering a parcel, its delivery may be proved by his servant. *Ross v. Rowe*, *Ford's MSS.* 98. See further, 1 *Stark on Ev.* 120.

A wife is also sometimes admitted *ex necessitate* as a witness against her husband, as on a charge against him of violence committed on her person. 1 *St. Tr.* 397; 1 *Str.* 633; 1 *T. R.* 698. See *Baron and Feme*, 1, 2.

A right of way by necessity may likewise be pleaded to an action of trespass. See *Ways*.

**NE DISTURBA PAS.** The general issue in *Quare Impedit*. *Hob.* 162; *Bac. Abr. Simony* (1). But there is a dictum of *Ashhurst, J.* that there is no general issue in that action. 3 *T. R.* 158.

It simply denies that the defendant obstructed the presentation, and is adapted to no other ground of defence. Consequently it is never pleaded, unless in cases where there has been actually no refusal to institute and induct the plaintiff's clerk. It amounts to a confession of the right of patronage; and, therefore, upon its being pleaded, the plaintiff may immediately pray judgment and a writ to the ordinary. Or if he pleases, he may proceed in the action to maintain the disturbance, and recover damages. 1 *Arch.* 441; *Hob.* 162; *Bac. Abr. Simony* (1). See further *Quare Impedit*.

**NE DONA PAS, or NON DEDIT.** Was the general issue in a *formedon*. See 10 *Wentw.* 182. It merely denied the gift in tail to have been made in manner and form as alleged; and was therefore the proper plea, if the tenant meant to dispute the fact of the gift, but did not apply to any other case. See 5 *East*, 289.

**NEEDLE WORK.** May be exported duty free. 11 & 12 *W. 3. c. 3. § 15.*

**NE EXEAT REGNO;** (or as it is sometimes, ungrammatically as it seems, termed *ne exeat regnum*.) A writ (issuing out of chancery) to restrain a person from going out of the kingdom without the king's licence. *F. N. B.* 85. It may be directed to the sheriff to make the party find surety that he will not depart the realm; and on his refusal, to commit him to prison: or it may be directed to the party himself; and if he then goes, he may be fined. 2 *Inst.* 178.

The use and object of this writ is, in fact, at present, exactly the same as an arrest at law in the commencement of an action, *viz.* to prevent the party from withdrawing his person and property beyond the jurisdiction of the court, before a judgment could be obtained and carried into execution: so where there is a suit in equity for a demand, for which the defendant cannot be arrested in an action at law, upon an affidavit made that there is reason to apprehend that he will leave the kingdom before the conclusion of the suit, the chancellor by this writ will stop him, and will commit him to prison, unless he produces sufficient sureties that he will abide the event of the suit. 1 *Comm. c. 7. p. 266. n.* And see 2 *Com. Dig.*; *F. N. B.* 85, &c.; 2 *C. C.* 245; *La.* 29; 7 *Mod.* 9; *Pre.*

*Ch.* 171; 1 *P. Wms.* 263, and *Mr. Cox's* note there; 15 *Vin.* 537, 9.

The affidavit of a threat or intention to go abroad must be positive, not upon information and belief. 8 *Ves.* 597; 16 *Ves.* 470. But the court acts on evidence of design to go without regard to denial. 3 *Swanst.* 375. And notice of motion for the writ need not be given, for that might defeat its object. 18 *Ves.* 355. A bill must however be first filed. 6 *Ves.* 92; and 3 *P. W.* 312, *post.*

The demand for which a *ne exeat* may be issued must in general be equitable, and not legal, except in the case of an account. 1 *Bail & B.* 327. It must be completely due, and be such a debt, that the sum to be marked on the writ may be ascertained. 3 *Swanst.* 377; 1 *Turn. & Russ.* 343. This writ may be obtained by a British subject against a foreigner who happens to be in this country, to enforce the adjustment of an account upon a foreign transaction, although according to the law of that country, the foreigner could not there have been held to bail. 1 *Jac. & W.* 405. And see 1 *B. & Ad.* 284.

This writ of *ne exeat* is also used where a party has been decreed by the ecclesiastical courts to pay alimony and costs, and is about to withdraw himself from the court's jurisdiction. A bill is filed in these cases founded on the affidavit, and prays for the suit; the granting it is matter of discretion, and as it is a severe process, and such use of it is a departure from its original purpose, the discretion is exercised with great caution. See 1 *Ves. jun.* 94; 7 *Ves.* 171; 1 *Turn. and Russ.* 322.

A *ne exeat regno* has been granted to stay a defendant from going to Scotland: for though it is not out of the kingdom, yet it is out of the process of the court, and within the same mischief. *Salk.* 702; 3 *Mod.* 127, 169; 4 *Mod.* 179. If the writ be sued for the king, the party against whom sued may plead licence by letters-patent, &c. which shall discharge him; but where any subject goes beyond sea with the king's licence, and continues longer than his appointed time, it hath been held he loses the benefit of a subject. 4 *Leon.* 29. And if a person beyond sea refuses to return to England on the king's letters under his privy seal, commanding him upon his allegiance to return; being certified into the chancery, a commission may be awarded to seize his lands and goods for the contempt; and so it is if such person's servants hinder a messenger from delivering his message, on affidavit of it, &c. *Jenk. Cent.* 246; 3 *Nels. Abr.* 211. See *King, V. 3.*

The right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, (or of recalling them when beyond sea,) is classed by *Blackstone* among his prerogatives as *Generalissimo* of the realm. By the common law every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home; (which

liberty was expressly declared in king John's great charter, though left out in that of Henry III.; but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm without licence; and if he do the contrary, he shall be punished for disobeying the king's command. *F. N. B.* 85. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained; among which were reckoned all peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined, by the fourth chapter of the constitution of Clarendon, on account of their attachment in the times of popery to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of Britton, who wrote in the reign of Edw. I. And Sir E. Coke gives us many instances to this effect in the time of Edw. III. Britton, c. 133; 3 *Inst.* 175. In the succeeding reign the affair of travelling wore a very different aspect: an act of parliament being made (5 *Ric.* 2 c. 2.), forbidding all persons whatever to go abroad without licence; except only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by 4 *Jac.* 1. c. 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regno* under his great seal or privy seal, thinks proper to prohibit him from so doing, and the subject disobeys, it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment. 1 *Hawk.* P. C. 22; 1 *Comm.* c. 7.

It is said, in Lord Bacon's Ordinances, No. 89, that, "towards the latter end of the reign of king James I. this writ was first thought proper to be granted, not only in respect of attempts prejudicial to the king and state; (in which case the lord chancellor granted it on application from any of the principal secretaries, without showing cause, or upon such information as his lordship should think of weight;) but also in the case of interlopers in trade; great bankrupts in whose estates many subjects might be interested; in duels and other cases that did concern multitudes of the king's subjects."

But in the year 1734, Lord Chancellor Talbot declared, that in his experience he never knew this writ of *ne exeat regno* granted or taken out without a bill first filed. It is true, it was originally a state-writ, but for some time, though not very long, it has been made use of in aid of the subjects for the helping of them to justice: but it ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have

double bail both in law and equity. 3 *P. Wms.* 312.

**NEGATIVE.** Is a proposition by which something is denied; also a particle of denial; as, not. An affirmative includes a negative; for where any thing is limited to be done in one form, this includes a negative on the contrary. *Plowd.* 206. b. 207. a; 2 *P. Wms.* 19. But, *è contrà*, a negative or prohibition does not necessarily imply an affirmation. 2 *P. Wms.* 9.

A negative cannot be proved or testified by witnesses, only an affirmative. 2 *Inst.* 662. Though a negative is incapable of being proved directly, yet indirectly it is otherwise; for in case one accuses B. to have been at York, and there to have committed a certain fact, in proof of which he produces several witnesses; here B. cannot prove that he was not at York against positive evidence that he was: but shall be allowed to make out the negative by collateral testimony, that at that very time he was at Exeter, &c. in such a house and in such company. *Fortescue*, 37.

Negative may be implied by an affirmative, but not necessarily *è contrà*. As the saying, that a papist, unless he conforms, shall not take by devise, does not necessarily imply, that if he does conform he shall take by devise, &c. 2 *P. Wms.* 9.

**NEGATIVE PREGNANT,** *negativa pregnans.* Is a negative, implying also an affirmative; as if a man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo et forma declarata*, which implieth, nevertheless, that in some sort he did it; or if a man be said to have alienated land in fee, and he saith he hath not aliened in fee, that is a negative pregnant; for though he hath not aliened in fee, yet it may be, he hath made an estate in tail. *Terms of the Law*.

A negative pregnant is a fault in pleading, to which there must be a special demurrer, for the court will intend every pleading to be good, till the contrary doth appear. See 2 *Leon.* 248; *Bro. Issue join.* pi. 81; *Heath's Max.* 53; 2 *Leo.* 199; *Cro. Jac.* 559, 560.

A negative pregnant is such a form of negative expression, as may imply or carry within it an affirmative. This is considered as a fault in pleading; and the reason why it is so considered is, that the meaning of such a form of expression is ambiguous. In trespass, for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him licence to do so, and that he entered by that licence. The plaintiff replied, that he did not enter by her licence. This was considered as a negative pregnant; and it was held that the plaintiff should have traversed the entry by itself, or the licence by itself, and not both together. *Cro. Jac.* 87. It will be observed that this form of traverse may imply, or carry within it, that a licence was given, though the defendant did not enter by that licence. It is, therefore, in the language of pleading, said to be pregnant with that admission,—viz., that a li-



cence was given. *Bac. Abr. Pleas, &c.* At the same time the licence is not expressly admitted; and the effect therefore is, to leave it in doubt, whether the plaintiff means to deny the licence, or to deny that the defendant entered by virtue of that licence. It is this ambiguity which appears to constitute the fault. 28 *Hen. 6*, 7; *Hob. 295*; *Styles' Prac. Reg. tit. Negative Pregnant*.

This rule, however, against a negative pregnant, appears in modern times at least to have received no very strict construction. For many cases have occurred, in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection. See several instances in *Com. Dig. Pleader*, (R. 6.) Thus in debt on a bond, conditioned to perform the covenants in an indenture of lease, one of which covenants was, that the defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him; the defendant pleaded, that he did not deliver the possession to any but such as lawfully evicted him. On demurrer to this plea, it was objected that the same was ill, and a negative pregnant; and that he ought to have said, that such an one lawfully evicted him to whom he delivered the possession; or that he did not deliver the possession to any: but the court held the plea as pursuing the words of the covenant good, being in the negative,—and that the plaintiff ought to have replied, and assigned a breach, and therefore judgment was given against him. 1 *Lev. 83*. *Stephen on Pleading*, 426: 1st ed. See further, 15 *Vin. Abr.* title *Negative pregnant*; and title *Pleading*.

**NEGGILDARE.** To claim kindred. *Leg. H. 1. c. 70*; *LL. Inæ*, §§ 7, 8.

**NEGLECT.** Negligence may be considered, 1st, generally as a test of civil or criminal liability. A gross and vicious disregard of the interests of others is not distinguishable either in point of moral guilt, or evil results, from a malicious intention to injure; and therefore, where a man so uses even his own carelessly and negligently, and without a reasonable degree of care and caution not to injure others, where injury is likely to ensue, he is usually not only civilly but even criminally responsible for the consequences. It may be regarded as an important and fundamental principle of adjudication, in cases where a loss occasioned by spoliation or fraud must fall on one or the other of two innocent persons, that he through whose negligence or want of caution the injury has been effected should bear the loss. See 1 *Taunt.* 76; 5 *B & C*. 750.

In the next place, negligence may be regarded as a species of fraud, being a breach of some undertaking, either express or implied; in this point of view its effect will at present be considered. Where the plaintiff complains of an injury resulting from the negligence or unskilful conduct of the defendant, in the performance of some work or duty undertaken by the latter, he must, whether the action be

framed in contract or in tort, prove, 1st. The contract or undertaking on the ground of which the defendant acted. 2dly, The negligence of the defendant. 3dly, The loss which has resulted from it, according to the allegations in the declaration. The degree of negligence which is essential to the action varies much in reference to circumstances. According to the soundest principles of morality, the very foundation of the law itself—"whoever undertakes another man's business, makes it his own, that is, promises to employ upon it the same care, attention, and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation, and with no more than this." This principle seems to govern all cases where one man acts gratuitously for another, whether the business in which he acts does or does not import particular skill and knowledge. If the party act gratuitously, and in a situation which does not import particular skill and experience, and act *bonâ fide* to the best of his ability, and with as much discretion as he would exercise in his own affairs, he is not liable to an action for any loss which ensues.

Thus, where a merchant voluntarily, and without reward, undertook to enter a parcel of goods at the custom-house for the plaintiff, together with a parcel of his own, and made the entry under a wrong denomination, in consequence of which the goods were seized, it was held that having acted *bonâ fide*, and to the best of his knowledge, he was not liable. 1 *H. Bl.* 158. But it seems, that in such a case, if a shop broker or clerk in a custom-house had undertaken to enter the goods, although gratuitously, such a mistake in making the entry would have amounted to gross negligence, since his situation and employment would then have necessarily implied a complete degree of knowledge in making such entries. See Lord *Loughborough's observations*, 1 *H. B.* 162.

Although in each of the preceding cases the agent acted gratuitously, in the former he was not liable, because he acted to the best of his ability, which was all that he engaged to do; in the latter, he impliedly undertook to exert a degree of skill and knowledge which he failed to do.

Most then of the cases of this nature, if not all, resolve themselves into a question of understanding and compact. Lord Holt, in the case of *Coggs v. Bernard*, 2 *Ld. Ray.* 808, held, that the mandatory was liable, because in such a case a neglect is a deceit to the bailor; for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be good ground of action.

Where a party receives a reward for the performance of certain acts, he is by law answerable for any degree of neglect on his part; the payment of the money may be considered as an insurance for the due performing of what he

has undertaken. See 1 *H. Bl.* 161. And it seems, that in general, where a person professes himself to be of a certain business, trade, or profession, and undertakes to perform an act which relates to his particular employment, an action lies for any injury resulting either from want of skill in his business or profession, or from negligence or carelessness in his conduct. 8 *East*, 348.

In some instances, as in the cases of carriers and innkeepers, (see these titles,) the undertaking results as a legal obligation incident to the character in which the defendant undertakes to act; and it is consequently sufficient to show that the plaintiff dealt with him in that character, without proof of any special undertaking of agreement.

The question of negligence is usually one of fact for the jury. The question may be either one of law, where the case falls within any general and settled rule or principle; or of fact, where no such rule or principle is applicable to the particular circumstances, and where therefore the conclusion of negligence in fact must be found, or excluded by the jury.

In an action against a coach owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *prima facie* evidence that the injury arose from the unskillfulness of the driver, or the insufficiency of the coach. 2 *Camp.* 79. See 2 *Stark. on Ev.* 526; and further, *tit. Attorney, Bailment, Carriers, Innkeepers, &c.*

**NEGRO.** See titles *Slaves* and *Slave-trade*.

By the 3 & 4. *Wm.* 4. c. 54. (for the encouragement of British shipping and navigation) § 18. British ships trading between places in America may be navigated by British negroes.

**NEIF, Fr. neif, Lat. naturalis, nativa.]** A bondwoman, or she villein, born in one's house, mentioned in 9 *R. 2. c. 2. Terms de Ley.* See title *Villein*.

**NEIFTY, Nativitas.]** There was an ancient writ called *Writ of Neifty*, whereby the lord claimed such a woman for his Neif; now out of use. See title *Villein*.

**NEIGHBOUR, vicinus.]** One who dwells near another. See *Vicinage; Jury*.

**NE INJUSTE VEXES.** A writ founded on *Magna Carta*, c. 10, that lay for a tenant distrained by his lord, for more services than he ought to perform; and it was a prohibition to the lord not unjustly to distrain or vex his tenant: in a special use, it was where the tenant had prejudiced himself, by doing greater services, or paying more rent, without constraint, than he needed; for in that case, by reason of the lord's seisin, the tenant could not avoid it by avowry, but was driven to his writ for remedy. *Reg. Orig.* 4; *F. N. B.* 10. And if the lord distrained to do other services, or to pay other rent than due, after the prohibition delivered unto him, then the tenant should have an attachment against the lord, &c. and when the lord came thereon, the tenant should count against him, and put himself upon the grand assise, &c. whereupon judgment should be given. *New Nat. Br.* 22.

This writ was one of the remedies which the ancient law provided to remedy the oppression of lords; though it was of the prohibitory kind, yet it was in the nature of a writ of right. *Booth*, 126. It lay where tenant in fee simple and his ancestors had held of the lord by certain services, and the lord had obtained seisin of more or greater service, by the inadvertent payment or performance of them by the tenant himself; there the tenant could not in an avowry avoid the lord's possessory right, because of the seisin given by his own hands; but was driven to this writ to divest the lord's possession, and to establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. 3 *Comm. c.* 15. p. 234.

The writ was always ancestral, where the tenant and his ancestors had holden of the lord and his ancestors, and the lord had encroached any rent, &c. A feoffee could not avoid seisin of rent had by encroachment of his feoffor, nor have the writ *ne injuste vexes*; also a man could not have a writ of *ne injuste vexes* against the grantee of the seignior. *Mich.* 18 *Ed.* 2; 10 *Ed.* 3. Tenant in tail might not have this writ; but should plead and show the matter, and not to be estopped by the payment of his ancestors, &c. *Trin.* 20 *Ed.* 3; for he might avoid such seisin of the lord obtained from the payment of his ancestors, by plea to an avowry in replevin. *F. N. B.* 11; 2 *Inst.* 21.

This writ has been long laid aside, as almost every question that arose, where it was formerly in use, might be determined in an action of trespass. It is now abolished by the 3 & 4 *W. 4. c.* 27. s. 35.

The following was the form of the writ of *ne injuste vexes*—

*George the Third, &c. To A. B. greeting: We command you, that you do not vex or trouble C. D., or suffer him to be vexed, for his freehold messuage, &c. which he holds of you, in, &c. Nor in any manner exact, or permit to be exacted from him, services which therefore he ought not to do, (or rent which he owes not,) nor has been accustomed, &c.*

**NEMINE CONTRADICENTE.** Words used to signify the unanimous consent of the members of the House of Commons in parliament to a vote or resolution. The term *Nemine dissente* is, in the same manner, applied in the House of Peers.

**NE RECIPIATUR.** A caveat against the receiving and setting down a cause to be tried; that is, where the cause is not entered in due time. See *Trial*.

**NE UNQUES EXECUTOR, or ADMINISTRATOR.** A plea whereby a defendant denies his being executor or administrator. It does not deny the cause of action, but only that the defendant is the personal representative of the testator or intestate. 1 *Saund.* 207, a.

**NE UNQUES ACCOUPLE, in loyal matrimonie.]** A plea, whereby the tenant in an action of dower, under *nihil habet*, controverts the validity of the demandant's marriage with the person out of whose lands she claims

dower. *Co. Ent.* 180. *a*; *Com. Dig. Pleader*, (2 Y 10.)

To this plea the demandant must reply, that she was accoupled in lawful matrimony at B., in such a diocese, upon which a writ issues to the bishop of that diocese, requiring him to certify the fact to the court. *Co. Ent.* 180, *a*; *Rast. Ent.* 228, *b*; *Dyer* 313 *a*, 368, *b*; 2 *H. Bl.* 145.

#### NE UNQUES SEISIE QUE DOWER.

The general issue in an action of dower *unde nihil habet*. Upon this plea the jury are only to inquire whether the husband was ever seised of a dowerable estate; and if they find the affirmative, judgment must be for the demandant, although the estate has been defeated by title paramount. *Rast. Ent.* 230, *a*; *Co. Ent.* 176, *a*; *Co. Lit.* 31, *b*; *Dyer*, 41, *a*; 1 *Leon.* 66. But see *Winch*, 77.

NE VICECOMES, *colore mandati Regis, quenquam amoveat à possessione Ecclesie minus justè.* *Reg. Orig.* 61.

**NEW ASSIGNMENT.** In many actions the plaintiff who hath alleged in his declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such a manner as clearly to ascertain and identify it consistently with his general complaint; which is called a new or novel assignment. 3 *Comm.* 311. See *Pleading*.

The following perspicuous account of the nature and object of a new assignment is taken from Serjeant Stephen's valuable treatise on pleading:—

A new assignment is a method of pleading, to which the plaintiff, in such cases, is obliged to resort in his replication, for the purpose of settling the defendant's right. An example shall be given in an action for assault and battery. A case may occur, in which the plaintiff has been twice assaulted by the defendant; and one of these assaults may have been justifiable, being committed in self defence, while the other may have been committed without any legal excuse. Supposing the plaintiff to bring his action for the latter, it will be found, by referring to the precedents of declaration for assault and battery, that the statement is so general, as not to indicate to which of the two assaults the plaintiff means to refer. The defendant may, therefore, suppose, or affect to suppose, that the first is the assault intended, and will plead *son assault demesne*, (see that title.) This plea the plaintiff cannot safely traverse; because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume such assault, and no other, is the cause of action. And it is evidently reasonable that he should have this right; for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the de-

fendant might suffer by a mistake, into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground for demurrer, or for pleading in confession and avoidance, has no course but, by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the first, but for the second assault, and this is called a new assignment.

The example that has been given is a case where the defendant, in his plea, wholly mistakes the subject of complaint. But it may also happen, that the plea correctly applies to part of the injuries; while, owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus, in trespass, *quare clausum fregit*, for repeated trespasses, the declaration usually states, that the defendant, on divers days and times, before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, &c. without setting forth more specifically in what parts of the close, or on what occasions, the defendant trespassed. Now the case may be, that the defendant claims a right of way over a certain part of the close; and, in exercise of that right, has repeatedly entered, and walked over it; but has also entered and trod down the soil, &c., on other occasions, and in parts out of the supposed line of way; and the plaintiff, not admitting the right claimed, may have intended to point this action both to the one set of trespasses and to the other. But from the generality of the declaration, the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may, therefore, in his plea, allege, as a complete answer to the whole complaint, that he has a right of way by grant, &c., over the said close; and if he does this, and the plaintiff confines himself, in his replication, to a traverse of that plea, and the defendant at the trial proves a right of way as alleged, the plaintiff would be precluded (upon the principle already explained) from giving evidence of any trespasses committed out of the line or tract in which the defendant should thus appear entitled to pass. His course of pleading in such a case, therefore, is, both to traverse the plea, and also to new assign, by alleging that he brought his action, not only for those trespasses supposed by the defendant, but for others, committed on other occasions, and in other parts of the close, out of the supposed way, which is usually called a new assignment, *extra viam*; or if he means to admit the right of way, he may new assign simply without the traverse. See examples of a new assignment, *extra viam*, 9 *Went.* 323, 396.

As the object of a new assignment is to correct a mistake occasioned by the generality of the declaration, it always occurs in answer to a plea; and is, therefore, in the nature of a replication. It is not used in any other part of the pleading; because the statements subse-



quent to the declaration are not in their nature such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment. *Vin. Ab. Novel Assignment*, 4, 5, 3 *Went* 131; *Cro Jac* 141.

A new assignment chiefly occurs in an action of trespass; but it seems to be generally allowed in all actions in which the form of declaration makes the reason of the practice equally applicable.

Several new assignments may occur in the course of the same series of pleading. Thus, in the example given above, if it be supposed that three different assaults had been committed, two of which were justifiable, the defendant might plead, as above, to the declaration; and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault; upon which, it would become necessary for the plaintiff to new assign a third; and this upon the same principle by which the first new assignment was required. 1 *Saund.* 299 c.

A new assignment is said to be in the nature of a new declaration. *Bac. Ab. Trespass*, (1.), 4, 2; 1 *Saund.* 299, c. It seems, however, to be more properly considered as a repetition of the declaration, differing only in this that it distinguishes the true ground of complaint, as being different from that which is covered by the plea. Being in the nature of a new, or repeated declaration, it is consequently to be framed with as much certainty or specification of circumstance as the declaration itself. *Bac. Abr. ubi supra*. In some cases, indeed, it should be even more particular; so as to avoid the necessity of another new assignment.

A new assignment was formerly of frequent occurrence in an action of trespass *quare clausum fregit*. In that action it was, until recently, allowable for the plaintiff to declare for breaking his close in a certain parish, without naming, or otherwise describing the close. See 2 *Bl.* 1089. If the defendant happened to have any freehold land in the same parish, he might be supposed to mistake the close in question for his own; and might, therefore, plead what is called a *cessum per viam* that the close in which the trespass was committed was his own freehold. And then, upon the principle already explained, it became necessary for the plaintiff to new assign; alleging, that he brought his action in respect of a different close from that claimed by the defendant as his freehold. In order, however, to avoid the necessity of a new assignment it has long been the practice to name or describe the close in the declaration; and now, by the general rules, *H. T. 4 W. 4* the close must be designated in the declaration by name, or abutments, or other description; in future whereof the defendant may justify specially. See further *Plead. g. Trespass*.

**NEWCASTLE UPON TYNE.** No person shall ship, load, or unlload any goods to be sold into or from ships at any place on the river Tyne, but at the town of Newcastle upon Tyne, to forfeit the goods; and none shall raise

any wear in the haven there, between certain places on the said river, &c. *Stat.* 21 H. 8. c. 18.

**NEW FOREST**, Hampshire. See 39 & 40 G. 3. c. 86; & 41 G. 3. (U. K.) c. 108, for the preservation of timber there, and for ascertaining the bounds of the forest.

**NEWFOUNDLAND.** See *Fisheries, Plantations*.

**NEWPORT** in the Isle of Wight. The poll for a knight of the shire is to be held at Newport for the whole of the island which is now severed from Hampshire. See 2 W. 4. c. 15 § 16.

**NEW RIVER.** See *Press*.

**NEWS.** Spreading false news, to make discord between the king and nobility, or concerning any great man of the realm, is punishable at common law with fine and imprisonment; which is confirmed by *Westm.* 1, 3 E. 1. c. 34; 2 R. 3. st. 1. c. 5; 12 R. 2. c. 11; 2 Inst. 226; 3 Inst. 198; 4 Comm. c. 11. p. 149. See *False News*.

**NEWSPAPERS.** The earliest attempt at periodical literature was made, in England, in the reign of Elizabeth. It was in the shape of a pamphlet, called the "English Mercurie;" and its first number, dated 1588, is still preserved in the British Museum. No newspapers, however, appeared in England, in single sheets of papers, until many years afterwards. The first newspaper, called "The Public Intelligencer," was published by Sir Roger L'Estrange, on the 31st of August, 1663. Periodical pamphlets, which had become fashionable in the reign of Charles I., were more rare in the reign of James II. The rebellion in 1641, gave rise to a great number of tracts, filled with violent appeals to the public, many of which bore the title of diurnal occurrences of parliament. The first gazette in England was published at Oxford, on the 7th of November, 1665; the court being then held there. On the removal of the court to London, the title was altered to "The London Gazette." The "Orange Intelligencer" was the third newspaper published, and the first after the Revolution in 1688. This paper continued to be the only daily newspaper in England for some years; but, in 1690, there began to appear the London newspapers, published weekly. In Queen Anne's reign, in 1703, the number of these was increased to eighteen; but still there continued to be but one daily paper, which was then called "The London Courant." In the reign of George I., the number was three daily, six weekly, and ten published three times in the week.

In 1833, the number of newspapers in the United Kingdom amounted to 369, whereof 248 were published in England, 46 in Scotland, and 75 in Ireland.

A variety of statutory regulations have been made with respect to newspapers, for the purpose of securing to government the heavy duties with which they are charged and for facilitating the proof of their publication.

By the 3 G. 3. c. 16 the persons applying for stamped paper for newspapers, were first to

give security to his majesty for the payment of the advertisement duties.

By the 29 G. 3. c. 50. the duties on newspapers were put under the management of the commissioners of stamps; and (§ 10) the proprietors of such papers were required to join in the security to be given under the above act.

By the 38 G. 3. c. 78. no person is to print or publish a newspaper until an affidavit be delivered at the stamp office, specifying the names and abode of the printer, publisher, and of the proprietors, if the number, exclusive of the printer and publisher, do not exceed two; and in case they exceed that number, then of two of such proprietors, and also their proportional shares in the paper, with a description of the printing house and the title of such paper. Printing, &c., a newspaper without such an affidavit renders the party liable to a penalty of 100*l*.

§ 10. requires the names of the printers and publishers of the paper to be printed in some part thereof, under a penalty of 100*l*.

By § 11, after production of the affidavit, or a certified copy thereof, and of a newspaper intitled as that mentioned in such affidavit, it shall not be necessary to prove that such paper was purchased of the defendants or their servants.

§ 17. A copy of every newspaper is to be delivered within six day after publication to the commissioners of stamps, on a penalty of 100*l*.

By the 60 G. 3. & 1 G. 4. c. 9. (passed to restrain the publication of blasphemous and seditious libels,) all pamphlets, and papers containing public news, intelligence, or occurrences, or remarks thereon, or upon any matter of church or state, printed in any part of the United Kingdom, and published periodically in parts or numbers, at intervals not exceeding twenty-six days, where the same shall not exceed two sheets, and be published for less than sixpence, exclusive of the duty thereon imposed, shall be deemed newspapers, within the acts relating to newspapers.

By § 8. no person shall print or publish newspapers or pamphlets containing public news, &c., without entering into a recognizance of 300*l*., if such papers, &c., are printed in London, or Westminster, or in Edinburgh, or in Dublin; or giving a bond in 200*l*. (or 300*l*., if within twenty miles of London) with two or three sufficient sureties, where the papers, &c. are printed elsewhere, for securing fines upon conviction for blasphemous or seditious libels.

By the 1 W. 4. c. 73. the amount of recognizances to be given under the above act, by principals and their sureties, is increased to 400*l*. and of bonds, to 300*l*.; and damages due for any libel may be recovered on such recognizances, &c.

By 6 G. 4. c. 119. newspapers, which before could not be contained on sheets of paper exceeding thirty-two inches in length, and twenty-two inches in breadth, may be printed on paper of any size.

By the 3 & 4 W. 4. c. 23. the duties on advertisements were considerably reduced; but no alteration has been made in the amount of the stamps required on newspapers, which are regulated by the 55 G. 3. c. 184.

For the conveyance of newspapers by post, see *Post Office*.

See further, *Advertisements, Libel, Pamphlets, Stamps*.

NEW STYLE. See *Year*.

NEW TRIAL. Judgments are often suspended by granting new trials. The causes of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or *dehors* the record. See *Trial*.

NEXT OF KIN. See *Descent; Executor*, III.; and V. 8.

NICOLE. Anciently used for Lincoln. 7 E. 1; 30 Ed. 1; *et saepe alibi*. Cowell.

NIDERLING, NIDERING, or NITHING. A vile, base person, or sluggish. *Will. of Malmsh. p. 121; Mat. Par. Ann. 1088*. Chicken-hearted. See *Spelman in voc*.

NIENT COMPRISE. Is an exception taken to a petition, because the thing desired is not contained in that deed or proceeding whereon the petition is founded; for example, one desires of the court wherein a recovery is had of lands, &c. to be put in possession of a house, formerly among the lands adjudged unto him; to which the adverse party pleads, that this is not to be granted, by reason this house is not comprised amongst the lands and houses for which he had judgment. *New Book Entries*.

NIENT DEDIRE. Signifies to suffer judgment to be had against one, by not denying or opposing it, i. e. by default.

When a fair and impartial trial cannot be had in the county where the venue is laid, the court, on an affidavit of the circumstances, will change it in transitory actions; or in local actions, will give leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in an adjoining county. 1 *Tidd's Pr.* 655, 8*th* ed.

NIGER LIBER. The black book or register in the Exchequer is called by this name. Several chartularies of abbies, cathedrals, &c. are distinguished by a like appellation.

NIGHT. Is when it is so dark that the countenance of a man cannot be discerned; and by some opinions, burglary in the night may be committed at any time after sun-set, and before rising. *H P. C.* 79; 3 *Inst.* 63; 1 *Hawk. P. C.* See *Noctanter; Burglary*.

Under the act against preaching by night (9 G. 4. c. 69. § 12.) the night is to be considered to commence at the expiration of the first hour after sun-set, and to conclude at the beginning of the last hour before sun-rise.

NIGHTWALKERS. Are such persons as sleep by day, and walk by night, being oftentimes pilferers, or disturbers of the peace. 5 *Ed.* 3. c. 14.

Constables are authorized by the common law to arrest nightwalkers, and suspicious per-

sons, &c. Watchmen may also arrest night-walkers, and hold them until the morning; and it is said, that a private person may arrest any suspicious nightwalker, and detain him till he give a good account of himself. 2 Hawk. P. C. Watchmen, either those appointed by the statute of Winchester, 13 E. 1. c. 4, to keep watch and ward in all towns from sun-setting till sun-rising, or such as are mere assistants to the constable, may, *virtute officii*, arrest all offenders, and particularly nightwalkers, and commit them to custody till morning. 4 Comm. c. 21. p. 292; cites 2 Hal. P. C. 88—96. One may be bound to the good behaviour for being a nightwalker; and common nightwalkers and haunters of bawdy-houses are to be indicted before justices of peace, &c. 1 Hawk. P. C.; 2 Hawk. P. C.; Latch. 173; Poph. 280.

By the 5 G. 4. c. 83. all provisions theretofore made, relative to idle and disorderly persons, rogues and vagabonds, incorrigible rogues or other vagrants, in England, are repealed. The provisions of this statute will be found under tit. Vagrants.

NIHIL CAPIAT PER BREVE, or *per Billam*. Is the judgment given against the plaintiff in an action, either in bar of his action, or in abatement of his writ or bill, &c. Co. Litt. 363.

Proceedings by bill are now abolished. See Process.

NIHIL, or NIL DEBET. Was the proper form of the general issue, not only in debt or simple contract, but in all other actions of debt, not founded on a deed or specialty. And an action was not considered as founded on a deed or specialty, so as to require a plea of *non est factum*, if the deed were mentioned in the declaration only as introductory to some other main cause of action. Therefore *nil debet* was a good plea in debt for rent, upon an indenture, or in debt for an escape, or in debt upon a devastavit. 1 Tidd. 701, 8th ed.

There was hardly any matter of defence to an action of debt, to which the plea of *nil debet* might not be applied; because almost all defences resolved themselves into a denial of the debt. See Stephen on Pleading, 194, 1st. ed.

Now, by the general rules, H. T. 4. W. 4. the plea of *nil debet* is no longer allowed in any action.

NIHIL, or NIL DICIT. Is a failing by the defendant to put in an answer to the plaintiff by the day assigned; which being omitted, judgment is had against him of course, as saying nothing why it should not. See Judgment.

NIHIL, or NIL HABUIT IN TENEMENTIS. A plea to be pleaded in an action of debt only, brought by a lessor against lessee for years, or at will, without deed. 2 Lil. Abr. 214. In debt for rent upon an indenture of lease, *nil habuit in tenementis* may not be pleaded; because it is an estoppel, and a general demurrer will serve. 3 Lev. 146. But if debt is brought for rent upon a deed poll, the defendant may plead this plea; and where a defendant pleaded *nil habuit in tenementis tempore dimissionis*, the plaintiff replied, *quod ha-*

*bit in tenementis*, &c. and verdict and judgment was had for the plaintiff; whereupon writ of error being brought, it was assigned for error, that the replication was not good, for he ought to have shown what estate he then had; and of that opinion was the court; and it had been bad upon demurrer; but being after a verdict, it is good. Cro. Jac. 312. If a less estate is found than the plaintiff pleads in his reply to a *nil habuit*, &c. so as it be sufficient to entitle the plaintiff to make a lease, it is good enough. 10 W. 3. *Nil habuit in tenementis* cannot be given in evidence where the plaintiff hath been in possession. *Ld. Raym.* 746.

But though *nil habuit in tenementis* is a bad plea when demurred to, yet where the declaration merely states *quod cum demisisset*, without stating an indenture, it is, *prima facie*, a good plea, till the plaintiff reply to the indenture, and rely on the estoppel; and if the plaintiff replies, that he had a sufficient estate in the premises, he loses the benefit of the estoppel. 6 T. R. 62; 1 Will. Saund. 276, b. And if the lessor become bankrupt, the assignees have the benefit of the estoppel, if the demise is by indenture. 7 T. R. 537; and see Bac. Ab. tit. Pleas, G. 3. p. 253, (7th ed.) In assumpsit for use and occupation, *nil habuit* is a bad plea. 1 Wils. 314. See Covenant, Pleading.

NIHILS, or NICHILS. Were issues which the sheriff that was apposed in the Exchequer said were nothing worth, and illeivable, for the insufficiency of the parties from whom due. Accounts of *nil* should be put out of the Exchequer. 5 R. 2. c. 13.

But now, by the 3 & 4 W. 4. c. 99. sheriffs are no longer to be apposed, or to pass their accounts in the Exchequer; but these are to be audited by the commissioners for auditing the public accounts.

NISI PRIUS. The commission to justices of assize; so called from a judicial writ of *distringas*, whereby the sheriff is commanded to distrain the empannelled jury to appear at Westminster before the justices at a certain day, in the following term, to try some cause. *Nisi prius justic. domini regis ad assisas capiend. venerint*, viz. unless the justices come before that day to such a place, &c. 2 Inst. 424; 4 Inst. 159.

A writ of *nisi prius* is where an issue is joined; then there goes a *venire* to summon the jury to appear at a day in court; and upon the return of the *venire*, with the panel of the jurors' names, the record of *nisi prius* is made up and sealed, and there goes forth the writ of *distringas* to have the jurors in court, *Nisi prius justic. venerint*, &c. such a day in such a county, to try the issue joined between the parties. 2 Lil. 215.

All civil causes at issue in the courts at Westminster, are brought down in the two issuable vacations before the day of appearance appointed for the jury above, into the county where the action was laid to be tried there, viz. at the assizes: and then, upon the return of the verdict given by the jury to the court above, the next term, the judges there give judgment



for the party for whom the verdict is found; and these trials by *nisi prius* are for the ease of the county, the parties, jurors, and witnesses, by saving them the charge and trouble of coming to Westminster; but in matters of great weight and difficulty, the judges above, upon motion, will retain causes to be tried there; though laid in the country, and then the juries and witnesses in such causes must come up to the courts at Westminster for trial at bar; and the king hath his election to try his suits at the bar, or in the county, &c. *Wood's Inst.* 479.

The nature of *Westm. 3. 13 Ed. 1. st. 1. c. 30.* having ordained, "that all pleas in either bench, which require only an easy examination, shall be determined in the country, before justices of assize, by virtue of the writ appointed by that statute, commonly called the writ of *nisi prius*; it has been held, that an issue joined in the King's Bench upon an indictment or appeal (now abolished,) whether for treason or felony, or a crime of an inferior nature, committed in a different county from that wherein the court sits, may be tried in the proper county by writ of *nisi prius*: but as the king is not expressly named in this statute, and it is a general rule that he shall not be bound except named, it is said, where the king is party, a *nisi prius* ought not to be granted without his special warrant, or the assent of his attorney; though the court may grant it in appeals in the same manner as any other actions. *2 Inst.* 424; *4 Inst.* 160; *Dyer* 46; *2 Hawk P. C. c. 42. § 2, 3.*

Justices of *nisi prius* have power to record nonsuits and defaults in the country at the days assigned; and are to report them at the bench, &c. And are to hear and determine conspiracy, confederacy, champerty, &c. *4 Ed. 3. c. 11.*

*Nisi prius* was granted in attaints (abolished by *6 G. 4. c. 50. § 60*); but that which cannot be determined before the justices upon the *nisi prius*, shall be adjourned to the bench where they are justices; and the justices before whom inquisitions, inquests, and juries, shall be taken by the king's writ of *nisi prius*, are empowered to give judgment in felony and treason &c. and to award execution by force of their judgment. *5 Ed. 3. c. 11; 14 Hen. 6. c. 1.*

It was held by Hale, that the justices of *nisi prius* have not any original power of determining felony, without special commission for that purpose; and by virtue of *27 Ed. 1. st. 1. c. 3; 14 H. 6. c. 1.*, they have authority to determine such felonies only as are sent down to be tried before them; in which case, on removal of the indictments, they may proceed to trial and judgment as if justices of gaol-delivery. *2 Hale's Hist. P. C. 41.*

The sittings of the judges at *nisi prius* are chiefly confined to the trial of civil actions; those in London and Middlesex being regulated by the *18 Eliz. c. 12; 12 Geo. 1. c. 31; 24 Geo. 2. c. 18; 11 Geo. 4. and 1 Wm. 4. c. 70*; and those at the assizes, by the statute of Westminster 2, *13 Edw. 1. c. 30; 27 Edw. 1. c. 4; 12 Edw. 2. st. 1. c. 3; and 14 Edw. 3. st. 1. c. 16.*

By the construction of these statutes, the Court of King's Bench may grant a writ of *nisi prius* as well in cases of treason and felony, as in other common cases. *2 Hawk. c. 3. § 7; c. 42. § 2.* Yet, inasmuch as the king is not expressly named in the statute of *Westm. 2.*, it seems to have been generally holden, that whenever the king is a party, it is irregular to grant a trial by *nisi prius* without his special warrant, or the assent of the attorney-general. *6 Mod. 246; 2 Hawk. c. 42. § 3.* And in one case where, on an indictment for barratry against a justice of peace, the attorney-general himself moved for a trial at *nisi prius*, the court (thinking it was a cause that required great examination) refused the motion, unless the king, by his letters, should signify his pleasure that the indictment should be so tried, which was afterwards so done. *Cro. Car. 348.* So in another case, where the attorney-general opposed the motion of a defendant for a trial at bar, the court said, that they were not satisfied that the attorney-general ought to have a *nisi prius*, (where a trial at bar is reasonable), without consent. *6 Mod. 123.*

The authority of justices of *nisi prius* in the country, is annexed to the justices of assize; and the court above will take judicial notice of what is done at *nisi prius*, being entered on record.

With respect to the powers given to judges at *nisi prius* to amend records in case of variance, see *Amendment; Record; Variance.*

As to the course of trial at *Nisi prius*, see *Trial.* And see further, *Assize; Circuits; Jury; Justices of Assize, &c.*

**NISI PRIUS RECORD.** Is supposed to be transcribed from the issue roll (see that title), and ought to contain an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the *venire facias*, as in the issue. It formerly consisted of four parts; the first placita; the pleadings, &c.; the second placita; and the jurata. But now, by the form prescribed by the general rules, *H. T. 4. W. 4.* the placitas are to be omitted. See *1 Archb. Pr. by Chitty. 303, 4th ed.*

**NIVICOLINI BRITONES.** Welshmen; because in Caermarthenshire and other northern counties of Wales, they lived near high mountains, covered with snow. *Du Cange; Cowel.*

**NOBILITY, nobilitas.]** Comprises all degrees of dignity above a knight; under which latter term is included a baronet; so that a baron is the lowest order of nobility: it is derived from the king, and may by him be granted by patent in fee, for life, &c. See *Peers of the Realm.*

**NOBLE.** An ancient kind of English money in use in England in the time of *Edw. III.* Knighton says, the rose noble was a gold coin, current in England about the year 1311. A noble is now valued at 6s. 8d.; but we have no peculiar coin of that name. From the treaty of peace between John, king of France, and Edward III. A. D. 1360, the noble was valued as equal to two French gold crowns.

**NOCTANTER, by night; in the night**

time.] The name of a writ formerly issuing out of the Chancery, and returnable in the King's Bench, given by *Westm. 2; 13 E. 1. st. 1. c. 46*; but which has been repealed by the *7 & 8 Geo. 4. c. 27.*)

By virtue of that statute, in case any one having right to approve waste ground, &c. raised and levied a ditch or hedge, and it was thrown down in the night-time, and it could not be known by a verdict of the assize or a jury by whom; or if the neighbouring towns could not indict such as are guilty, they were liable to be distrained to make again the hedge or ditch at their own costs, and to answer damages. *2 Inst. 476.* And the *noctanter* writ thereupon was directed to the sheriff of the county to make inquisition relative thereto. On the return of this writ by the sheriff, that the same was found by inquisition, and that the jury were ignorant who did it, the return being filed in the Crown office, there went out a writ of inquiry of damages, and a *distraints* to the sheriff to distrain the circumdacent tithes to repair the hedges and fences so destroyed at their own charge, and also to restore the damages, &c. See *2 Lil. Abr. 217.*

The writ of *noctanter*, by the better opinion, lay for the prostration as well of all inclosures as those improved out of commons, but if it were not in the night this writ would not have lain; and there ought to have been a convenient time (when the court was to judge of) before the writ was brought, for the country to inquire of and indict the offenders, which, according to *Coke*, was a year and a day. *2 Inst. 476.* See *C. C. 140, 1 Keb. 515.* And if any one of the offenders were indicted the defendants must have pleaded it, &c.

The words, *at the night time*, are so necessary in an indictment of burglary that it hath been adjudged insufficient for the burglary without it. *C. C. 140. 1 Keb. 515.* See *Burglary.*

**NODIES or NODIEM DE TRIMA.** In the book of *Distraints* we often meet with *Ten nodies de trima, or trau tot noctem*, which is understood of entertainment of meat and drink for so many nights. For in the time of the English Saxons, time was computed not by days, but nights, and so it continued till the reign of King Henry I. as appears by his laws *c. 65 § 76.* And hence it is still usual to say a seven night, i. e. *saptem nodies*, for a week; and a fortnight for two weeks, i. e. *quatuordecim nodies.*

**NODFYRS, or NEDFRI. Sax.]** *Spelman* says this word is derived from the old Saxon *neod, obsequium*, and *fry, ignis*, and signifies fires made in honour of the heathen deities. But by others it is said to come from the Saxon *nob*, that is, *necessary*; and was used for the necessary fire.

**NOLLE PROSEQUI.** Is used in the law where a plaintiff in any action will not proceed any further; and may be before or after verdict, though it is usually before; and it is then stronger against the plaintiff than a nonsuit, which is only a default in appearance;

but this is a voluntary acknowledgment that he hath no cause of action. *2 Lil. 218.*

A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit as to the whole or a part of the cause of action; or where there are several defendants, against some or one of them; and it is in nature of a *retraxit* operating as a release or perpetual bar. *Tidd, Pract. cites Cro. Car. 239, 243; 2 Rol. Ab. 100; Hard. 153; 8 Co. 58; Cro. Jac. 211.* But see *Ld. Raym. 599*, where there are other defendants.

On a plea of coverture, &c. if the plaintiff cannot answer it, he may enter a *nolle prosequi* as to the whole cause of action, but the defendant in such case is entitled to costs, under *8 H. 2. c. 2 § 2; 3 T. R. 511.* So if the defendant demur to one of several counts of a declaration, the plaintiff may enter a *nolle prosequi* as to that count which is demurred to, and proceed to trial upon the other counts. *2 Salk. 456.* Or if judgment be given for him on demurrer, he may enter a *nolle prosequi* as to the issue, and proceed to a writ of inquiry on the demurrer. *1 Salk. 219; 2 Salk. 456, 1 Str. 532, 571.* But after a demurrer for misjoinder, the plaintiff cannot cure it by entering a *nolle prosequi*. *1 H. Bl. 108.* And after demurrer to a declaration, consisting of two counts against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a *nolle prosequi* on that count, and proceed on the other. *1 T. R. 360.* And the court of C. P. refused to allow a defendant to strike out the entry of a judgment of *nolle prosequi*, entered by a plaintiff as to one of the counts of the declaration, after it had been demurred to, &c. and would not in that stage of the proceedings determine the question of costs respecting such count. *1 Bos. & Pull. 157.*

If there be a demurrer to part, and an issue upon other part, and the plaintiff prevails upon the demurrer, it was in one case holden, that without a *nolle prosequi* as to the issue, he cannot have a writ of inquiry on the demurrer; because on the trial of the issue, the same jury will ascertain the damages for that part which is demurred to. *1 Salk. 219; 12 Mod. 358.* But in a subsequent case, where the declaration consisted of four counts, to three of which there was a plea of *non assumpsit*, and a demurrer to the fourth, and after judgment on the demurrer, the plaintiff took out a writ of inquiry, and executed it; this was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted that the plaintiff ought to take out a *venire*, as well to try the issue, as to inquire of the damages upon the demurrer; *sed per curiam*, that is, indeed, the course where the issues are carried down to trial before the demurrer is determined, and in that case the jury give contingent damages; but where the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the record to *nisi prius*, and as to the want of a *nolle prosequi*.

qui upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry must stand. 1 *Stra.* 532; 8 *Mod.* 108.

In trespass or other action for a wrong, against several defendants, the plaintiff may, at any time before final judgment, enter a *nolle prosequi* as to one defendant, and proceed against the others; *Hob.* 70; *Cro. Car.* 239, 243; 2 *Roll. Abr.* 100; 2 *Salk.* 55, 6, 7; 3 *Salk.* 244, 5; 1 *Wils.* 306; so in *assumpsit*, or other action upon contract, against several defendants, one of whom pleads bankruptcy, or other matter in his personal discharge, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the other defendants. 1 *Wils.* 89. But a *nolle prosequi* cannot be entered as to one defendant after final judgment against the others. 2 *Salk.* 455.

It seems that in *assumpsit*, or other action upon contract, against several defendants, the plaintiff cannot enter a *nolle prosequi* as to one, unless it be for some matter operating in his personal discharge, without releasing the others. 1 *Wils.* 89; 6 *Taunt.* 179.

Thus in *assumpsit* against two, where one pleads *non assumpsit* and a plea of bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, as to the several matters pleaded by him, and the other defendants pleads *non assumpsit*, the latter is not discharged by the *nolle prosequi*. 2 *M. & S.* 444.

Where, in an action against several defendants, the jury by mistake have assessed several damages, the plaintiff may cure it by entering a *nolle prosequi* as to one of the defendants and taking judgment against the others. 11 *Co.* 5; *Cro. Car.* 239, 243; *Carth.* 19.

Where there are several defendants, and they sever in plea, whereupon issue is joined, the plaintiff may enter a *nolle prosequi* as to one defendant at any time before the record is sent down to be tried *ad nisi prius*. 2 *Roll. Ab.* 100; *Salk.* 457. See *Nonsuit*.

A plaintiff comes by his attorney *hic in curiam et faletur se ulterius nolle prosequi*; whereupon judgment was given that the defendant *eat sine die*, and no amercement upon the plaintiff; this was held erroneous; for the plaintiff ought also to be amerced. 8 *Rep.* 58. But later determinations have settled that in entering a *nolle prosequi* the plaintiff need not be amerced *pro falso clamore*, but it is sufficient that the defendant be put without day. 1 *Stra.* 574.

Where there are two defendants, and one pleads not guilty, and the other another plea; if on demurrer there is judgment for the plaintiff against one on the demurrer, and a *nolle prosequi* for the other, there it ought to be *eat sine die*, or it is ill, and the entry of *quod eat sine die* is a discharge to the defendant. *Cro. Jac.* 439; *Hob.* 180.

With respect to criminal proceedings, the king may, by his attorney-general, enter a *nolle prosequi* on an information; but it shall not stop the proceedings of the informer. 1 *Leon.*

119. But the clerk of the crown cannot enter a *nolle prosequi* on an indictment without leave of the attorney-general. 1 *Ld. Raym.* 721. Nor can an agreement between the parties for this purpose be effected, unless the attorney-general actually enters a *nolle prosequi*. 2 *Wils.* 341; 5 *East*, 302; 2 *Bing.* 258.

By the 3 & 4 *Wm. 4. c. 42. § 32.* where any one or more of several defendants shall have a *nolle prosequi* entered as to him or them, or upon a trial a verdict shall pass for him or them, every such person shall have judgment for his costs, unless the judge, in case of a trial, shall certify on the record there was a reasonable cause for making him a defendant.

And by § 33 where any *nolle prosequi* shall have been entered upon any court, or as to part of any declaration, the defendant shall be entitled to his costs.

**NOMENCLATOR.** One who opens the etymologies of names, interpreted, *Thesaurus. Spelman; Cowell.*

**NOMINATION, nominatio.]** Is the power (by virtue of some manor or otherwise) of appointing a clerk to a patron of a benefice, by him to be presented to the ordinary. The right of nomination a man may have by deed; and in such case, if the patron refuse to present the nominee, or presents another, he may bring a *quare impedit*; for he who is to present, is only an instrument to him who nominates; and the person who hath the nomination is in effect the patron of the church. *Plowd.* 529; *Moor.* 47. A nominator must appoint his clerk within six months after avoidance; if he doth not, and the patron presents his clerk before the bishop hath taken any benefit of the lay-c, he is obliged to admit that clerk. But where one hath the nomination, and another the presentation, if the right of presentation should afterwards come to the king, it is said he who hath the nomination will be entitled to the presentation also; because the king, who should present, cannot be subservient to the nominator, being contrary to his dignity. *Hughes's Par. Law*, 76, 77. Right of nomination may be forfeited to the crown as well as presentation, where the nominator corruptly agrees to nominate, within the statute of *Simony, &c.* See *Advowson, Parson.*

**NOMINA VILLARUM.** Edward II. in the 9th year of his reign, sent his letters to every sheriff in England, requiring an exact account and return into the Exchequer of the names of all the villages, and possessors thereof, in every county, which being done accordingly, the returns of the sheriffs all joined together are called *nomina villarum*, still remaining in the Exchequer, *anno 9 Ed. 2.*

**NOMINE PENÆ.** A penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for payment thereof. 2 *Lil.* 221.

This *nomine penæ* is incident to the rent, and will descend to the heir; if an annual rent, therefore, be devised, the *nomine penæ* passes as incident thereto, and the devisee may have an action of debt for the arrears. *Co. Lit.* 61 b; *Cro. Eliz.* 383; *Lutw.* 1156.



If rent is reserved, and there is a *nomine pænæ* on the non-payment of it, and the rent be behind and unpaid, there must be an actual demand thereof made before the grantee of the rent can distrain for it; the *nomine pænæ* being of the same nature as the rent, and issuing out of the land out of which the rent doth issue. *Hob.* 82, 133. And where a rent-charge was granted for years, with a *nomine pænæ* and clause of distress, if it was not paid on the day; on the rent's being behind, and the term expired, the court was moved that the grantee might distrain for the *nomine pænæ*; but it was held that he could not, because the *nomine pænæ* depended on the rent, and the distress was gone for that, and by consequence for the other. *2 Nels. Abr.* 1182. See *8 Ann. c.* 14.

When any sum *nomine pænæ* is to be forfeited for non-payment of the rent at the time, &c. the demand of the rent ought to be precisely at the day, in respect of the penalty; and debt will not lie on a *nomine pænæ* without a demand. *7 Rep.* 28; *Cro. Eliz.* 383; *Style*, 4. If there is a *nomine pænæ* of such a sum, for every day after rent becomes due, it has been a question whether there must be a demand for every day's *nomine pænæ*, or one demand for many days. And by the better opinion it hath been holden, that for every day there ought to be a demand; and that one will not be sufficient for the whole; but where a *nomine pænæ* of forty shillings was limited *quolibet die proximo* the feast-day on which the rent ought to be paid, it was adjudged that there was but one forty shillings forfeited, because the word *proximo* must relate to the very next day following the rent day; so likewise when the rent became due and unpaid at the next rent day after that, and so on. *Palm.* 207; *2 Nels.* 1182.

This penalty, it should seem, is waived by an acceptance of the rent. *Coup.* 247.

An assignee is chargeable with a *nomine pænæ* incurred after the assignment, but not before. *Moor.* 357; *2 Lil. Abr.* 221.

Though forfeiture is mentioned to be *nomine pænæ*, for not paying of a collateral sum, it is no *nomine pænæ*, if it be not of a rent. *Lutw.* 1156.

It is not unusual to mention stipulated penalties for other things, as for ploughing up ancient meadow, or above a certain number of acres in one year, for changing the character of particular premises or the like, by the general name of *nomine pænæ*. See further *Distress*, IV.

**NON-ABILITY.** Is an exception taken against the plaintiff in a cause, upon some just ground, why he cannot commence any suit in law; as *præmunire*, outlawry, excommunication, &c. *F. N. B.* 35, 65. See *Abatement*; *Disability*.

**NONÆ ET DECIMÆ.** Payments made to the church by those who were tenants of church farms; where *nonæ* was a rent or duty for things belonging to husbandry; and *decimæ* were claimed in right of the church. Formerly a ninth part of moveable goods was paid to the clergy on the death of persons in

their parish, which was called *nonagium*, and claimed on pretence of being distributed to pious uses. *Blount*.

**NON-AGE.** In general understanding, is all the time of a person's being under the age of twenty-one; and in a special sense, where one is under fourteen as to marriage, &c. See *Age*, *Infant*.

**NON ASSUMPSIT.** The general issue in an action of *assumpsit*, whereby a man denies that he made any promise. See further *Pleading*.

By this plea, until recently, the defendant could put in issue all the material allegations of the declaration; and under the summary denial it contained of the plaintiff's case, could, with a few exceptions, urge any ground of defence, whether it were in direct repudiation of the contract or obligation charged, or by way of confession in avoidance of the cause of action.

Now by the general rules of *H. T.* 4 *W.* 4. in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

*Ex. gr.*—In an action on a warranty, the plea will operate as the denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Where there have been two accounts stated between the parties, and the plaintiff sues upon the former, the defendant cannot, since the above rules, upon the plea of *non assumpsit*, give the second account in evidence. *1 C. M. & R.* 108.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatis assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which makes such receipt by the defendant a receipt to the use of the plaintiff.

In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

In every species of *assumpsit*, all matters in

confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes, by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

NON ASSUMPSIT INFRA SEX ANNOS. See *Limitation of Actions*.

NON-CEPIT. The general issue in replevin. See that title.

NON-CLAIM. An omission or neglect of one that claimed not within the time limited by law, as within a year and a day, where a continual claim ought to have been made, or in five years after a fine had been levied, &c. by which a man might be barred of his right of entry. See 4 *H. 7. c. 24*; 32 *H. 8. c. 33*.

Now by the 3 & 4 *W. 4. c. 27. § 11*, no continual or other claim shall preserve any right of making an entry or distress, or of bringing an action.

And by the 3 & 4 *W. 4. c. 74*, fines are abolished. See further *Claim, Entry, Fine, Limitation of Actions*.

NON COMPOS MENTIS. One not of sound mind, memory, and understanding. See *Idiots and Lunatics*.

NON-CONFORMISTS. Persons not conforming to the rites and ceremonies of the Church of England as by law established. The stats. 1 *Eliz. c. 2*; 13 & 14 *Car. 2. c. 4*, were made for the uniformity of common prayer and service in the church. Non-conformists to be punished by imprisonment, and to submit in three months, or to abjure the realm; and keeping a non-conformist in the house after notice, subjected the offender to the penalty of 10*l.* a month. 35 *Eliz. c. 1*. Penalties on being at conventicles. 22 *Car. 2. c. 1*.

Toleration of the episcopal communion in Scotland. 10 *Ann. c. 7*. Episcopal meeting-houses in Scotland to be registered; and a penalty imposed on unqualified ministers officiating in Scotland. 19 *Geo. 2. c. 38*. Episcopal ministers in Scotland to be ordained by a bishop of England or Ireland. *Ib.* and 21 *Geo. 2. c. 34*. Peers and others present at unlawful meeting-houses in Scotland disqualified from voting. 19 *Geo. 2. c. 38*. A form of affirmation to be taken instead of an oath by the members of the *unitas fratrum*; and privileges granted to the members thereof who should settle in America. 22 *Geo. 2. c. 30*.

After the Revolution, it was enacted by the Toleration Act, 1 *W. & M. st. 1. c. 18*, that the 1 *Eliz. c. 2. § 14*; 23 *Eliz. c. 1*; 29 *Eliz. c. 6*; 3 *Jac. c. 4*; 3 *Jac. c. 5*, (or any other statute made against Papists, with two exceptions, but the whole of which last mentioned statutes are now in effect repealed by the Roman Catholic Relief Act, 10 *Geo. 4. c. 7*), should not extend to persons dissenting from

the Church of England that should take the oaths of allegiance and supremacy, and subscribe the declaration against popery.

By 52 *Geo. 3. c. 155*, the acts 13 & 14 *Car. 2. c. 1*, for preventing mischief by Quakers and others refusing lawful oaths, 17 *Car. 2. c. 2*, for restraining non-conformists from inhabiting in corporations; and 22 *Car. 2. c. 1*, to prevent and suppress seditious conventicles, were repealed.

By 9 *Geo. 4. c. 17*, so much of the 13 *Car. 2. st. 2. c. 1*, and the 25 *Car. 2. c. 2*, (commonly called the Test and Corporation Acts), and of the 16 *Geo. 2. c. 30*, as required the persons therein described to receive the Sacrament as a qualification for offices, were repealed; and by § 2, all mayors, aldermen, recorders, and corporate officers are within one month before or upon their admission to office to make and subscribe the declaration set forth in the act, to the effect that they will not use the power or influence of their office to injure or weaken the Protestant church, or disturb the bishops or clergy in the rights and privileges to which they are by law entitled. See *Bac. Abr. Office* (E), 7th ed.

By the 10 *Geo. 4. c. 7*, the acts requiring the declarations against transubstantiation, &c. were repealed; and by § 10, his majesty's subjects professing the Roman Catholic religion may hold any office, civil or military, and places of trust or profit, under his majesty, and exercise any other franchise (except as therein mentioned) on taking the oath therein set forth instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oaths as were then by law required to be taken for the purpose aforesaid by Roman Catholics. See further *tit. Dissenters, Non-Jurors, Oaths, Quakers, Roman Catholics*.

NON CULPABILIS. See *Not Guilty*.

NON DAMNIFICATUS. A plea to an action of debt upon bond, with condition to save the plaintiff harmless. 2 *Lil. Abr. 224*.

It cannot be pleaded to an action of debt on bond conditioned for payment of a sum of money on a certain day, although it appears by the condition that the bond was given by way of indemnity. 1 *Boss. & Pull. 638*; and see as to this plea, *Bac. Abr. Pleas* (I.) 7th ed.

NON DECIMANDO. A custom or prescription. *De non decimando* is to be discharged of all tithes, &c. See *Modus Decimandi, Tithes*.

NON DEMISIT. Where a demise is stated to have been by indenture, this is not a good plea to an action of debt for rent, though it may be pleaded when the plaintiff declares *quod cum demisset* without stating the indenture. *Bull. N. P. 177*; *Gilb. on Action of Debt*, 436, 438.

And as a lessee cannot plead *nil habuit in tenementis* to an action of covenant, neither can he nor his assignee plead *non demisit*. 2 *Taunt. 278*.

NON DETINET. The general issue in an action of detinue.

By the rules, *H. T. 4. Wm. 4.* this plea

shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under it.

**NON DISTRINGENDO.** A writ not to distrain, used in divers cases. *Table of Reg. of Writs*

**NONES, nonæ.]** So called from their beginning the ninth day before the *Ides*. The seventh day of March, May, July, and October, and the fifth day of all other months. By the Roman account the *nones* in the aforementioned months are the six days next following the first day, or the *calends*; and of others the four days next after the first, according to these verses:—

*Sex Nonas, Maius, October, Julius, et Mars.  
Quatuor at reliqui, &c.*

Though the last of these days is properly called *nones*; for the others are reckoned backwards as distant from them, and accounted the third, fourth, or fifth *nones*. See *Ides*.

**NON EST FACTUM.** The general issue, in an action on bond or other deed, whereby the defendant denies that to be his deed whereon he is impleaded. *Broke*. In every case where a bond is void, the defendant may plead *non est factum*. But when a bond is voidable only, he must show the special matter, and conclude judgment. *Si a lio, &c.* 2 *Lil* 226

None but the party, his heirs, executors, &c. can plead *non est factum*. *Lutw.* 662 For a stranger to the deed cannot plead a special *non est factum*; but must say, nothing passed by the deed. 1 *Roll* 188.

Now by the rules of H. T. 4 *Wm.* 4. in debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. See *Com. Dig. tit. Pleading*; and this *Dict. tit. Bond, Deed, Pleading*

**NON EST INVENTUS.** The sheriff's return to a writ when the defendant is not to be found in his bailwick. And there was a return that the plaintiff *non inventi plegiam* on original writs. *Shep. Epit.* 1129. See further *Process*.

**NON-FEASANCE.** An offence of omission of what ought to be done; as in not coming to church, &c. which need not be alleged in any certain place; for, generally speaking, it is not committed any where. But non-feasance will not make a man a trespasser, &c. *Hob.* 251; 8 *Rep.* 146.

Non-feasance is to be distinguished from misfeasance or malfeasance. Non-feasance is the not doing that which it was a legal obligation or duty, or contract, to perform; misfeasance is the performance in an improper manner of an act which it was either the party's duty or his contract to perform, or which he had a right to do; and malfeasance the unjustifiable performance of some act which the party had no right, or which he had contracted not

to do. These several modes of committing private injuries are compensated by peculiar and appropriate remedies, in which the cause of action must be properly described. See *Nuisance, Trespass*.

**NON IMPLACITANDO ALIQUEM DE LIBERO TENEMENTO SINE BREVI.** A writ to prohibit bailiffs, &c. from distraining or impleading any man touching his freehold without the king's writ. *Reg. Orig.* 171.

**NON INTROMITTENDO, QUANDO BREVE PRÆCIPE IN CAPITE SUBDOLE IMPETRATUR.** Was a writ directed to the justices of the bench, or in eyre, commanding them not to give one, who had, under colour of entitling the king to land, &c. as holding of him *in capite*, deceitfully obtained the writ called *præcipe in capite*, any benefit thereof, but to put him to his writ of right. *Reg. Orig.* 4. This writ having dependence on the court of wards, since taken away, is now disused.

**NON-JOINDER.** A plea in abatement.

In actions upon contracts, when there are several parties, the action should be brought by or against all of them if living; 1 *Saund.* 291, b. (4); or if some are dead, by or against the survivors. 2 *Saund.* 121, c. (1). But if an action be brought upon a joint contract against one of several partners, he can only plead an abatement, though the plaintiff knew and even contracted with the other partners. 5 *Burr.* 2611; 2 *Bl.* 695; 5 *T. R.* 649.

In actions for wrongs, as they are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is no plea in abatement, or ground of nonsuit, that there are other parties not named. In an action on the case, therefore, against a common carrier for the loss of goods, or for not safely carrying a passenger, the defendant cannot plead in abatement the non-joinder of a co-partner. And by the Common Carriers' Act, 11 *Geo.* 4. & 1 *Wm.* 4. c. 68. § 5 any one or more of several mail contractors, stage-coach proprietors, or common carriers, may be sued; and no action commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in any mail, stage-coach, or other public conveyance by land for hire.

By Lord Tenterden's Act, 9 *Geo.* 4. c. 14. § 2. no plea in abatement can be supported alleging the non-joinder of parties against whom no action is maintainable for want of a written promise

By the 3 & 4 *Wm.* 4. c. 42. § 8. pleas in abatement must state that the person, the non-joinder of whom is pleaded, resides in the jurisdiction of the court, and his residence must be stated with convenient certainty in affidavits verifying such pleas.

§ 9. To a plea in abatement for non-joinder the plaintiff may reply that the person has been discharged by bankruptcy and certificate, or under the Insolvent Acts.



§ 10. A plaintiff commencing another action against defendants in the action wherein a plea of abatement was pleaded, and the persons named in such plea as joint-contractors (if it shall appear by the pleadings or on the trial of such subsequent action that all the original defendants are liable, but one or more of the others are not,) shall nevertheless be entitled to judgment, or to a verdict and judgment against the defendants appearing liable; and every defendant not so liable shall have judgment and his costs as against the plaintiff, who shall be the same against the original defendants; but the latter may in the trial adduce evidence of the liability of the defendants named by them.

By the rules T. H. 4 Wm. 4. in all cases under the above section, the commencement of the declaration shall be in the form thereby given.

**NON-JURORS.** Persons who refuse to take the oaths to government, who are liable to certain penalties.

By 13 & 14 Car. 2. c. 1. those who maintained that oaths in any case were unlawful, were for a third offence to abjure the realm, or otherwise to be transported; but this statute was repealed by 52 Geo. 3. c. 155.

Ecclesiastical persons not taking the oaths on the Revolution, were rendered incapable to hold their livings; but the king was empowered to grant such of the non-juring clergy as he thought fit, not above twelve, an allowance out of their ecclesiastical benefices for their subsistence, not exceeding a third part. 1 W. & M. sess. 1. c. 8. Persons refusing the oaths shall incur, forfeit, and suffer the penalties then inflicted on Popish recusants, and the Court of Exchequer may issue out process against their lands, &c. 7 & 8 W. 3. c. 27.

Blackstone enumerates, among the contempts to the king's title, the refusing or neglecting to take the oaths appointed by the statutes for the better securing the government, and yet acting in a public office, place of trust, or other capacity for which the said oaths are required to be taken, viz. those of allegiance, supremacy, and abjuration, which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by 1 Geo. 1. st. 2. c. 13. are very little if any thing short of those of a *præmunire*; being an incapacity to hold the said offices or any other, to prosecute any suit, to be guardian or executor, to take any legacy or deed of gift; and to vote at any election for members of parliament; and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same. Members on the foundation in any college of the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register within one month after; otherwise, if the electors do not remove him and elect another within twelve months, or after, the king may nominate a person to succeed him, by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon and tender the oaths to any per-

son whom they shall suspect to be disaffected. 4 Comm. 123, 124. See further *Dissenters, Non-conformists, Oaths, Roman Catholics.*

**NON MERCHANDIZANDO VICTUALIA.** An ancient writ to justices of assize, to inquire whether the magistrates of such a town do sell victuals in gross, or by retail, during the time of their being in office, which is contrary to an obsolete statute; and to punish them if they do. *Reg. Orig.* 184.

**NON MOLESTANDO.** A writ that lies for a person who is molested contrary to the king's protection granted him. *Reg. of Writs*, 184.

**NON OBSTANTE, Notwithstanding.]** Was a clause heretofore frequent in statutes and letters-patent, and was a licence from the king to do a thing which at the common law might be lawfully done; but which being restrained by act of parliament, could not be done without such licence. *Vaugh.* 347; *Plowd.* 501. But this doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated at Westminster Hall when King James abdicated the kingdom. 1 Comm. 342. See *tit. Grant of the King; King, V. 3; Mortmain; Pardon.*

**NON OMITTAS.** A writ directed to the sheriff, where the bailiff of a liberty or franchise who hath the return of writs refuses or neglects to serve a process for the sheriff to enter into the franchise and execute the king's process himself, or by his officer.

Before this writ is granted, the sheriff ought to return that he hath sent to the bailiff, and that he hath not served the writ; but for despatch, the usual practice was to send a *non omittas* with a *capias* or *latitat*. *F. N. B.* 68, 74; 2 *Inst.* 453. And a clause of *non omittas* is to be inserted in the *capias* given by the uniformity of process act. See *Process*.

If a sheriff return that he sent the process to the bailiff of a liberty, who hath given him no answer, a *non omittas* shall be awarded to the sheriff. And if he returns that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter, and the bailiff bring not in the body, or money, &c. at the day, the bailiff shall be amerced, and a writ issue to the sheriff to distrain the bailiff to bring in the body. 2 *Hawk. P. C.*

The *Reg. of Writs* mentions three sorts of this writ, given to prevent liberties being privileged to hinder or delay the general execution of justice; and the clause of the *non omittas* is, *quod non omittas, propter aliquam libertatem*, (viz. such liberty to which the sheriff hath made a *mandavi ballivo, qui nullum dedit responsum*) *quin in am ingrediaris et capias A. B. Si, &c.*

Writs of *capias utlagatum* and of *quo minus* (now abolished) out of the Exchequer, and it is said all writs whatsoever at the king's suit, are of the same effect as a *non omittas*; and the sheriff may by virtue of them enter into a liberty and execute them. 2 *Lil. Abr.* 229.

**NON PLEVIN, non plevina.]** Is defined to be *defalta post defaltam*; and in *Hengham*

*Magna, cap. 8.* it is said, that the defendant is to replevy his lands seized by the king within fifteen days; and if he neglects, then, at the instance of the plaintiff, at the next court-day, he shall lose his seisin, *sicut per defaultam post defaultam*. But by 9 *Edw. 3. c. 2.* it was enacted, that none should lose his land, because of *non plevin*, i. e. where the land was not replevied in due time.

**NON PONENDIS IN ASSISIS ET JURATIS.** A writ formerly granted for freeing and discharging persons from serving on assizes and juries; and when one had a charter of exemption, he might have sued the sheriff for returning him. This writ was founded on the *West. 2. 13. Edw. 1. st. 1. c. 38.* and *Articuli super Chartas, 28 Edw. 1. st. 3. c. 9*; both of which are now repealed by the 6 *Geo. 4. c. 50. § 62.* See *F. N. B.*, 165; 2 *Inst.* 127, 447.

**NON PROCEDENDO AD ASSISAM REGE INCONSULTO.** A writ to stop the trial of a cause appertaining to one who is in the king's service, &c. until the king's pleasure be farther known. *Reg. Orig.* 220.

**NON PROS, or NON PROSEQUITUR.** See *Nolle Prosequi, Nonsuit.*

**NON RESIDENCE.** The absence of spiritual persons from their benefices. See *Residence*.

**NON RESIDENTIA PRO CLERICUS REGIS.** A writ directed to the bishop, charging him not to molest a clerk employed in the king's service, by reason of his non residence; in which case he is to be discharged. *Reg. Orig.* 58.

**NON SANE MEMORY,** *Non sanæ Memoriae*] See *Idiots and Lunatics.*

**NONSENSE.** Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, some words cannot be rejected to make sense of the rest, but must be taken as they are; for there is nothing so absurd but what by rejecting may be made sense; but where the matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected. As in ejectment where the declaration is of a demise the 2d of January, and that the defendant *postea*, to wit, on the 1st of January, ejected him; here the *scilicet* may be rejected, as being expressly contrary to the *postea* and the precedent matter; per *Holt, C. J.* 1 *Salk.* 324. But per *Powell, J.*—Words unnecessary might in construction be omitted or rejected, though they are not repugnant or contradictory; but in *cæteris omnibus* agreed with the chief justice. See *Amendment, Mistake.*

**NON SOLVENDO PECUNIAM, AD QUAM CLERICUS MULCTATUR PRO NON RESIDENTIA.** A writ prohibiting an ordinary to take a pecuniary mulct, imposed on a clerk of the king's for non-residence. *Reg. of Writs*, fol. 59.

## NONSUIT.

**NON EST PROSECUTUS.]** A renunciation of

a suit by the plaintiff or demandant, most commonly upon the discovery of some error or defect, when the matter is so far proceeded in that the jury is ready to deliver their verdict. The civilians term it *litis renunciationem* *Cowell.*

If the plaintiff in an action neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law, in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do; and thereupon a nonsuit or *non prosequitur* is entered, and he is said to be non-prossed. And for thus deserting his complaint, after making a false claim (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. A nonsuit differs from a *retraxit*, in that the former is negative, and the latter positive. The nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he for ever loses his action. 3 *Comm.* c. 20. p. 295, 296.

Before the jury gave their verdict on a trial, it was formerly usual to call or demand the plaintiff, in order to answer the amercement, to which by the old law he was liable, in case he failed in his suit. 3 *Comm.* 376. And it is now usual to call him, whenever he is unable to make out his case, either by reason of his not adducing any evidence in support of it, or any evidence arising in the proper county. The cases in which it is necessary that the evidence should arise in a particular county, are either where the action is in itself local, or made so by act of parliament, as in action upon penal statutes, &c. or where upon a motion to change or retain the venue, the plaintiff undertakes to give material evidence in the county where the action was brought. 2 *Black. Rep.* 1039. See *Action, Venue.* And there is this advantage attending a nonsuit; that, as is already hinted, the plaintiff, though he pay costs, may afterwards bring another action for the same cause, which he cannot do after a verdict against him. *Tidd's Prac.*

- I. Who may be Nonsuit; in what Action, and at what time, there may be a Nonsuit.
- II. How far the Nonsuit of one shall be the Nonsuit of another; and how far a Nonsuit for part of the thing in demand shall be a Nonsuit for the whole.
- III. Of the effect of a Nonsuit; and of its being a temporary bar.
- IV. Of Judgments as in case of a Nonsuit.

I. It is agreed that the king being in supposition of law, always present in court, cannot be nonsuit in any information or action wherein he is sole plaintiff; but it is held, that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, as well in respect of the king as of himself. *Bro. Nonsuit*, 68; *Co. Lit.* 139, b; 2 *Roll. Abr.* 131.

If an infant bring an assize by guardian, although the infant disavow the suit in proper

person, yet no nonsuit shall be awarded. 39 *Ass. pl.* 1; 2 *Roll. Abr.* 130.

If an attorney of the Common Pleas sues an action there, he shall not be demanded, because he is supposed always present aiding the court. 2 *H. 6.* 44 *b*; 1 *Roll. Abr.* 581. *Sed. qu.* as to this doctrine. In many cases it is the interest of the plaintiff to be nonsuit, instead of having a verdict against him, as he may bring a new action, wherein, if properly advised and pursued, he may recover. *J. M.*

A person may be nonsuit in a writ of error 2 *Roll. Abr.* 130; 1 *Sid.* 255. So in a writ of false judgment. 20 *H. 6.* 18 *b*; 2 *Roll. Abr.* 130, *S. C.*

One cannot be nonsuit in an action in which he is not an actor or demandant; and though he afterwards becomes an actor, yet not being originally so, he cannot be nonsuit, as an avowant; so of garnishees who become actors, but were not so originally. 22 *Edw.* 4. 10.

So if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, though hereby he is an actor, yet he cannot be nonsuit. 2 *Roll. Abr.* 130.

So if a man traverse an office he cannot be nonsuit, though he is an actor, for he hath no original pending against the king. 2 *Roll. Abr.* 130; *Dyer*, 141, *pl.* 17, where it is made a *quare*

But in a petition of right against the king, the plaintiff may be nonsuit. 11 *H. 4.* 52; 2 *Roll. Abr.* 130.

So in an *audita querela*, to avoid a statute, the plaintiff may be nonsuit, for he is plaintiff in this action. 47 *Edw.* 3. 5 *b*

So he may be nonsuit in *scire facias* as well as in other actions. 1 *Camp.* 484.

If in two *nikils* returned to a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonsuit; for the statute ordains, that upon his appearing he ought to count against the defendant. 45 *Edw.* 3. 16.

At the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit. *Co. Lit.* 139, *b*. That if at common law he did not like the damages given by the jury, he might be nonsuit. See 5 *Mod.* 208.

But by 2 *Hen. 4. c. 7.* it was enacted in the words following: "Whereas, upon verdict found before any justice in assize of *novel disseisin*, *mort d'ancestor*, (now abolished,) or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, the same plaintiff shall not be nonsuited."

Notwithstanding this statute, it has been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and argument thereon. *Co. Lit.* 139; 2 *Jon.* 1; 2 *Roll. Abr.* 131, 132; 3 *Leon.* 28, and see 2 *Hawk. P. C. c.* 23, § 95.

A nonsuit can only be at the instance of the defendant; and therefore where the cause at *nisi prius* was called on, and jury sworn, but no counsel, attorneys, parties, or witnesses ap-

peared on either side, the judge held, that the only way was to discharge the jury; for nobody has a right to demand the plaintiff but the defendant, and the defendant not demanding him, the judge could not order him to be called. 1 *Str.* 267. See also 2 *Str.* 1117.

But the plaintiff may be nonsuited in an undefended cause if he do not make out a proper case, or for a variance. 3 *Taunt.* 81. Where a cause is undefended at *nisi prius*, and the judge directs a nonsuit, with liberty for the plaintiff to move to enter a verdict, the court may order the verdict to be entered accordingly for the plaintiff. 4 *B. & A.* 418.

When a cause is carried down by *proviso*, and the plaintiff does not appear at the trial, he should be nonsuited. 1 *B. & C.* 110; and see 1 *B. & C.* 94.

After a plea of tender the plaintiff, it is said, cannot be nonsuited. 1 *Camp.* 327, (but see the notes). It is the practice to nonsuit him if he cannot make out his case, although money has been paid into court. 2 *Salk.* 597; 7 *T. R.* 372.

The plaintiff in no case is compellable to be nonsuited after he has appeared; 2 *T. R.* 275; and therefore if he insist upon the matter being left to a jury, they must give in their verdict, which is general or special. If it be for the plaintiff, or for the defendant in *replevin*, the jury should regularly assess the damages; but when the plaintiff is nonsuited on the trial of an issue, he cannot have contingent damages assessed for him on a demurrer. 1 *Str.* 507. Though when the plaintiff in *replevin* is nonsuited, the jury may assess damages for the defendant. *Comb.* 11; 5 *Mod.* 76; and see *Tidd's Pract.*

With respect to nonsuits in ejectment, see that title, VII.

II. In real or mixt actions, the nonsuit of one demandant is not the nonsuit of both; but he who makes default shall be summoned and severed; but regularly, in personal actions, the nonsuit of one is the nonsuit of both. *Co. Lit.* 139; 2 *Inst.* 563; and see *Roll. Abr.* 132, several cases to this purpose.

But in personal actions brought by executors, there shall be summons and severance, because the best measure shall be taken for the benefit of the dead; and so it is in action of trespass, as executors for goods taken out of their own possession. Like law in account, as executors by the receipt of their own hands. *Co. Lit.* 139, *a*. See *Executors.* VI. 2.

In an *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge; and freeing themselves, therefore the default of the one shall not hurt the other, *Co. Lit.* 139. In an *audita querela*, *scire facias*, *attaint*, the nonsuit of one shall not prejudice the other. 6 *Co.* 26.

In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both; because the tenant cannot attorn according to the grant. *Co. Lit.* 139, *a*.

So on an appeal against divers, whether they pleaded to the same or several issues, it was ad-



judged that a nonsuit against one, at the trial of any of the issues, was a nonsuit as to all, because a nonsuit operated as a release of the whole. *Cro. Eliz.* 460, *pl.* 6; *Dyer*, 420; 2 *Roll. Abr.* 133; 1 *Sid.* 378.

A *latitat* was sued out against four defendants in trespass, the plaintiff was nonsuit for want of a declaration, and the defendant's attorney entered four nonsuits against him; and, it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till severed by the court. 2 *Salk.* 455. There is a nonsuit before appearance at the return of the writ, or after appearance at some day of continuance. *Co. Lit.* 138, *b.*

In an action against several defendants, the plaintiff must be nonsuited as to all or none of them; and, therefore, if one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict if the plaintiff fail to make out his case. 3 *T. R.* 662.

It is laid down as a general rule, that a nonsuit for part is a nonsuit for the whole; but it hath been held, that if a defendant plead to one part, and thereupon issue is joined, and demur to the other, the plaintiff may be nonsuit as to one part, and proceed for the other. 2 *Leon.* 177; *Hob.* 180.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is confessed; but there is a *cesset executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall be a nonsuit for the damages to be given, because that he had judgment. 2 *Roll. Abr.* 134.

If in trover the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others, that he had them of the gift of the plaintiff, and as to the rest not guilty; and as to the first, the plaintiff enters *non vult ulterius prosecui*; this amounts only to a *retrahit*, and is no nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule that a nonsuit for part is a nonsuit for the whole. 2 *Leon.* 177.

III. A NONSUIT, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature; but this general rule has or had the following exceptions:—

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent that cometh in by that writ, shall never be removed, which is a flat bar to that presentation.

2. Nonsuit in an appeal of murder, rape, robbery, &c. after appearance was peremptory, and this *in favorem vite*; but the nonsuit of the plaintiff in an appeal was not such an acquittal on which the defendant should recover damages against the abettors, by *Westm.* 2. 13 *Edw.* 1. *st.* 1. *c.* 12; unless after the non-

suit he were arraigned at the king's suit, and acquitted.

3. So if the plaintiff, in an appeal of maihem, were nonsuit after appearance, it was peremptory, for the words therein were *felo-nice maihemavit*. Appeals, however, in criminal cases, were abolished by the 59 *Geo.* 3. *c.* 46.

4. A nonsuit after appearance is also peremptory in a writ of *nativo habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem liberatis*; for in a *libertate probanda* such nonsuit is not peremptory, neither is the nonsuit of one plaintiff the nonsuit of both. *Co. Lit.* 139, *a*; *Cro. Eliz.* 881.

5. Such nonsuit was also peremptory in attaint (abolished by the 6 *Geo.* 4. *c.* 50. § 60), but a discontinuance in an attaint was not, because there was a judgment given upon the nonsuit, but not upon the discontinuance. *Co. Lit.* 139, *a.*

If a record be ever so erroneous, the plaintiff who has made default by suffering a nonsuit, cannot have a judgment afterwards in his favour. 4 *T. R.* 436.

IV. The delay and expense attending the trial by proviso, (see *Trial*), gave rise to the 14 *Geo.* 2. *c.* 17. which enacted, that where any issue is joined in an action in the courts at Westminster, and the plaintiff hath neglected to bring such issue on to be tried, according to the practice of the said courts, the judges of the said courts respectively may, at any time after such neglect, upon motion in open court (due notice having been given thereof), give the like judgment for the defendant as in cases of nonsuit; unless the said court shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time so allowed, then the said court shall proceed to give such judgment as aforesaid. Provided that all judgments given by virtue of this act shall be of the like force and effect as judgments upon nonsuit. Provided also, that the defendants shall upon such judgment be awarded their costs in any action or suit where they would upon nonsuit be entitled to the same.

This statute has been held to extend to *quidam* actions, as well as others. *Barnes*, 315. And also to a traverse of the return of a mandamus. *Say. Rep.* 110; *Say. Costs*, 166; 4 *T. R.* 689. And to a writ of right, in which it may be entered against the demandant. 1 *Bos. & Pull.* 103.

But it does not extend any more than the trial by proviso to actions of *replevin*, &c. in which the defendant is considered as an actor, and may therefore enter the issue and carry down the cause to trial himself. 1 *Black. Rep.* 375; *Say. Costs*, 168; 3 *T. R.* 661; 5 *T. R.* 400; but see *Barnes*, 317. And where there are two defendants one of whom lets judgment go by default, the other cannot have judgment as in case of a nonsuit. *Say. Rep.* 22, 103; *Say. Costs*, 163, 164, 168; 1 *Wils.* 325; 1 *Burr.* 358. Also, where the cause has been once carried down to trial, the defendant cannot have such judgment for not carrying it down

again. 1 *T. R.* 192; 3 *T. R.* 1; 1 *H. Black.* 101.

The course and practice of the court, referred to by the statute, is that which before regulated the trial by *provisio* (see *Trial*); and as the defendant could not have such trial until the plaintiff had been guilty of laches, nor until after the issue was entered on record, so neither till then is he entitled to judgment as in case of a nonsuit. If the action be laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which it is joined, unless notice of trial hath been given; and accordingly it is held, that in a town cause, unless notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after that term; the plaintiff in such case having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after. 4 *T. R.* 557; 1 *H. Black.* 65, *contra*; and see 1 *H. Black.* 123, 282. But if notice of trial has been given, in a town cause, for a sitting in term, the plaintiff may move for judgment as in case of a nonsuit, the next term, being the term after that in which the issue ought to be entered. To support a rule for judgment as in case of a nonsuit in the next term after that in which issue was joined, the affidavit must state that notice of trial was given for a sitting in the preceding term; but in the third or other subsequent term, a general affidavit, stating the term when the issue was joined, is deemed sufficient. 1 *H. Black.* 282. In a country cause, where notice of trial is given for the assizes, the defendant may move for judgment as in case of a nonsuit the next term; but the plaintiff is not bound to give notice of trial till the term succeeded that in which issue was joined. And if he do not, the plaintiff cannot move for judgment as in case of a nonsuit, till after the next assizes. 2 *T. R.* 734.

The rule for judgment as in case of a nonsuit is a rule to show cause, founded on an affidavit of the state of the proceedings, and of the plaintiff's default in not proceeding to trial; which rule has been held sufficient notice of motion within the act. *Loffl*, 265; 1 *H. Black.* 527, *contra*.

Now by the rules *H. T.* 2 *W.* 4. a rule nisi for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

The roll must formerly have been in court at the time the motion was made.

But by one of the above rules, no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit.

The rule is made absolute of course, on an affidavit of service, unless the plaintiff show some cause to the contrary; as the absence of a material witness, &c. But a slight cause in general is deemed sufficient, if the plaintiff will undertake peremptorily to try at the next sittings or assizes. The insolvency of the defendant, after the action brought, is good cause against judgment as in case of a nonsuit. *Doug.* 671. But unless the plaintiff will consent to stay all further proceedings, and enter a *cesset processus*, the court will bind him down to a peremptory undertaking. Where the rule to show cause was discharged, on an affidavit which contained an answer false in itself, the court would not afterwards open the matter, on an affidavit which disproved the contents of the former one. 3 *T. R.* 405. See *Tidd's Pract.* See further *Costs, Damages, Process, Trial, &c.*

**NON SUM INFORMATUS.** A formal answer made of course by an attorney, that he is not instructed or informed to say any thing material in defence of his client; by which he is deemed to leave it undefended, and so judgment passeth against his client. See *Judgments acknowledged for Debts*.

**NON-TENURE.** Was a plea in bar to a real action, by saying, that he (the defendant) held not the land mentioned in the plaintiff's count or declaration, or at least some part thereof. See 25 *E. 3. c.* 16; 1 *Mod. Rep.* 250. And our books mention non-tenure general and special; general, where one denied ever to have been tenant of the land in question; and special was an exception, alleging that he was not tenant on the day whereon the writ was purchased. *West. Symb. par.* 2. When the tenant or defendant pleaded non-tenure of the whole, he need not have said who was tenant; but if he pleaded non-tenure as to part, he must have set the tenant forth. 1 *Mod.* 181. Non-tenure in part, or in the whole, was not pleadable after imparlance. 3 *Lev.* 55. See *Pleading*.

**NON-TERM, non terminus.]** The vacation between term and term; formerly called the time or days of the king's peace. *Lamb. Archæ.* 126

**NON-USER.** Of offices concerning the public, is cause of forfeiture. 9 *Rep.* 50. And if one have a franchise, and do not use it, he shall forfeit the same; which likewise may be lost by default, as well as non-user. See *Condition, I. 1, Office*.

**NOOK OF LAND, nocata terra.]** In an old deed of Sir Walter de Pedwardyn, twelve acres and a half of land were called a nook of land; but the quantity is generally uncertain. *Dugd. Warwick. p.* 665.

**NORRY, quasi North Roy.]** The Northern King at Arms, 14 *Car. 2. c.* 33. See *Herald*.

**NORTHAMPTON.** The statute named from this place was made there, *anno* 2 E. 3. **NORTHERN BORDERS, NORTHUMBERLAND AND NORTHERN COUNTIES.** Provisions for preventing theft and rapine upon the northern borders were made by numerous statutes, which are now repealed by the 7 & 8 Geo. 4. c. 27.

**NORTH WALES.** See *Wales*.

**NORTH-WEST PASSAGE.** Various rewards for the discovery of a passage from the Atlantic to the Pacific ocean, were offered by the 16 Geo. 3. c. 6. and the 58 Geo. 3. c. 20. both of which statutes were repealed by the 9 Geo. 4. c. 66. The same act also repealed the statutes proposing rewards for the discovery of the longitude at sea. See *Longitude*; under which head it should have been stated that these latter statutes are now no longer in force.

**NORWICH.** See 9 Geo. 1. c. 9; and *Wool, Woollen Manufactures*.

**NOTARY, OR NOTARY-PUBLIC, notarius.]** A person who takes notes, or makes a short draught of contracts, obligations, or other writings and instruments. 27 Ed. 3. st. 1. c. 1. At this time a notary-public is one who publicly attests deeds or writings, to make them authentic in another country, but principally in business relating to merchants, they make protests of foreign bills of exchange, &c.

The 41 Geo. 3. c. 79. was passed for regulating public notaries in England. By this act no person shall act as a notary unless duly admitted, nor shall he be admitted as a notary unless he shall have served seven years' apprenticeship to a notary, on penalty of 50*l*. Notaries shall not permit unqualified persons to act in their names. Persons applying to become notaries within the jurisdiction of the Company of Scriveners in London, shall be free of the said company.

By the 3 & 4 W. 4. c. 70. the clause in the above act requiring persons to serve a seven years' clerkship before they can be admitted notaries, is limited to London and a circuit of ten miles from the Royal Exchange.

§ 2. empowers the master of the Court of Faculties of the Archbishop of Canterbury to appoint and admit as notaries; attorneys, solicitors, or proctors, residing beyond, but who (§ 3.) are not to practise within the above limits. By § 4. notaries admitted under the act, practising out of the district specified in their faculties, are to be struck off the roll, and disabled from performing any notarial act.

**NOTE OF A FINE.** Was a brief of the fine made by the chirographer before it was engrossed. *West. Symb.*

**NOTES PROMISSORY.** See *Bills of Exchange*.

**NOT GUILTY, IN CRIMINAL CASES.** The general issue or plea of the defendant in any criminal action or prosecution.

By the 7 & 8 Geo. 4. c. 28. § 1. if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto "not guilty," he shall by such plea, without any further

form, be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly.

By § 2. if any person arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court may, if it think fit, order a plea of not guilty to be entered on behalf of such person, which shall have the same effect as if such person had pleaded.

**NOT GUILTY, IN CIVIL ACTIONS.** The general issue in trespass and actions on the case. Not guilty is a good issue in actions of trespass, and upon the case for deceits or wrongs: but not on a promise, &c. *Palm.* 393. If one have just cause of justification in trespass, and plead not guilty, he cannot give the special matter in evidence, but must confess the fact, and plead the special matter, &c. 5 Rep. 119. Unless where it is otherwise provided for by statute; as in the case of justices of the peace, peace officers, church-wardens, and overseers of the poor, &c.

By the rules of H. T. 4 W. 4. in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

See the instances subjoined of the above rule by way of example. See further *Nuisance, Pleading, Slander, Way*.

**NOTICE.** The making something known, that a man was or might be ignorant of before. And it produces divers effects; for by it the party who gives the same shall have some benefit, which otherwise he should not have had; by this means, the party to whom the notice is given is made subject to some action or charge that otherwise he had not been liable to, and his estate in danger of prejudice. *Co. Lit.* 309

Notice is required to be given in many cases by law to justify proceedings where any thing is to be done or demanded, &c. But none is bound by law to give notice to another person of that which such other may otherwise inform himself, except in cases where notice is directed by act of parliament.

Generally speaking, where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling-house is sufficient. But it is otherwise in the case of process, to bring a party into contempt; there personal notice is necessary.

It is impossible in the present work to enumerate the various cases in which a notice is necessary or advisable; many of which will be found enumerated in 1 *Chitty's General Practice of the Law*. And see further *Action, Award, Condition, Covenant, Justice, Lease, Mortgage, Motion, Trial, &c.*



NOTICE TO QUIT. See *Ejectment*, V., *Lease*, I. 4.

NOVALE. Land newly ploughed or converted into tillage, that had not been tilled within time of memory; and sometimes it is taken for ground which hath been ploughed for two years, and afterwards lies fallow for one year; or that which lies fallow every other year; it is called *novale*, because the earth *novâ culturâ proscinditur*. *Cartular. Abbat. de Furnesse in Com. Lac. in Officio Ducat. Lanc. fol. 41.*

NOVA OBLATA. See *Oblata*.

NOVEL ASSIGNMENT, *nova assignatio*.] See *New Assignment*, *Trespas*.

NOVEL DISSEISIN, *nova disseisina*.] Now abolished. See *Assize of Novel Disseisin*, *Disseisin*.

NOVELLÆ. Those constitutions of the civil law which were made after the publication of the *Theodosian* code, were called *novellæ* by the Emperors who ordained them; but some writers call the *Julian* edition only by that name. See *Civil Law*.

NOYLES. By the 21 *Jac.* 1. c. 18. no person should put any flocks, noyles, thrums, &c. or other deceivable thing, into any broad woollen cloth; but this statute was repealed by the 49 *Geo.* 3. c. 109.

NUCES COLLIGERE. To gather hazelnuts; this was formerly one of the works or services imposed by lords upon their inferior tenants. *Paroch. Antiq.* 495.

NUDE CONTRACT. See *Nudum Pactum*.

NUDE MATTER. A bare allegation of a thing done, &c. See *Matter*.

NUDUM PACTUM. Is a bare naked contract without a consideration. If a man bargains or sells goods, &c. and there is no recompence made or given for the doing thereof; as if one say to another, I sell you all my lands or goods, but nothing is agreed upon what the other shall give or pay for the same, so that there is not a *quid pro quo* of the one thing for another; this is a nude contract, and void in law, and for the non-performance thereof, no action will lie; for the maxim of law is *ex nudo pacto non oritur actio*. *Terms de Ley*. The law, in fact, supposes error in making these contracts; they being as it were of one side only. See *Assumpsit*, III., *Consideration*.

NUISANCE (anciently spelled) NUSANCE.

NOCUMENTUM, from the Fr. *nuire*, i. e. *nocere*.] Annoyance; any thing that worketh hurt, inconvenience, or damage.

Nuisances are of two kinds; public or common, which affect the public, and are an annoyance to all the king's subjects; and private nuisances, which may be defined to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. *Finch*, L. 188.

I. *Common or public Nuisances; what shall be considered as such.*

II. *What are private Nuisances.*

III. *Of the remedy for public Nuisances.*

IV. *Of the remedy for Private Nuisances.*

I. COMMON NUISANCES are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. 1 *Hawk. P. C. c.* 75. § 1.

Of this nature are—1. Annoyances in the highways, bridges, and the public rivers, by rendering the same inconvenient or dangerous to pass, either positively by actual obstructions, or negatively by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large may be indicted, distrained to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assize, &c. or a justice of the peace, shall be in all respects equivalent to an indictment. 7 *Geo.* 3. c. 42.

Where there is an house erected, or an inclosure made on any part of the king's demesnes, or of an highway, or common street, or public river, or such like public things, it is called a *perpresture*, from the French *pourpris*, an inclosure. 1 *Inst.* 277; and see *Way*.

A bridge built in a public highway without public utility, is indictable as a nuisance; and so it is if built colorably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. 2 *East*, 342.

In a late case, the defendant being proprietor of a colliery, made a rail-road from it to a sea-port town. The rail-road was 400 yards long, and laid upon a turnpike-road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass. Defendant allowed the public to use the rail road, paying a toll. Held, that the facility thereby given to the general traffic with the sea-port, and particularly to the conveyance of coals there, was not such a convenience as justified the obstruction of the highway. 1 *B. & Adol.* 111.

The defendants, for the preservation of their lands had severally raised banks or fenders, which occasioned the water of a brook to flow in much greater quantities to the aqueduct of a canal than it otherwise would have done, and thereby greatly endangered the canal. The canal had been constructed under an act of parliament before the embankments of the defendants were made, and had not been the cause of a greater flow of water on the defendants' lands. Held, that the defendants were indictable as for a nuisance, in turning the water from its natural course to the injury of the canal, (which was regarded as a public highway,) though by so doing they protected their own lands from injury. *The King v. Trafford*, 1 *B. & Ad.* 874; and see 6 *B. & C.* 317; 8 *B. & C.* 355.

Under acts of parliament empowering a company to make a railway between certain points, (reciting that it would be of great public utility, and materially assist the general traffic of the country,) and to use locomotive engines upon it; the railway was made parallel to an ancient highway, and in some places within a few yards of it. The locomotive engines frightened the horses of persons using the highway. On an indictment against the company for a nuisance, it was held that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, the words authorising the use of the engines being unqualified; and the public benefit derived from the railway showed that there was nothing unreasonable in the clause that gave such an authority to the company. *Rez v. Pease*, 4 B. & Ad. 30.

A common waggoner, who continually obstructs the passage of a street by the exercise of his business, may be indicted for a nuisance. 6 East, 427. See 3 Camp. 226.

If a ship be sunk in a port or haven, and it is not removed by the owner, he may be indicted for it as a common nuisance, because it is prejudicial to the commonwealth in hindering navigation and trade. 2 Lil. 244.

So it is a nuisance to lay timber in a public river, although the soil on which it is laid belong to the party; provided it obstructs the necessary intercourse. 3 Bac. Abr.; Str. 1247. Or to place a floating dock in the river, although beneficial in repairing ships. 2 Hawk. P. C. c. 75. § 11. in n.

So indictments lies for laying logs, &c. in the stream of a public navigable river; it is a common nuisance to divert part of a public navigable river whereby the current is weakened, and unable to carry vessels of the same burden it could before; and if a river be stopped to the nuisance of the country, and none appear bound by proscription to cleanse it; those who have the piscary, and the neighbouring towns that have a common passage and easement therein, may be compelled to do the same. 1 Hawk. P. C. c. 75. §§ 11. 13.

In a late important case the law respecting nuisances in navigable rivers was fully considered, and led to a difference of opinion on the bench. On the trial of an indictment for a nuisance in the river at Newcastle by erecting staiths there for loading ships with coals, the jury were directed by Bayley, J. to acquit the defendants if they thought that the abridgement of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for passage of vessels on the river; and he pointed out to the jury that by

means of the staiths coals were supplied at a cheaper rate, and in better condition than they otherwise could be, which was a public benefit. Held by Bayley and Holroyd, Justices, that this direction to the jury was proper. Lord Tenterden, C. J. dissente.; *Rez v. Russell*, 7 Barn. & C.; and see *Rez v. Grosvenor*, 2 Stark. 511.

2. All those those kinds of nuisances (such as offensive trades and manufactures) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by public prosecutions, and subject to fine according to the quantity of the misdemeanor; and particularly the keeping of any hogs in any city or market-town is indictable as a public nuisance. Salk. 460.

A brew-house erected in such an inconvenient place, wherein the business cannot be carried on without incommoding the neighbourhood, may be indicted as a common nuisance; and so in the like case may a glass-house, &c. 1 Hawk. P. C. c. 75. § 10. Where there hath been an ancient brew-house time out of mind, although in a most public street of a city, this is not any nuisance, because it shall be supposed to be erected when there were no buildings near: though if a brew-house should be new built in any of the high streets of London, or trading places, it will be a nuisance, and action on the case lies for whomsoever receives any damage thereby, 2 Lil. Abr. 246; Palm. 536.

So it was decided in a recent case, that where a person sets up a noxious trade remote from human habitations and public roads, and new houses are afterwards built, and new roads constructed near it; the party in this case is not guilty of a nuisance for continuing his trade, although it be a nuisance to the new inhabitants, and to persons passing along the new constructed road; for they cannot by their own act of coming to settle in the neighbourhood, make that a nuisance which was not so before, on the principle of *volenti non fit injuria*. 2 C. & P. 483.

It is a nuisance to manufacture acid spirit of sulphur, vitriol, or *aqua fortis* in the vicinity of dwelling-houses, 1 Barn. 233; and see *Peake's Ca.* 90; 1 Mod. & Malk.; and it is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life uncomfortable; 1 Barn. 337; and it seems to be immaterial how long an offensive manufacture or other nuisance has been carried on, since no length of time can legitimate a nuisance; 3 Camp. 227; 7 East, 199; and at all events a party increasing the nuisance of an offensive trade may be indicted for the increase, even though the original establishment

of it may become legal by the lapse of time. *1 Mod. & Malk.* 281. For which offence she may be indicted. *6 Mod.* 213. And, if convicted, shall be sentenced to be placed in a certain engine of correction, called the trebucket, castigatory, or cucking-stool. *3 Inst.* 219. See *Castigatory, Scold*.

In judging whether a particular trade is a public nuisance or not, the public good may in some cases—when the public health is not concerned—be taken into consideration to see if it outweighs the public annoyance. And with respect to offensive works, though they may have been originally established under circumstances which would *prima facie* protect them against a prosecution for a nuisance, yet it seems, that a wilful neglect to adopt established improvements which would make them less offensive may be indictable. *1 Russ.* 297.

3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may upon indictment be suppressed and fined. *1 Hawk. P. C. c. 75. § 6.*

Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller, without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behaviour. *1 Hawk. P. C. c. 78. § 2.* See *Inns*.

4. By the 10 & 11 W. 3. c. 17. all lotteries are declared to be public nuisances; and all grants, patents, or licenses for the same to be contrary to law. See further *Lotteries*.

As to the statute 6 Geo. 1. c. 18. (now repealed), which rendered certain advertising stock companies, with transferable shares, public nuisances, and the cases decided on the act, see *Bac. Abr. Nuisance, A. 7th edit.*

5. The making and selling of fire-works and squibs, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, 9 & 10 W. 3. c. 7. and therefore is punishable by fine. See title *Fire-works*. To this head also may be referred (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of gunpowder at one time, or in one place, or vehicle, which is prohibited by 12 Geo. 3. c. 61. under heavy penalties and forfeiture. See title *Gunpowder*.

6. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to harken after discourse, and thereupon to frame scandalous and mischievous tales, are a common nuisance, and presentable at the court-leet. *Kitch. of Courts*, 20. Or are indictable at the sessions, and punishable by fine, and finding sureties for their good behaviour. *Ibid.* *1 Hawk. P. C. c. 61. § 4.*

Lastly, a common scold is a public nuisance,

to her neighbourhood. For which offence she may be indicted. *6 Mod.* 213. And, if convicted, shall be sentenced to be placed in a certain engine of correction, called the trebucket, castigatory, or cucking-stool. *3 Inst.* 219. See *Castigatory, Scold*.

It is a common nuisance indictable to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of sickness and infection of the plague. *2 Roll. Abr.* 139.

So it is a nuisance for persons afflicted with infectious disorders to go about in the highways and other places of resort. See *4 M. & S.* 73; *Ib.* 272.

A common playhouse, if it draws together such number of coaches and people as incommode and disturb the neighbourhood, may be a nuisance; but these places are not naturally nuisances, but become so by accident. *1 Roll. Rep.* 109; *1 Hawk. P. C. c. 75. § 7.*

A prohibitory writ was issued out of B. R. against Betterton and other actors, for erecting a new playhouse in Little Lincoln's Inn Fields, reciting that it was a nuisance to the neighbourhood; and they not obeying the writ, an attachment was granted against them; but it was objected that an attachment could not be issued, and that the most proper method was to proceed by indictment, and then the jury would consider whether it was a nuisance or not; and this was the better opinion. *5 Mod.* 142; *2 Nels. Abr.* 1192.

One Hall having begun to build a booth near Charing Cross, for rope-dancing, which drew together many idle people, was ordered by the lord chief justice not to proceed: he proceeded, notwithstanding, affirming, that he had the king's warrant and promise to bear him harmless; but being required to give a recognizance of three hundred pounds that he would not go on with the building, and he refusing, he was committed, and a record was made of this nuisance, as upon the court's own view, it being in their way to Westminster, and a writ issued to the sheriff of Middlesex to prostrate it. *1 Vent.* 169; *1 Mod.* 96.

And it has lately been held that keeping a pigeon-shooting-ground at Bayswater for rifle-shooting, whereby idle and disorderly persons are collected in the neighbourhood outside the ground to shoot the strayed pigeons, is an indictable nuisance. *3 B. & Adol.* 184.

It hath been holden to be a common nuisance to make great noises in the night with a speaking trumpet. *Stra.* 704. Or to permit a house near the highway to continue in a ruinous condition. *Salk.* 357. Or to travel with a cart on a common pack-way or horseway, and by thus ploughing it up to render the use of it inconvenient. *6 Mod.* 145. Or



to put a ship of three hundred tons into Billingsgate dock; for although it is a common dock, it is only for the reception of small vessels freighted with provisions for the London market. 1 *Hawk. P. C. c.* 75. § 11.

So it is an indictable nuisance to keep a fierce dog and to bite mankind, to go at large unmuzzled; 4 *Burn's J.* 578; and the like for permitting a savage bull to go about the public thoroughfares.

So it is a public nuisance to sell unwholesome food, or to mix noxious ingredients in any thing made and supplied for the food of man. See 3 *M. & S.* 11.

So whatever openly outrages decency, and is injurious to public morals, is a common nuisance, and indictable as a misdemeanor. 1 *Hawk. c.* 5. § 4; 4 *Comm.* 65. n. And see *Indecency*, &c.

But erecting a dove-cote is not a common nuisance; though action on the case will lie at the suit of the lord of the manor for erecting it without his license. 1 *Hawk. P. C. c.* 75. § 8. It was anciently held, that if a man erected a dove-cote he was punishable at the leet; but it has been since adjudged not to be punishable in the leet as a common nuisance, but that the lord for this particular nuisance should have an action on the case, or an assize of nuisance: as he may for building an house to the nuisance of his mill. 5 *Rep.* 104; 3 *Salk.* 248.

And the annoyance proceeding from a public nuisance must be of a real and substantial nature; for the fears of mankind, however reasonable, will not create a nuisance; therefore it is no nuisance to erect a building for the purpose of inoculation. 3 *Atk.* 21, 726, 750.

Neither the king, nor lord of a manor, may license any man to commit a nuisance. 1 *Roll. Abr.* 138.

Generally speaking, no length of time will legalise a public nuisance. See 7 *East.* 195; 3 *Camp.* 227; 2 *B. & A.* 662.

See also 13 *E. 1. c.* 24; 12 *R. 2. c.* 13; 2 *W. & M. st.* 2. c. 8; 30 *Geo. 2. c.* 22. (repealed in part by the 7 *Geo. 3. c.* 42. § 57); 31 *Geo. 2. c.* 17. respecting nuisances in the cities of London and Westminster.

A nuisance in a church-yard is, properly, of ecclesiastical cognizance. *Carth.* 152. ●

**II. PRIVATE NUISANCES** are such as affect either the corporeal or incorporeal hereditaments of an individual.

*First*, As to corporeal hereditaments. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie. *F. N. B.* 184.

So if a man have a spout falling from his house, and another person erect any thing above it, that the water cannot fall as it did, but is forced into the house of the plaintiff, and rots the timber, it is a nuisance actionable. 18 *E.* 3; 2 *Roll. Abr.* 140. And in trespass for a nuisance, in causing stinking water in the defendant's yard to run to the walls of the plaintiff's house, and piercing them so that it ran into his cellar, &c. judgment was given for the plaintiff. *Hard.* 60.

Likewise to erect a house or other building so near to mine that it obstructs my ancient lights and windows, is a nuisance of a similar nature. 9 *Rep.* 58. But in this latter case it is necessary that the windows be ancient; that is, have subsisted a long time without interruption, otherwise there is no injury done, (but see the recent statute under tit. *Lights*.) For he has as much right to build a new edifice upon his ground as I have upon mine, since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. *Cro. Eliz.* 118; *Salk.* 459.

Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him, and make the air unwholesome (or renders the enjoyment of life or property uncomfortable,) this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. 9 *Rep.* 58; 1 *Burr.* 337.

So where a person kept a hog-sty near a man's parlour, whereby he lost the benefit of it. 2 *Roll. Abr.* 140.

A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, ut alienum non ledas*; this therefore is an actionable nuisance. *Cro. Car.* 510.

An inn-keeper brought an action on the case against a person for erecting a tallow furnace, and melting stinking tallow so near his house, that it annoyed his guests, and his family became unhealthy; and adjudged that the action lay. *Cro. Car.* 367.

So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for, *cujus est solum, ejus est usque ad cælum*. 2. Stopping lights; and 3. Corrupting the air with noisome smells; for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a

wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance. 9 Rep. 58; Cro. Eliz. 118; 3 Salk. 247, 459.

As to nuisance to one's lands, if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. 1 Roll. Abr. 89.

If a person melt lead so near the close of another that it injures his grass there, whereby cattle are lost; notwithstanding this is a lawful trade, and for the benefit of the nation, action lies against him, for he ought to use his trade in waste places, so as no damage may happen to the proprietors of the land adjoining. 2 Roll. Abr. 140.

A plaintiff was possessed of an house where in he dwelled, and the defendant built a brew-house, &c. in which he burnt coal so near the house that by the stink and smoke he could not dwell there without danger of his health; and it was adjudged that the action lay, though a brew-house is necessary, and so is burning coal in it. Hutton, 135.

And by consequence it follows, that if one does any other act in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less offensive. So also if my neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance. Hale on F. N. B. 427.

With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill. F. N. B. 184. To corrupt or poison a water-course, by erecting a dye-house, or a lime-pit, for the use of trade, in the upper part of the stream. 9 Rep. 59; 2 Roll. Abr. 141. Or, in short, to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour. 3 Comm. c. 13.

Building a smith's forge near a man's house, and making a noise with hammers, so that he could not sleep, was held a nuisance for which action lies, although the smith pleaded that he and his servants worked at seasonable times; that he had been a blacksmith and used the trade above twenty years in that place, and set up his forge in an old room, &c. For though a smith is a necessary trade, and so is a limeburner and a hog-merchant, yet these trades must be used so as not to be injurious to the neighbours. 1 Lutw. 69.

But if a schoolmaster keeps a school so near the study of a lawyer by profession, that it is a disturbance to him, this is not a nuisance

for which action may be brought. Wood's Inst. 538.

Where two houses, one whereof is a nuisance to the other, come both into one and the same hand, the wrong is purged. See Hob. 131.

Secondly, As to incorporeal hereditaments. If I have a way annexed to my estate, across another's lands, and he obstructs me in the use of it either by totally stopping it or putting logs across it, or ploughing over it, it is a nuisance; for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. F. N. B. 183; 2 Roll. Abr. 140.

Also if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. F. N. B. 148; 2 Roll. Abr. 140. See Market.

If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects: otherwise he may be grievously amerced: it would therefore, be extremely hard if a new ferry were suffered to share its profits, which does not also share his burden. 2 Roll. Abr. 140.

But where the reason ceases, the law also ceases with it; therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school in a neighbourhood, in rivalry with another; for by such emulation the public are like to be gainers; and if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ*. Hale on F. N. B. 184.

The stopping up a way leading from houses to lands, suffering the next house to decay, to the damage of my house (but see *contra*, *Peyton v. Mayor of London*, 9 B. & C. 725), and setting up or making a house of office, lime-pit, dye-house, tan-house, or butcher's shop, &c. and using them so near my house that the smell annoys me, or is infectious; or they hurt my lands or trees, or the corruption of the water of lime-pits spoils my water or destroys fish in a river, &c.; these and the other evils already enumerated, are in general private nuisances. 3 Inst. 231; 5 Rep. 101; 9 Rep. 54; 1 Roll. Abr. 88; 2 Roll. 140; 1 Danv. Abr. 173.

III. The proceeding in the case of a public nuisance is by indictment or present-

ment, which should charge the offence to be done to the common nuisance of all the liege subjects, &c. *Cro. Eliz.* 148; 1 *Hawk.* c. 75. § 3.

By an old statute, 12 R. 2. c. 13, which if not actually obsolete is now entirely disregarded, none shall cast any garbage, dung, or filth, into ditches, waters, or other places within or near any city or town, on pain of punishment by the Lord Chancellor, at discretion, as a nuisance.

Where a statute makes an act "a common nuisance," an indictment lies against the offender although a summary remedy is also given by proceedings before justices. 2 *N. & M.* 478.

The punishment imposed by the law on a person convicted of a nuisance, is fine and imprisonment; but as the removal of the nuisance is of course the object of the indictment, the court will adapt the judgment to the circumstances of the case.

On an indictment for a nuisance in erecting a wall across a road (not for continuing the nuisance), it is not necessary to adjudge that the nuisance be abated. But where it is stated in the indictment to be an existing nuisance there must be judgment to abate it. 7 *T. R.* 467; 8 *T. R.* 143.

By 1 & 2 Geo. 4. c. 41. the court by which judgment ought to be pronounced on conviction for any public nuisance, is authorized to award such costs to the prosecutor as shall be deemed proper and reasonable, to be paid by the party convicted. By § 2, such court, without the consent of the prosecutor, may make order to remedy the grievance by altering the construction of the furnace, where the nuisance arises from furnaces used in the working of steam-engines: but by § 3. the act as to costs and alterations is not to extend to the furnaces of steam-engines used solely for sinking mines or smelting ores, &c. And see *post*, IV.

IV. As common or public nuisances are such inconvenient or troublesome offences which annoy the whole community in general, and not merely some particular person, they are therefore *indictable* only and not *actionable*; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damns him in common only with the rest of his fellow-subjects. 4 *Comm. c.* 13. p. 167; 5 *Rep.* 73; 1 *Inst.* 56; 1 *Vent.* 208. And as the law gives no private remedy for any thing but a private wrong, therefore no action lies for a public or common nuisance but an indictment only, because the damage being common to all the king's subjects, no one can assign his particular propor-

tion of it. 3 *Comm. c.* 13. p. 219. For this reason no person natural or corporate can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor and *pater familias* of the kingdom. *Vaugh.* 341, 2. Yet this rule admits of one exception; where a private person suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have a private satisfaction by action. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer an injury by falling therein: there, for this particular damage, which is not common to others, the party shall have his action. 1 *Inst.* 56; 5 *Rep.* 73. So if by reason of a pit dug in a highway, a man for whose life I held lands, is drowned; or my servant falling into it receives injury, whereby I lose his service, &c.: for this special damage, which is not common to other persons, action lies. 4 *Rep.* 18; 5 *Rep.* 73; *Cro. Car.* 446; *Vaugh.* 341; 4 *Bulst.* 344. But a modern authority says, the injury must be direct, and not consequential, as by being delayed in a journey of importance. *Bull. N. P. c.* 5. p. 26; but see *c.* 7. p. 78. And where the inhabitants of a town had, by custom, a watering place for their cattle, which was stopped by another, it has been held that any inhabitant might have an action against him, otherwise they would be without remedy, because such a nuisance is not common to all the king's subjects, and presentable in the leet, or to be redressed by presentment or indictment in the quarter sessions. 5 *Rep.* 73; 9 *Rep.* 103.

It is said both of a common and private nuisance, that they may be abated or removed by those who are prejudiced by them, and they need not stay to prosecute for their removal. 2 *Lil. Abr.* 244; *Wood's Inst.* 443. Also if a house be on the highway, or a house hang over the ground of another, they may be pulled down; but no man can justify the doing more damage than is necessary, or removing the materials farther than requisite. 1 *Hawk. P. C. c.* 75, 76; *Stra.* 680.

Also, if a man hath abated or removed a nuisance which offended him, in this case he is entitled to no action, for he had choice of two remedies; but having made his election of one remedy, he is totally precluded from the other. 3 *Comm. c.* 13. p. 220, cites 9 *Rep.* 55. See also *F. N. B.* 185; 2 *Roll. Abr.* 745. But this apparently admits of some qualification; for the party's right of action might attach before the removal; and in another case it is said, there is a difference between an assize for a nuisance (now abolished), and an action on the case (see *post*) for the first



was to abate the nuisance, but the last is not to abate it, but to recover damages; therefore if the nuisance be removed, the plaintiff is entitled to his damages which accrued before; and though it is laid with a *continuando* for a longer time than the plaintiff can prove, he shall have damages for what he can prove, before the nuisance was removed. 2 *Mod.* 253.

This abatement or removal of nuisances is classed by *Blackstone* among the species of remedy, allowed by law, through the mere act of the party injured. 3 *Comm. c.* 1. This abatement, removing, or taking away, may be performed by the party aggrieved by the nuisance, so as he commits no riot in the doing it. 5 *Rep.* 101; 9 *Rep.* 55. If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbour's lands and peaceably pull it down. *Salk.* 459. Or if a new gate be erected across the public highway, which is a *commone* nuisance, any of the king's subjects passing that way may cut it down and destroy it. *Cro. Car.* 184. And the reason why the law allows this private and summary method of doing oneself justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice. 3 *Comm.* 6.

When the nuisance is caused by the misfeasance or malfeasance of another, the party injured may in general abate it immediately, and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists of omission, he should be requested to remove it before the injured party can himself abate. 2 *B. & C.* 302; 3 *D. & R.* 556, *S. C.* And see further as to the abating of private nuisances, 1 *Chitty's Gen. Prac. of the Law*, 649.

With respect to the redressing of *private nuisances* by due course of law, the remedy by suit is by action on the case for damages, in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. However every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be given if after one verdict against him the defendant has the hardness to continue it. 2 *Leon. pl.* 129; *Cro. Eliz.* 402.

On the principle that the continuation of a nuisance is, as it were, a new nuisance, where a nuisance is erected in the time of the deviser, and continued afterwards by the devisee, an action may be maintained against the latter. 2 *Leon.* 129; *Cro. Car.* 231. But a plaintiff may declare both ways, one for erect-

ing and continuing, the other for continuing only, though the latter method is sufficient in any case.

If one hath freehold land adjoining to the highway, and he encroach part of the way, and lay lands to it, and then dying, it comes to his heir, if he continues it, though he do nothing else, he may be indicted for the continuance of the nuisance. *Rol. Abr.* 137. So where a man erects a nuisance, and then lets it, the continuance by the lessee has been held a nuisance, and an action lies against him. *Cro. Jac.* 373; *Moor.* 353. And see 1 *Mod.* 54; 3 *Salk.* 248.

Also if a person assigns his lease with a nuisance, action lies against him for continuing it, because the lease was transferred with the original wrong, and his assignment confirms the continuance; besides he hath a rent as consideration for the continuance; therefore he ought to answer the damages occasioned by it. 2 *Salk.* 460; 2 *Cro.* 272, 555.

The law, in order to give relief to the injured, formerly provided two other actions, the assize of nuisance and the writ of *quod permittat prosternere*; which not only gave the plaintiff satisfaction for his injury past, but also struck at the root, and removed the cause itself, the nuisance that occasioned the injury. These two actions, however, could only be brought by the tenant of the freehold, so that a lessee for years was confined to his action upon the case. *Finch's L.* 289.

An assize of nuisance was a writ wherein it was stated that the party injured complained of some particular fact done *ad nocumentum liberi tenementi sui*; and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein. *F. N. B.* 183. And if the assize was found for the plaintiff, he should have judgement of two things, 1st, to have the nuisance abated; and 2d, to recover damages. 9 *Rep.* 55. An assize of nuisance lay against the very wrong-doer himself who levied or did the nuisance, and did not lie against any person to whom he had aliened the tenements whereon the nuisance was situated. This was the immediate reason for making that equitable provision in that stat. *West.* 2. 13 *Edw.* 1 *c.* 24, for granting a similar writ in *casu consimili*, where no former precedent was to be found. The statute gave the form of a new writ in this case, which only differed from the old one in stating that the wrong-doer and the alienee both raised the nuisance; for every continuation, as was before said, is a fresh nuisance.

Before this statute, the party injured, upon

any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere*, which was in the nature of a writ of right, and therefore subject to greater delays. 2 *Inst.* 405. This was a writ commanding the defendant to permit the plaintiff to abate the nuisance complained of, and unless he so permitted, to summon him to appear in court, and show cause why he would not. *F. N. B.* 124. And this writ lay as well for the abatement of the party first injured, as against the alienor of the party first injuring. 5 *Rep.* 100, 101. And the plaintiff should have judgment therein to abate the nuisance, and to recover damages against the defendant.

Both these actions of assize of nuisance and of *quod permittat prosternere* have long been obsolete, having given way to the action on the case; and by the 3 & 4 *Wm. 4 c. 27. § 36*, they are abolished.

In an action on the case, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages; and there is therefore, now no proceeding at law whereby a man may obtain a judgment to abate a nuisance; but as a man is liable to a fresh suit for a continuance of a nuisance, the remedy afforded by an action on the case seems sufficient, as the damages awarded in repeated actions will at length compel the most obstinate man to remove the cause of complaint.

Where a party cannot himself, or with the assistance of others, abate a private nuisance, and in an action on the case fails in procuring him the desired relief, his only course to get rid of it seems to be by an application to a court of equity, which after a verdict at law finding the nuisance, and not before, will cause it to be removed. 1 *Cox*, 102; 2 *Ves.* 193.

See further, *Injunction, Lights, Mines, Prescription*.

**NUL DISSEISIN**, Plea of. A plea in real actions, that there was no disseisin, and it was one species of the general issue. See *Disseisin*.

**NUL TIEL RECORD**. The plea of a plaintiff that there is no such record, on the defendant's alleging matter of record, in bar of the plaintiff's action. See *Failure of Record*.

It is sometimes the plea of a defendant, as in action on a judgement, &c.

If a record be asserted on one side to exist, and which is denied by the opposite party under the form of traverse, that there is no such record remaining in court as alleged, the issue thus raised is called an issue of *nul tiel record*, and the court awards in such case a trial by inspection and examination of the record. See further *Record*.

**NUL TORT**, Plea of. A plea in a real action, i. e. that no wrong was done, and a species of the general issue. See *Pleading*.

**NULLUM ARBITRIUM**. The usual plea of the defendant prosecuted on an arbitration bond, for not abiding by an award; that there was no award made. See *Award*.

**NULLITY**. Is where a thing is null and void, or of no force. *Lit. Dict.*

**NUMERUM**. *Civitas Cant' reddit 24l. ad numerum*, i. e. by number or tale, as we call it. *Domesday*.

**NUMMATA**. The price of any thing, generally by money; as *denariata* denoteth the price of a thing by computation of pence, and *librata* by computation of pounds.

**NUMMATA TERRÆ**. Is the same with *denariatus terræ*, and thought to contain an acre. *Spelman*.

**NUMMUS**. A piece of money or coin among the Romans; and it is a penny according to *Moth. Westm. sub anno 1095*.

**NUN**, *munna*.] A consecrated virgin or woman, who by vow has bound herself to a single and chaste life, in some place or company of other women, separated from the world, and devoted to the services of God by prayer, fasting, and such like holy exercises; it is an Egyptian word, St. Jerome says.

By *Westm. 2. 13. Ed. 2. c. 34*, the punishment of three years' imprisonment, &c. was imposed for taking a nun from her convent.

**NUNCIUS**. A nuncio, or messenger, servant, &c. The Pope's nuncio was termed *legatus pontificis*, a legate; See *Legate*.

**NUNCUPATIVE WILL**. See *Will*.

**NUPER OBIT**. Was a writ that lay for a sister and co-heir, deforced by her coparcener of lands or tenements, whereof their father, brother, or any other common ancestor died seized of an estate in fee-simple for if one sister deforced another of land hold in fee-tail, her sister and co-heir should have a formedon against her, &c. and not *nuper obiit*; and where the ancestor, being once seised, died seised, not of the possession, but the reversion, in such a case a writ of *rationabili parte* lay. *Reg. Orig.* 226; *F. N. B.* 197; *Terms de Ley*; *Finch. L.*

This writ of *nuper obiit* is now abolished. See *Limitation of Actions*, III. See also *Assize of Mort d' Ancestor*; which is likewise abolished.

**NURSERY GROUND**. See *Gardens*.

**NURTURE**, Guardian for. This is, of course, the father or mother, until the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some proper person. *Co. Lit.* 88; *Moor*, 738; 3 *Rep.* 38; 2 *Jones*, 90; 2 *Lev.* 163. See further *Guardian*, I. 2.

**NYAS**, *Nidarius accipiter*.] A hawk or bird of prey. *Lit. Dict.*

## OATH.

**O.** The seven Antiphones, or alternate hymn of seven verses, &c. sung by the choir in the time of Advent, was called O, from beginning with such acclamation.—In the statutes of St. Paul's church in London, there is one chapter *De faciendo O. Liber Statut. MS. f. 86.*

**OATH**, Sax. *eoþ*, Lat *juramentum*.] An affirmation or denial of any thing before one or more persons who have authority to administer the same, for the discovery and advancement of truth and right, calling God to witness that the testimony is true; therefore it is termed *sacramentum*, a holy band or tie: it is called a *corporal oath*, because the witness when he swears lays his right hand on the Holy Evangelists, or New Testament. 3 *Inst.* 165.

There are several sorts of oaths in our law; viz: *Juramentum promissionis*, where oath is made either to do, or not to do such a thing; *Juramentum purgationis*, when a person is charged with any matter by bill in Chancery &c. *Juramentum probationis*, where any one is produced as a witness, to prove or disapprove a thing: and *Juramentum trationis*, when any persons are sworn to try an issue, &c. 2 *Nels.* 1181.

All oaths must be lawful, allowed by the common law, or some statute; if they are administered by persons in a private capacity, or not duly authorised they are *coram non judice*, and void; and those administering them are guilty of a high contempt, for doing it without warrant of law, and punishable by fine and imprisonment. 3 *Inst.* 165; 4 *Inst.* 278; 2 *Roll. Abr.* 277.

One who was to testify on behalf of a felon, or person indicted of treason, or other capital offence, upon an indictment at the king's suit could not formerly be examined on his oath for the prisoner against the king though he might be examined without oath; but by the 1 *Ann.* 2. c. 9. witnesses on behalf of the prisoner upon indictments are to be sworn to depose the truth in such manner as witnesses for the king; and if convicted of wilful perjury, shall suffer the punishment inflicted for such offences.

The evidence for the defendant in an appeal (now abolished), whether capital or not, or on indictment or information for a misdemeanor, was to be on oath before this statute—2 *Henk. P. C.*

A person who is to be a witness in the cause may have two oaths given him, one to speak the truth to such things as the court shall ask him concerning himself, or other things which are not evidence in the cause; the other to give testimony in the cause in which he is produced as a witness; the former is called the oath upon a *voir (vrai) dire*.

If oath be made against oath in a cause, it is a *non liquet* to the court which oath is true; and in such case the court will take that oath to be true which is to affirm a verdict, judgment, &c. as it tends to the expediting of justice. 2 *Lil. Abr.* 247.

A voluntary oath by consent and agreement of the parties, is lawful as well as a compulsory oath; and in such case, if it is do a spiritual thing, and the party fail, he is suable in the ecclesiastical court, *pro læsione fidei*; if to do a temporal thing, and he fail therein, he may be punished in *B. R.* Adjudged on assumpsit, where, if the defendant would make oath before such a person, the plaintiff promised, &c. *Cro. Car.* 486; 3 *Salk.* 248.

By the common law, officers of justice are bound to take an oath for the due execution of justice. *Trin.* 22 *Car.* 1. *B. R.* Though if promissory oaths of officers are broken, they are not punished as perjuries, like unto the breach of assertory oaths; but their offences ought to be punished with a severe fine, &c. *Wood's Inst.* 412.

Anciently, at the end of a legal oath, was added, *So help me God at his holy dome*, i. e. judgment; and our ancestors did believe that a man could not be so wicked as to call God to witness any thing which was not true; but that if any one should be perjured, he must continually expect that God would be the revenger and thence probably *purgations* of criminals by their own oaths, and for great offences by the oaths of others, were allowed. *Malmsh. lib.* 2. c. 6; *Leg. Hen.* 1 c. 64.

By the 6 *Geo.* 4. c. 87. § 20. consuls at fo-



reign parts may administer oaths or take affirmations; and do all acts which may be performed by notaries.

By 1 & 2 Will. 4. c. 4. a great variety of oaths and affirmations in the customs and excise departments were abolished, and declarations substituted. But this act was repealed as to the customs by the 3 & 4 Will. 4. c. 50.

Quakers, Moravians, and Separatists, are now in all cases relieved from the necessity of taking oaths. See *Quakers Separatists*.

For the offence of uttering profane oaths, see *Swearing*. And see further, *Evidence, Non-jurors, &c.*

By an act passed in the present sessions of parliament (5 Wm. c. 8.) for the more effectual abolition of oaths and affirmations taken, and made in various departments of the state, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra judicial oaths and affidavits," it is enacted, that in any case where, by acts made or to be made, relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works and buildings, the army pay office, the office of the treasurer of the navy or the treasurer of ordnance, his majesty's treasury, Chelsea Hospital, Greenwich Hospital, the board of trade, or any of the offices of his majesty's principal secretaries of state, the office for auditing the public accounts, or any office under the control, direction, or superintendence of the lords commissioners of his majesty's treasury, any oath, solemn affirmation, or affidavit might, but for the passing of the act, be required to be taken or made, the lords commissioners of his majesty's treasury or any three of them, by writing under their hands and seals, may substitute a declaration to the same effect as the oath, &c.; and the person who might under the acts imposing the same be required to take or make such oath, &c. shall, in presence of the commissioners, collector, other officer or person empowered to administer such oath, &c. make and subscribe such declaration, and every such commissioner, &c. is thereby empowered and required to administer the same accordingly.

By § 2. the substitution of such declaration is to be published in the Gazette; and after twenty-one days from the date thereof the provisions of the act are to apply. And (§ 3.) after the said twenty-one days, no oath is to be administered, in lieu of which a declaration has been directed.

By § 4. in cases of false declarations in matters relating to the customs, excise, stamps, and taxes, or post office, an additional penalty of 100*l.* shall be inflicted.

By § 5. the oath of allegiance is still to be required in all cases.

§ 6. Provided also, that nothing in the act shall extend to any oath, solemn affirmation, or affidavit, in any judicial proceeding in any court of justice, or in any proceeding by way of summary conviction before justices of the peace.

By § 7. the universities of Oxford and Cambridge, and other bodies corporate and politic, may substitute a declaration in lieu of an oath.

By § 8. the churchwarden's and sidesman's oaths are abolished, and declarations are to be made in lieu thereof.

§ 9. A declaration is to be substituted for an oath by persons acting in turnpike trusts.

§ 10. A declaration is substituted for the affidavit heretofore required on taking out a patent.

§ 11. A declaration is substituted for oaths and affidavits required by acts as to pawnbrokers. And the penalties as to such oaths, &c. are to apply to declarations.

By § 12. after reciting that "a practice wholly contrary to the policy of the law has been permitted to prevail, of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in any wise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received:" And "doubts have arisen whether or not such proceeding is illegal;" it is enacted, that it shall not be lawful for any justice of the peace or other person to administer or to receive any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice, &c. hath not jurisdiction or cognizance by some statute: provided, that nothing therein contained shall extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences.

By § 13. the fees due on oaths are payable on declarations substituted in lieu thereof.

By § 14. persons making false declarations are declared guilty of a misdemeanor, and are punishable as for perjury.

**OATHS, UNLAWFUL.** In 1797, in consequence of the alarm excited by the mutiny at the Nore, and with a view to check the attempts then made to induce the soldiery as well as sailors to enter into seditious conspiracies, the 37 Geo. 3. c. 123. was passed. By this statute persons administering or aiding, or present at and consenting to the administering of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or being of any association, society or confederacy for any such purpose; or obeying the orders or commands

of any committee or body of men not lawfully constituted; or of any leader or commander, or other person not having authority by law for that purpose; or not informing or giving evidence against any associate, confederate, or other person; or not revealing or discovering any illegal act done or to be done; or any illegal oath or engagement which may have been administered or tendered or taken; are declared guilty of felony, punishable with transportation for seven years.

And every person who shall take any such oath or engagement, not being compelled thereto, is also declared guilty of felony, and subject to the same punishment.

By § 5. any engagement or obligation whatsoever shall be deemed an oath within the act, and whether the same shall be actually administered by any person, or taken by any person, without administration.

By the 52 Geo. 3. c. 104. the provisions of the 37 Geo. 3. c. 123. were extended, and it was made a capital felony for any person to administer, &c. any oath binding the person taking it to commit treason, murder, or any capital felony; and the person taking such oath is declared guilty of felony, and is liable to be transported for life.

By § 5. any engagement or obligation in the nature of an oath, is to be deemed an oath within the act.

By the 39 Geo. 3. c. 79. and the 57 Geo. 3. c. 19. enactments were made against unlawful combinations and seditious assemblies, members whereof were required to bind themselves by oaths, and such oath were declared to be unlawful within the 37 Geo. 3. c. 123. See these statutes more fully stated under the title of *Seditious Societies*.

Although the preamble of the 37 Geo. 3. c. 123. is mainly directed against combinations for purposes of sedition and mutiny, yet the enacting part extends to all illegal associations in which oaths are administered of the nature described in that act. Therefore, where an associated body of men conspired together to raise the price of wages, and to make regulations in a particular trade (which was then an illegal act), and administered an oath binding the individual not to reveal such conspiracy, the offence was held to be within the above statute. 6 East, 419.

So in the recent case of the Dorsetshire Labourers, where the prisoners were charged in the indictment with administering an oath not to reveal an unlawful combination; an oath not to reveal an illegal oath; and an oath to obey the orders of a body of men not lawfully constituted; they were found guilty under the same act, and were sentenced to seven years' transportation.

By 53 Geo. 3. c. 102. persons in Ireland administering or tendering any oath for various unlawful purposes (stated in the act), are declared felons, punishable by transportation for life, and persons taking any such oath felons transportable for seven years.

By the above acts, persons compelled to take such oaths, &c. are not justified or excused, unless they declare the same (within fourteen days in England, and ten in Ireland) to some justice of peace, &c. All aiders and abettors are declared principals.

**OATHS TO THE GOVERNMENT.** As to the oaths of the Chancellor, Judges of both benches, Barons of the Exchequer, &c. Clerks in Chancery, and the Cursitors, see 14 Edw. 3. st. 1. c. 5; 18 Edw. 3. st. 4, 5; 20 Edw. 3. c. 1, 2, 3.

Ecclesiastical persons are required to take the oaths of supremacy, &c. And clergymen not taking the oaths, on their refusal being certified into B. R. &c. do, for a second offence, incur the penalties of *premunire*.—See 1 Eliz. c. 1; and tit. *Parson*. Officers and ecclesiastical persons, members of parliament, lawyers &c. are to take the oath of allegiance, or be liable to penalties and disabilities. 7 Jac. 1. c. 6.

By 1 W. M. st. 1. c. 6, the coronation oath was altered and regulated. See *King*. The oaths of allegiance and supremacy were abrogated, and others appointed to be taken and enforced, on pain of disability, &c. by 1 W. & M. c. 8; 7 & 8 W. 3. c. 27.

By 13 W. 3. c. 6. all that bear offices in the government peers, and members of the House of Commons, ecclesiastical persons, members of colleges, school-masters, preachers, sergeants at law, counsellors, attornies, solicitors, advocates, proctors, &c. are enjoined to take the oaths of allegiance; and persons neglecting or refusing are declared incapable to execute their offices and employments disabled to sue in law or equity, to be guardian, executor, &c. or to receive any legacy or deed of gift, to be in any office, &c. and to forfeit five hundred pounds.

This extends not to constables, and other parish officers, nor to bailiffs of manors, &c.

The 1 Ann. c. 22. obliges the receiving the abjuration oath, with alterations.

The oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honor, and not to know or hear of any ill or damage intended him, without defending him therefrom." See *Mirr.* c. 3. § 35; *Fleta*, 3, 16; *Britt.* c. 29; 7 *Rep. Calvin's Ca.* 6. Upon which Sir M. Hale makes this remark: that it was short and

plain, not entangled with long and intricate clauses and declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. 1 *Hal. P. C.* 63. But at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful, and bear true allegiance to the king," without mentioning "his heirs," or specifying the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority; and the Oath, of Abjuration, as introduced by 13 *Will. 3. c. 6.* and regulated by 6 *Geo. 3. c. 53.* very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of majesty, derived under the Act of Settlement; engaging to support him to the utmost of the jurors power; promising to disclose all traitorous conspiracies against him, and expressly renouncing any claim of the descendants of the late Pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. 1 *Geo. 1. st. 2. c. 13*; 6 *Geo. 3. c. 53.* And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county. 2 *Inst.* 121; 1 *Hal. P. C.* 64; and see 1 *Comm.* 367, 368.

By 1 *W. & M. c. 8.* persons of eighteen years of age refusing to take the new oaths of allegiance on tender by the proper magistrate, are subject to the penalties of a *præmunire*. And by 7 & 8 *W. 3. c. 24.* serjeants, counsellors, proctors, attornies, and all officers of courts practising without having taken the oaths of allegiance, are guilty of a *præmunire*, whether the oaths be tendered or not. See 4 *Comm.* 116, 117.

By the 10 *Geo. 4. c. 7. §. 10.* Roman Catholics may hold any offices, civil or military, and places of trust or profit under his majesty, and exercise any other franchise (except as therein mentioned), on taking the oath therein given instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oaths as were then by law required to be taken for the purpose aforesaid by Roman Catholics. See this act more fully stated under the title *Roman Catholics*.

By several acts of *Eliz., Jac. 1.* and *Will.*

& *Mary*, the oaths of allegiance and supremacy were required to be taken by all members of parliament, before the lord steward or deputy, before they took their seats. And by the 30 *Car. 2. c. 1.* the same oaths were required to be taken at the table in the house before any member should sit or vote. This needless repetition of the same oaths is now put an end to by the 1 & 2 *Will. 4. c. 9.* by which the acts requiring the said oaths to be taken the lord steward or his deputy, are repealed. See further, *Parliament*.

In every session of parliament acts are passed for indemnifying persons who have omitted to qualify themselves for offices and promotions within the time limited by law, and for allowing further time for that purpose.

These annual indemnity acts are prospective as well as retrospective, and extend to those who may be in default during the time for which they are made, as well as those who have incurred penalties before they passed. 2 *B. & C.* 34.

See further on the subjects of oaths, *Nonconformist, Nonjuror, Parliament, Quakers, Roman Catholics, Separatists, &c.*

**OBDIENTIA.** In the canon law is used for an office, or the administration of it; whereupon the word *obedientiales*, in the provincial constitutions, is taken for officers under their superiors. *Can. Law, c. 1.* And as some of these offices consisted in the collection of rents or pensions, rents were called *obedientia: quia colliguntur ab obedientibus*. But though *obedientia* was a rent, as appears by *Hoveden*, in a general acceptation of this word, it extended to whatever was enjoined the monks by the abbot; and in a more restrained sense, to the cells or farms which belonged to the abbey to which the monks were sent, *vi ejusdem obedientia*, either to look after the farms, or to collect the rents, &c. See *Mat. Paris, Ann.* 1213.

**OBIT, Lat.]** Signifies a funeral solemnity or office for the dead, most commonly performed when the corps lies in the church uninterred: also the anniversary office. 2 *Cro.* 51; *Dyer*, 343. The anniversary of any person's death was called the obit; and to observe such day with prayers and alms, or other commemoration, was the keeping of the obit. In religious house they had a register wherein they entered to obits or obitual days of their founder or benefactors, which was thence termed the obituary. The tenure of obit, or obituary, or chantry lands, is taken away and extinct by 1 *Edw. 1. 6. c. 4.*

**OBJURGATRICES.** Scolds, or unquiet women, punished with the ducking-stool. *MS. LL. Lib. Burg. Villæ de Montgomery temp. Hen. II.* See *Castigatory*.



**OBLATA.** Gifts or offerings made to the king by any of his subjects, which in the reigns of King John and King Henry III. were so carefully heeded, that they were entered into the Fine Rolls under the title of Oblata; and if not paid, esteemed a duty, and put in charge to the sheriff. *Philips of Purveyance.*

In the Exchequer it signifies old debts, brought as it were together from precedent years, and put on the present sheriff's charge. *Pract. Excheq.* 78.

**OBKATIONS,** *oblaciones.*] Offerings to God and the church. See *Spelm. de Concil. tom. 1. p. 393.*

The word is often mentioned in our law books; and formerly there were several sorts of oblations; viz. *oblaciones altaris*, which the priest had for saying mass; *oblaciones defunctorum*, which were given by the last will and testaments of persons dying to the church; *oblaciones mortuorum*, or *funerales*, given at burials; *oblaciones penitentium*, which were given by persons penitent; and *oblaciones pentecostales*, &c.

The chiefs or principal feasts for the oblations of the altar were All Saints, Christmas, Candlemas, and Easter, which were called *oblaciones quatuor principales*; and of the customary offerings from the parishioners to the parish priest, solemnly laid on the altar, the mass or sacrament offerings were usually three-pence at Christmas, two-pence at Easter, and a penny at the two other principal feasts. Under this title of oblations were comprehended all the accustomed dues for *sacramentalia* or Christian offices; and also the tithes paid for saying masses and prayers for the deceased. *Kennett's Gloss.* See *Offerings.*

*Oblaciones funerales* were often the best horse of the defunct, delivered at the church gate or grate to the priest of the parish; to which old custom we owe the origin of mortuaries, &c. And at the burial of the dead, it was usual for the surviving friends to offer liberally at the altar for the pious use of the priest, and the good estate of the soul deceased, being called the *soul-seat*. In North Wales this usage still prevails, where at the rails of the communion-table in churches is a tablet conveniently fixed to receive the money offered at funerals according to the quality of the deceased; which has been observed to be a providential augmentation to some of those poor churches. *Kennett's Gloss.* At first the church had no other revenues beside these oblations, till in the fourth century it was enriched with lands and other possessions. *Blount.* See *Mortuaries.*

Oulations, &c. are in the nature of tithes, and may be sued for in the ecclesiastical courts,

and it is said are included in the act 7 & 8 Will. 3. c. 6. for recovery of small tithes under 40s. by the determination of justices of peace, &c. See *Tithes.*

**OBLIGATION,** *Obligatio.*] A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition though a bill may be obligatory. *Co. Lit.* 172. See *Bond.*

Obligations may also be by matter of record; as statutes and recognizances, to which there are sometimes added defeasances, like the condition of an obligation; but when the obligation is a simple, or single, without any defeasance or condition, it is most properly called so. 2 *Shep. Abr.* 475.

**OBLIGOR.** He who enters into an obligation; as obligee is the person to whom it is entered into.

Before the coming in of the Normans, writings obligatory were made firm with golden crosses, or other small signs or marks. But the Normans began the making such bills and obligations with a print or seal in wax, impressed with every one's special signet, attested by three or four witnesses. In former times many houses and lands thereto passed by grant and bargain, without script, charter or deed only with the landlord's sword or helmet, with his horn or cup; and many tenements were demised with a spur or currycomb, with a bow or with an arrow. *Cowell.* See *Bond, Deed,* II. 6, *Wang.*

**OBLATA TERRÆ.** According to some accounts, half an acre of land; but others hold it to be only half a perch. *Spelm. Gloss.*

**OBREPTION.** The obtaining a gift of the king by a false suggestion. *Scotch. Dict.*

**OBVENTIONS,** *Obventiones.*] Offerings or tithes; and oblations, obventions, and offerings are generally the same thing, though obvention has been esteemed the most comprehensive. See *Oblations, Tithes.*

**OCCASIO.** Is taken for a tribute which the lord imposed on his vassals or tenants; *propter occasiones bellorum vel aliarum necessitatum.* *Fleta, lib. 1. c. 24.* Rather the cause or pretext of such imposition.

**OCCASIONARI.** To be charged or loaded with payments, or occasional penalties. *Edw. 2. anno 21.* So in *Fleta, Ita quod ipsi vigilatores non occasionentur, lib. 1. c. 24. par. 7.*

**OCCASIONES.** Assarts, whercof *Manwood* speaks at large; the word is derived *ab accando*, i. e. harrowing or breaking clods. See *Spelman's Glossary, v. Essartum. Lib. Niger Scac. par. 1. cap. 13. and ante, Assurt.*

**OCCUPANT.** He who first gets possession grant: and the executors of A. could not have of a thing. An island in the sea, precious as it was not an estate testamentary, that it stoles on the seas, &c. and treasure discovered, should go to the executor as goods and chattels; and a ground that has no particular owner, so that it falls to him, could not title himself by the law of nature, but going to him who is to these lands; therefore the law preferred him who first entered, and he was called *occupans*, and should hold the land during the life of B. paying the rent, and performing the covenants. *Bar. Pl. 1.* And yet only if tenant *pur terme d'autre vie* died, leaving *cestui que vie*; but if tenant for his own life granted over, as estate to a stranger, and the grantee entered before him, there should be an occupant. *Co. Lit. 41, 388.*

The Law of Occupancy is founded upon the law of nature, viz. *Quod terra nemini est vacua*. *Bar. Pl. 1.* And yet only if *occupanti conceditur*. So as, upon the first coming of the inhabitants to a new country, he who first enters upon such part of it and improves it, gains the property; as is now used in Cornwall, &c. by the laws of the Stannaries, under certain regulations, so that it is the actual possession and maintenance of the land which was the first use of occupancy, and consequently is to be gained by actual entry. *Sid. 347.*

Where a man finds a piece of land which no other possesses, or hath title unto, and enters by the descent where the estate falls on him upon the same, this gains a property, and title by occupancy; but this manner of gaining property of lands as long as been of no use in England, tenants now possess without any title are in the crown, and not in him who first enters. *Sid. 218.*

However, the mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover as plaintiff against all the world, except such as can prove an older and better title in themselves. *1 Taunt. 347*; see also *2 Saund. 111*, and *5 East. 356*.

The true ground of occupancy is, that anciently all titles of titles were by real actions, therefore he who had the freehold was one to whom the law had a special regard. The ancient law, for many reasons, did not allow leases for above forty years, till the *21 Hen. 8. c. 15*. Besides, there was reason too, that not only he who had a right paramount, might know how to try his action, but that the lord might know how to avow for his services (which were considered things formerly), he ought to know who was his tenant, therefore the law provided there should be a person on whom he should avow. See *Cart. 57*; *1 Sid. 346*; *1 Lev. 202. Gray v. Beacroft*.

An estate for another's life, by our ancient laws, might be gotten by occupancy; as, for example, suppose A. had lands granted to him for the life of B. and died without making any estates of it; in such case, whoever first entered into the land after the death of A. got the property for the remainder of the estate granted to A. for the life of B. For to the heir of A. it could not go, not being an estate of inheritance, but only an estate for another man's life; which was not ascendible to the heir unless he were specifically named in the

The law of general occupancy of estates *pur autre vie* is now universally prevented by the *20 Car. 2. c. 3. s. 12*, *11 Geo. 2. c. 20. s. 9*.—The first statute enacts, that estates, *pur autre vie* shall be devisable; and if not devised, they shall go to the hands of the heir as assets as special occupant, and if he is not entitled as such, shall go to the grantee's executors or administrators, and he assigns. On this statute a doubt arose whether it operated further than by making such estates devisable, and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts, if not devised, and this case, therefore, is in the place of a general occupant. See *12 Mod. 149*. It is given also to the second statute, which expressly makes the surplus, in case of intestacy, distributable as personal estate. See further as to occupancy, *2 Comm. 258*; *Vaugh. 187*, *1 Vin. Dig. Estates, F.*

By the old law no right of occupancy was allowed where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession; and where the king's title and a subject's concur, the king's shall be always preferred; against the king, therefore, there could be no prior occupant, nor *nullum tempus occurrit regi*. *4 Inst. 41*. And even in the case of a subject, had the estate *pur autre vie* been granted to a man and his heirs during the life of *cestui que vie*, there the heir might and still may enter and hold possession, and is called in law a *special occupant*, as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hereditas jacens* during the residue of the estate granted: though some have thought him so called with no very great propriety, and that such estate is rather a descendible freehold. *Vaugh. 201*. See *2 Comm. c. 16 p. 259*.

By the statutes above mentioned, though the title of common or general occupancy is

utterly extinct and abolished, yet that of special occupancy by the heir at law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance; but as an occupant specially marked out and appointed by the original grant. And it seems (notwithstanding the opinion of Blackstone to the contrary) that these statutes extend to cases of incorporeal hereditaments; although, as has been already noticed, before the statute no common occupancy could be had of such incorporeal hereditaments. See 2 *Comm. c.* 16. p. 260; and *Christian's* note there; and 3 *P. Wms.* 264—6, with *Cox's* notes.

Thus in a recent case it was held, that a rent charge *pur autre vie*, if the grantee die, living the *cestui que vie*, goes to the grantee's executor, although not named in the grant. 7 *Bing.* 178.

Where the tenant of lands granted to him and his heirs *pur autre vie* devised them to A. B. without saying more, and A. B. died in the lifetime of the *cestui que vie*, it was held that the heir of the devisor took the lands as special occupant. 8 *B. & C.* 296.

As to the occupancy of leaseholds for lives limited to executors, administrators, and assigns, see 7 *Ves.* 425.

A man cannot, however, be an occupant but of a void possession; and it is not every possession of a person entering that can make an occupancy, for it must be such as would maintain trespass without farther entry. *Vaugh.* 191, 192; *Carter*, 65; 2 *Keb.* 250.

It has also been held, that there could be no occupancy by any person of what another has a present right to possess; and there cannot be an occupant of a copyhold estate. *Vaugh.* 190; *Mod. Ca.* 66; 1 *Inst.* 41. So in a recent case it was decided that there can be no general occupancy of copyholds, since the freehold is always in the lord, and the 29 *Car. 2. c.* 3. and 14 *Geo. 2. c.* 20. do not apply to copyholds. 7 *East*, 186.

But there may be a special occupancy by the heirs of a copyhold, if named, "because by the limitation to them, the lord has expressly excluded himself during the life of the *cestui que vie*." *Gillb. Ten.* 326; 2 *Black.* 1148.

Of *Things Personal*, to which a title may be obtained by occupancy.—Among these, *Blackstone* enumerates, 1. The goods of alien enemies; restrained, however, to captors authorized by public authority, and to goods brought into the country by an alien enemy after a declaration of war without a safe conduct. See *Alien*, and also *Insurance*, II. 2. The persons of prisoners till their ransom is paid; and perhaps in some cases negro slaves. See *Slaves*. 2. Any thing found which does

not come under the description of *waifs, estrays, wreck, or treasure-trove*. See those titles. 3. The benefit of the elements of light, air, and water, as far as they are previously unoccupied, or as they may be occupied without injury to another. See *Nuisance*. 4. Animals *feræ naturæ*, under the restrictions of the *Game Laws*. See that title. 5. A special personal property in corn growing on the ground, or other emblements; though the title to these, as *Mr. Christian* observes, is rather the continuation of an inchoate, than the acquisition of an original right. See *Emblements*. 6, 7. Property arising by accession and confusion of goods; as to the former of which a little shall be said presently. As to the latter, see *Confusion, property by*. 8. *Literary property*; see that title.

In some cases where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For *Bracton* says, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof, but if it be nearer to one bank than another, it belongs only to him who is proprietor of the nearest shore. *Bract. l. 2. c.* 2. Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed, there it seems just (and so is the constant practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and soil. *Salk.* 637. However, in case a new island rise in the sea, though the civil law gave it to the occupant, yet ours gives it to the king. *Bract. l. 2. c.* 2; *Callis of Sewers*, 22. And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth so as in time to make *terra firma*; or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. 2 *Roll. Abr.* 170; *Dyer*, 326. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have



the soil when the water has left it dry. *Callis*, 24, 28. So that the quantity of ground gained, and the time during which it is being gained, are what make it either the king's or the subject's property. See *Smart v. Dundee Corporation, Cases in Parliament*.

If a river running between two lordships by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place as a recompence for this sudden loss. *Callis*, 28.

Where the lord of a manor acquired a piece of land which had been formed gradually by ooze and soil deposited by the sea upon the extremity of his demesne lands, and it appeared that the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had been thus formed; upon an inquest finding that the land had been lost by the seas, and in an issue taken upon a traverse to that finding, the verdict was for the defendant; it was held that the crown was not entitled to judgment. *R. v. Lord Yarborough*, 4 D. & R. 790; and see the *Sixth Report of the Commissioners of Land Revenue*, &c. June, 1829; and 5 Bingham, 193, *Dom. Proc.*

The principle decided is, that land gradually and imperceptibly added by alluvion to the demesne lands of a manor, belongs not to the crown but to the owner of the demesne lands. As to the proceedings in this case, see 2 Bligh, 147.

The lord of a manor by lease and release bargained and sold certain sea-grounds, oyster-layings, shores, and fisheries, extending from the south at low-water-mark, to north at high-water-mark, and containing in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beacons, marked, and stobbed out. After the date of the deed, the sea imperceptibly encroached on the land, and the high and low-water-marks had varied in the same proportion: held, that so much of the soil of the shore as from time to time lay between high and low-water-mark passed to the grantee under this deed. *Scafton v. Brown*, 6 D. & R. 536; B. & C. 485.

As to property arising from *accession*.—By the Roman laws, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of

wood or metal into vessels and utensils the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. This has also long been the law of England; for it is laid down in the Year Books, that whatever alteration of form any property has undergone the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into gloves, cloth into a coat; or if a tree be squared into timber, or silver melted or beat into a different figure. 5 Hen. 7, c. 15; 12 Hen. 8, c. 10. But if the thing itself by such operations were changed into a different species, as by making wine, oil, or bread, from another's grapes, olives, or wheat, the civil law held, that it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. These doctrines are implicitly copied and adopted by Bracton, and have since been confirmed by many resolutions of the courts. *Bract. l. 2. c. 2, 3; Bro. Ab. title Property, 23; Moor, 20; Poph. 28*. It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman. *Moor*, 214. See 2 Comm. c. 26.

**OCCUPATION**, *occupatio*.} Use or tenure; as we say such land is in the tenure or occupation of such a man, that is, in his possession or management. Also it is used for a trade or mystery. See the repealed stat. 12 Car. 2. c. 18.

Occupations at large are taken for purpresures, intrusions, and usurpations, and particularly for usurpations upon the king, by the stat. *de Bigamis*, c. 4; 2 Inst. 272.

**OCCUPAVIT**. A writ that lay for him who was ejected out of his freehold in time of war; as the writ of *novel disseisin* lay for one disseised in time of peace. *Ingham*.

**OCHIERN**. The chief of a branch of a great family. *Scotch Dict.*

**OCTAVE**. The eighth day after any feast, inclusive. See *Utas*.

**ODHAL RIGHT**. See *Tenure*, I. I.

**ODIO ET ATIA**. Was a writ anciently called *breve de bono et malo*, directed to the sheriff to inquire whether a man committed to prison upon suspicion of murder, were committed on just cause of suspicion, or only upon malice and ill-will; and if upon the inquisition it were found that he was not guilty, then there issued another writ to the sheriff to bail him. See *Reg. Orig.* 133; *Bract. lib. 3. cap. 20*; 3 *Edw. 1. c. 11*; 28 *Edw. 3. c. 9*; S. P. C. 77; 2 *Inst.* 42; 9 *Rep.* 506.

The party committed, if entitled to be bailed, may now have the cause of his commitment inquired into, and be discharged on bail, by suing out an *habeas corpus*. See *Habeas Corpus*.

*Blackstone* remarks, that according to *Bracton*, lib. 3. tr. 2. c. 8, this writ ought not to be denied to any man, it being expressly ordered to be made out gratis, without any denial, by *Magna Carta*, c. 26. and stat. *West*. 2. 13 *Edw*. 1. c. 29; but the statute of *Gloucester*, 6 *Edw*. 1. c. 9, took it away in the case of killing by misadventure or self-deiſence; and the 28 *Edw*. 3. c. 9, abolished it in all cases whatsoever; but as the 42 *Edw*. 3. c. 1, repealed all the statutes then in being, contrary to the Great Charter, Sir *Edward Coke* is of opinion that the writ *de odio et atia* was thereby revived. 2 *Inst*. 43, 55, 315. See 2 *Comm*. c. 8. p. 129.

**ŒCONOMUS.** Is sometimes taken for an advocate or defender; as *summus secularium œconomus et protector ecclesiæ*. *Matt. Par.* anno. 1245.

**ŒCONOMICUS.** A word used for the executor of a last will and testament, as the person who had the economy or fiduciary disposal of the goods of the deceased. *Hist. Du-nelm. apud Whartoni Angl. Sacr. par.* 1. page 784.

**OFFENCE, Delictum.]** An act committed against a law, or omitted where the law requires it, and punishable by it. *West. Symb.*

Offences are capital or not; capital those for which the offender shall lose his life; not capital where an offender may forfeit his lands and goods, be fined, or suffer corporal punishment, or both; but not loss of life. *H. P. C.* 2. 126. 134.

Under capital offences were formerly comprehended treason and felony; but the greater number of felonies are now not visited with death.

Offences not capital include the remaining part of the pleas of the crown, and come under the title of misdemeanors.

An offence may be greater or less according to the place wherein it is done. *Finch*, 25. But the offence will be in equal degree in them who are equally tainted with it; and those who act and consent thereto are alike offenders. 5 *Rep*. 80. See *Misdemeanor*.

The term "offence" is usually, by itself, understood to be a crime not indictable but punishable summarily, or by the forfeiture or a penalty. If one statute make the doing an act *felonious*, and a subsequent act make it only *penal*, the latter is considered as a virtual repeal of the former. 1 *Hawk*. c. 40. § 5. These distinctions will be found highly important in their consequences. Private remedies are, in the case of felonies, suspended until after con-

viction or acquittal of the felon, but not so in general in the case of misdemeanors or minor offences. 1 *Chitty's Prac. of the Law*, 15.

**OFFERINGS.** Are reckoned among personal tithes payable by custom to the parson or vicar of the parish, either occasionally, as at sacraments, marriages, christenings, churching of women, burials, &c.; or at constant times, as at Easter, Christmas. See 2 & 3 *Edw*. 6. c. 13, 20, 21. Stat. 32 *Hen*. 8. c. 7. § 2. enforces the payment of offerings according to the custom and the place where they grow due. See *Oblations*.

By the 2 & 3 *Edw*. 6. c. 13. § 10, all persons who ought to pay offerings, shall yearly pay to the parson, vicar, proprietary, or their deputies, or farmers of the parishes where they dwell, at such four offering days as heretofore, within the space of four last years past, hath been accustomed, and in default thereof shall pay for their said offerings at Easter following.

The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church. *Gibbs*. 739.

**OFFERINGS OF THE KING.**—All offerings made at the holy altar by the king and queen are distributed amongst the poor by the dean of the chapel; there are twelve days in the year called offering days, as to these offerings, viz. Christmas, Easter, Whitsunday, All Saints, New Year's-day, Twelfth-day, Candlemas, Annunciation, Ascension, Trinity Sunday, St. John Baptist, and Michaelmas-day; all which are high festivals. *Lex Constitutionis*, 184.

The offering commonly made by James I. was a piece of gold, having on one side the portrait of the king kneeling before the altar, with four crowns before him, and circumscribed with this motto—"Quid retribuam Domino pro omnibus quæ tribuit mihi?" and on the other side, a lamb lying near a lion, with this inscription—"Cor contritum et humiliatum non despiciet Deus." *Ibid*.

**OFFERTORIUM.** A piece of silk or fine linen used to receive and wrap up the offerings or occasional oblations in the church. *Statut. Eccl. S. Pauli*, MS. folio, 39. Sometimes this word signifies the offerings of the faithful, or the place where they are made or kept; sometimes the service at the time of sacrament, the offertory, &c. See *Common Prayer, in the Communion Service*.

## OFFICE.

**OFFICIUM.]** That function by virtue whereof a man hath some employment in the affairs of another, as of the king, or of another person. *Cowell*.

Offices are classed by *Blackstone* among incorporeal hereditaments; and an office is defined to be a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public as those of magistrates, or private, as of bailiffs, receivers, or the like. 2 *Comm. c.* 3. p. 36.

It is said that the word *officium* principally implies a duty, and in the next place the charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer. *Carth.* 478.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices, such as an agreement to make hay, plough land, herd a flock, &c. which differ widely from that of steward of a manor, &c. 2 *Sid.* 142.

By the ancient common law, officers ought to be honest men, legal and sage, *et qui melius scient et possint officio illi intendere*; and this, says Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place grace the officer. 2 *Inst.* 32. 456.

Officers are distinguished into civil and military, according to the nature of their several trusts. *Carth.* 479.

So officers are public or private; and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty which makes him a public officer, and not the extent of his authority. *Carth.* 479.

Also offices are distinguished into ancient offices, and those which are of a new creation; and herein it is observable, that constant usage hath not only sanctioned the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have existed and are to continue to exist, in what manner to be exercised, how to be disposed, &c. 9 *Co.* 97; *Cro. Eliz.* 636; 2 *Rol. Abr.* 182; *Cro. Car.* 513; 1 *Show.* 436.

There is likewise another distinction of offices into judicial and ministerial; the first, relating to the administration of justice or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern. 1 *Jon.* 109; *Dan.* 35; 9 *Co.* 97.

I. Who has a right to create and grant or  
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assign an Office; and how and to whom; and of one Office being incident to or compatible with another.

II. Of the Offence of buying and selling an Office, and what Offices are prohibited to be thus disposed of.

III. What Remedies a person having a right to an Office must pursue to be let into the enjoyment of it, and how a disturbance is punishable.

IV. Of the Forfeiture of an Office; and where, for corruption, bribery, extortion, and oppressive proceedings, Officers are punishable.

I. THE king is the universal officer and disposer of justice within this realm, from whom all others are said to be derived; yet he cannot create a new office inconsistent with our constitution, or prejudicial to the subject. 12 *Co.* 116; 1 *Rol. Rep.* 206; *Carth.* 478. See *King.*

A man may have an estate in offices either to him and his heirs, or for life, or for a term of years, or during pleasure only, save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators 9 *Rep.* 97. Neither can any judicial office be granted in reversion, because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient; but ministerial offices may be so granted, for these may be executed by deputy. 11 *Rep.* 4.

There are three things, says Lord Coke, which have fair pretences, yet are mischievous; 1st, new courts; 2d, new offices; 3d, new corporations for trade. And as to new offices, either in courts or out of them, these cannot be erected without act of parliament; for that under the pretence of common good, they are exercised to the intolerable grievance of the subject. 2 *Inst.* 540.

An office granted by letters-patent for the sole making of all bills, informations, and letters missive in the council of York, was held unreasonable and void. 1 *Jon.* 231.

One Chute petitioned the king to erect a new office for registering all strangers within the realm, except merchant strangers, and to grant the office to the petitioner with or without a fee; and it was resolved by all the judges, that the erection of such new office for the benefit of a private person was against all law of what nature soever. 1 *Co.* 116, and several cases there cited to this purpose.

The king cannot grant to any person to hold a court of equity, though he may grant *tenere p. c. i. l. a.*; for the dispensation of equity is a special trust committed to the king, and



not by him to be intrusted with any other, except his chancellor. *Hob.* 63.

As to the alienation of an office by the crown, see 1 *B. & Ad.* 761.

The grant of an office, generally, may be made to any person whom the king pleases, for the king has an interest in his subject, and a right to his service; and therefore an information lies against him who refuses an office being duly elected; and he shall not be excused for his neglect to qualify himself according to law. 1 *Salk.* 168.

A woman may be an officer. Thus the grant of any office of government which may be exercised by deputy, is good, as regent of the kingdom; so of the keeper of a castle, forester, gaoler, commissioner of sewers, sexton, and overseer of the poor. See *Comm. Dig.* tit. *Officer* (B.) So an office of inheritance may descend or be granted to a woman, as the office of earl marshal. *Com. Dig.* Or lord great chamberlain of England. *Bro. P. C.*

Wherever one office is incident to another, such incident office is regularly grantable by him who hath the principal office; and on this foundation it hath been held, that the king's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff, and could not by any law or contrivance be taken away from him. 4 *Co.* 32. *Milton's case.*

So an office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. 1 *Salk.* 439; 1 *Leon.* 310, 321.

So it hath been resolved, that the office of exigenter of London and other counties in England, is incident to the office of chief justice of C. B., and therefore a grant thereof by the king, though in the vacancy of a chief justice, is null and void. *Dyer*, 175. a. pl. 25; 1 *And.* 152; and see *Shaw. P. C.*, *Sir Rowland Holt's case.*

Lord Coke says, that the justices of courts did ever appoint their clerks, some of which after, by prescription, grew to be officers in their courts; and this right which they had of constituting their own officers is further confirmed to them by stat. *West.* 2. 13 *Edw.* 1. st. 1. c. 30. The reasons are, 1st, that the law ever appoints those who have the greatest knowledge and skill to perform that which is to be done; 2dly, the officers and clerks are but to enter, enrol, or effect that which the justices adjudge, award, or order; the insufficient doing whereof maketh the proceeding of the justices erroneous, than which nothing can be more dishonourable and grievous to the jus-

tices, and prejudicial to the party. 2 *Inst.* 425; 4 *Mod.* 173.

If two offices are incompatible, by the acceptance of the latter the first is relinquished and vacant, even though it should be a superior office. 2 *T. R.* 81. See also *ibid.* 777; and *Dougl.* 398, in note, *Rez v. Godwin.*

By 50 *Geo.* 3. c. 85; 52 *Geo.* 3. c. 66. (which do not extend to offices under the government in Ireland) provisions are made for taking security for all persons employed in situations of public trust, and concerned in the receipt or distribution of public money. And see 50 *Geo.* 3. c. 59. (amended and rendered more effectual by the 2 *W.* 4. c. 4.) for preventing the embezzlement of public money by collectors, receivers, &c. throughout the United Kingdom.

By the 1 *Will.* 4. c. 42. the acts relating to the office of the treasurer of the navy were consolidated and amended.

See also the 50 *Geo.* 3. c. 117. for regulating the granting of salaries and pensions, and directing accounts of the payment thereof to be laid before parliament. This act applies to the minor officers in the various public departments in Great Britain and Ireland.

By 57 *Geo.* 3. 60, 61, 62, 63, 64, 67. and 84. various offices were abolished, and others regulated; as to which see the titles of the several offices.

By the 2 & 3 *Wm.* 4. c. 111. certain offices connected with the Court of Chancery were abolished, and the performance of the duties attached thereto, and the practice of other officers in that court, regulated by the 3 & 4 *Wm.* 4. c. 84 & 94.

By the 2 & 3 *Wm.* 4. c. 116. provision was made for the payment of the salaries of the judges in England and Ireland, of the lord lieutenant of the latter country, and for fixing diplomatic salaries and pensions, all of which are now charged on the consolidated fund instead of the civil list.

By the 4 & 5 *Wm.* 4. c. 15. the office of the receipt of his majesty's Exchequer is regulated various offices therein are abolished, and new arrangements made with respect to the rest.

By the 4 & 5 *Wm.* 4. c. 24. itself amended by c. 45. the laws regulating the pensions, compensations, and allowances to be made to persons holding civil offices under his majesty, are amended and consolidated.

By the 4 & 5 *Wm.* 4. c. 70. the salaries of the officers of the House of Commons are regulated, and several offices therein abolished.

For the act of the present reign, abolishing all stamp duties, and fees, formerly payable on the renewal of appointments consequent on the demise of the crown, see *Fees*, I.

II. THE taking or giving a reward for offices of a public nature is said to be bribery; and nothing can be more prejudicial to the good of the public, than to have places of the highest concern, (on the due execution whereof the happiness of both king and people depends, disposed of, not to those who are most able to execute, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry have qualified themselves for them, conferred on such who have no other recommendation but that of being highest bidders: neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expenses they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations. 2 *Inst.* 148; 1 *Hawk. P. C.* It is said to be *malum in se*, and indictable at common law. *Noy.* 102; *Moor.* 781.

For which reasons, among many others, it is expressly enacted by 12 R. 2. c. 2. that the chancellor, treasurer, and keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls of the justices of the one Bench and of the other, barons of the Exchequer, and all others who shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customs, comptrollers, or any other officer or minister of the king, shall not ordain, name, or make any of the above-mentioned officers for any gift or brokage, favour or affection; nor that none who sueth by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other; but that they make all such officers and ministers of the best and most lawful men, and sufficient, to their estimation and knowledge.

And by 4 H. 4. c. 5. it is enacted, that no sheriff shall let his bailiwick to farm to any man for the time he occupieth such office.

But the principal statute relating to this matter is 5 & 6 Ed. 6. c. 16; whereby it is enacted, "That if any person bargain or sell any office, or deputation of any office, or any part of any of them, or receive any money, fee, &c. directly or indirectly, or take any promise, &c. to receive any money, &c. directly or indirectly, for any office, or for the deputation of any office, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office, or the deputation of any office, or any part of any of them, which shall in anywise concern the adminis-

tration or execution of justice, or the receipt, &c. of any of the king's treasure, &c. or the keeping of the king's towns, &c. being for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of Court of Record wherein justice is to be administered; that then every person that shall so offend shall not only lose and forfeit all his and their right, interest, and estate, in or to any of the said office or offices, &c. but also persons who shall give or pay any sum of money &c. or shall make any promise, &c. shall immediately be adjudged a disabled person in the law to all intents and purposes to have, &c. the said office, &c.

"It is further enacted, that bargains, sales, promises, bonds, agreements, covenants, and assurances shall be void to and against him and them by whom any such bargain, &c. shall be made.

"Provided always, that this act shall not extend to any office whereof any person is seized of any estate of inheritance, nor to any office of parkership, or of the keeper of any park-house, manor, garden, chase, or forest, or to any of them.

"It is also provided, that this act shall not be prejudicial to the chief justices of the King's Bench and Common Pleas, or the justices of assize; but that they may do in every behalf, concerning any office to be given or granted by them, as they might have done before the making this act."

In the construction of the 5 & 6 Ed. 6. the following opinions have been holden.

The office of chancellor, registrar, and a commissary in Ecclesiastical Courts are within the meaning of the statute; inasmuch as those courts do not only determine matters which are brought before them *pro salute anime*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimation of children, which touch the inheritance of the subject; and also hold plea of legacies and tithes, &c. in which respects they are courts of justice. *Cro. Jac.* 269; 3 *Inst.* 148; 12 *Co.* 78; *Salk.* 468; 3 *Lev.* 287; 2 *Vent.* 187, 267.

But the office of clerk to the deputy registrar in the Prerogative court of Canterbury has been held not to be an office within the meaning of the statute, so as to prevent its being aliened or enarged; nor is such alienation or charge contrary to the general policy of the law as to offices. 3 Y. & J. 136.

Offices in fee are out of the statute: for if the king be seized in fee of a bailiwick, and he demise the same to A. who demises to B., rendering, &c. the demise to B. is not within the statute; for offices in fee being excepted out of the statute, under-leases of such offices are also excepted inclusively. 2 *Lev.* 151.

The place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and the king is bound by this statute, and could not dispense with it by any *non obstante*. 3 *Bulst.* 91; *Co. Lit.* 234; *Cro. Jac.* 385.

The sale of a bailiwick of a hundred is not within the statute; for such an offence doth not concern the administration of justice, nor is it an office of trust. 4 *Leon.* 33; 3 *Mod.* 223.

A seat in the six-clerks' office is not within the statute, being a ministerial office only, and they are but under clerks, who have so much a sheet for copying, &c.; but one judge held it not saleable at common law, for the following reasons: 1st. Discouragement of merit and industry. 2dly. It occasions extortion and exaction of excessive fees. 3dly. From its being a great charge to suitors. 4th y. It exempts the persons who enter, by these means, in a great measure, from the due regulations under which they ought to be; for they are not so easily removed as if they were at the will of him who had the disposal of them. *Pasch.* 26. *Car.* 2. in *C. B. Sparrow v. Reynolds*.

An assignment of all the emoluments of the office of clerk of the peace for Westminster is invalid, though the assignment is expressly subject to the deduction of the salary or allowance of the deputy. 2 *Brod. & Bing.* 673; 6 *Mo.* 28.

It is illegal to sell many offices not within the 5 & 6 *Ed. 6. c.* 16. Thus the appointment of captain of an East Indian ship cannot be legally sold (although not within the statute) without the consent of the East India Company, such a sale being contrary to a bye-law of the Company, a fraud on the Company, and contrary to the principles of public policy. But many offices, not within that statute, may be sold, provided the sale takes place with the consent of those who have the power of appointment. 8 *T. R.* 94. And see 2 *Barn. & C.* 661.

One who makes a contract for an office, contrary to the purport of the statute, is so far disabled to hold the same, that he cannot at any time during life be restored to a capacity of holding it by any grant or dispensation whatsoever. *Hob.* 75; *Co. Lit.* 234; *Cro. Car.* 361; *Cro. Jac.* 386.

Where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy by his constitution is in place of his principal, yet he has no right

to his fees, they still continue to be the principal's, so that as to him it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond of performance of such agreement is void by the statute. *Salk.* 468; 6 *Mod.* 234; *Comb.* 356.

This being a public law, the judges *ex officio* are to take notice of it; but yet it seems the more regular and safe way to plead it; but it hath been resolved, that a person in pleading this statute need not allege that the party against whom it is pleaded is not within any of the provisos or exceptions in the statute; but that if he be, it must come on his side to show it. *Trin.* 9 *Geo.* 2. in *B. R. Maccarty v. Wickford* *Sed quære?* Also vide 2 *And.* 55. 107; *Ld. Raym.* 1245.

By 49 *Geo.* 3. *c.* 126. the 5 & 6 *Ed.* 6. *c.* 16. is extended to Scotland and Ireland, and to all offices in the gift of the crown, and to all civil, naval, and military commissions, employments, and appointments under government, in the United Kingdom or in the colonies, or under the East India Company.

By § 3. persons buying or selling, or receiving and paying money, reward, or profit for buying or selling, any office, commission or employment mentioned in this act, or 5 & 6 *Ed.* 6. or any deputation thereto, or any participation in the profits thereof, or for consenting to any resignation, are declared guilty of a misdemeanor, § 3. As are also persons receiving or paying any money or profit for soliciting or obtaining offices, § 4. Like penalty on persons opening or keeping any place for soliciting for any such offices, or negotiating for the same, § 5. Penalty 50*l.* on persons advertising for like purpose, § 6. Officers in the army giving more than regulated prices shall forfeit their commissions, and be cashiered, § 8.

By 53 *Geo.* 3. *c.* 54. the battle-axe guards in Ireland, and by 53 *Geo.* 3. *c.* 129. the six clerks in Chancery there, are exempt from the operation of this act.

A bond was given by A. B. to C. D. colonial secretary of Tobago, reciting that C. D. had appointed A. B. his deputy, and to receive the fees of office in consideration of his paying him 450*l.* per annum thereout, and the condition was for punctual payment of that sum, without saying "out of the fees." To an action on the bond, A. B. pleaded that the bond was given in pursuance of a corrupt agreement against the statute, that A. B. should pay 450*l.* per annum at all events to C. D. Issue was taken on the plea and found for A. B. The court held that the fact showed the bond to be



illegal and void by the 49 *Geo. 3. c. 126*; and that the plea showing the illegal agreement was good. *Grenville v. Alkins*, 9 *Barn. & C.* 462. And see 2 *Salk.* 463; 1 *Bro. P. C.* 135.

Offices in the gift of the chief justices of the King's Bench and the Common Pleas, were expressly excepted out of the 5 & 6 *Edw. 6. c. 16*, and continued saleable down to the passing of the 6 *Geo. 4. c. 82* and 83, whereby the sale of offices in both courts was abolished, and a compensation provided for the chief justices in lieu of the emoluments formerly derivable by them from disposing of such offices. These statutes enact, that all appointments by the two chief justices shall be without fee, and *quem diu se bene gesserint*.

III. It was held clearly, that an assize lay at common law for an office, and that therefore though the statute of *Westminst. 2. 13 Ed. 1. st. 1. c. 25*, speaks only of offices in fee, yet, an assize lay for an office in tail, or for life: but this is to be understood of offices of profit, and not of an office of charge and no profit an assize did not lie. 8 *Co. 47. a*; 2 *Inst. 412*.

But a man should not have an assize of the whole office, unless he were disseised of the whole; yet if a man were disseised of parcel of the profits of an office, he may have had an assize for that parcel only. 8 *Co. 49 b*; 2 *Inst. 412*.

In an assize for an office newly erected and constituted, the demandant in his plaint must have shown what fee or profit is granted for the exercise thereof; for this office could not have a fee or profit appurtenant to it, as an ancient office might, and for an office without fee or profit no assize lay. 8 *Co. 49*.

But in assize for an ancient office, the demandant in his plaint need have shown what fee or profit was belonging to it, for it should be intended there was some fee or profit. 8 *Co. 49*.

In an assize for an office, the demandant must have shown a seisin; but it was held, that taking *3d.* for a *capias* against B. was sufficient seisin of the office of *filacer de banco*. 1 *Roll. Abr.* 270.

Also in assize for an office, the demandant, in his patent must have set forth a title. 3 *Mod.* 273.

An assize lay for the office of registrar of the admiralty; for though their proceedings are according to the civil law, yet the right of their office is determinable at the common law; so of the mastership of an hospital, being a lay fee. 8 *Co. 47*; 2 *Inst. 412*; 11 *Co. 99 b*; *Dyer*, 152.

Now by the 2 & 3 *W. 4. c. 27*, all real actions are, with one or two exceptions, abolished; and among them that of an assize for an office which had long been obsolete.

A man may bring an action on the case for the profits of an office, though he never had seisin. 1 *Mod.* 122. Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office, or where two persons claim title to an office, and one receive the profits, either by himself or his collector, the other may bring *indebitatus assumpsit* for money had and received, wherein, the title must be proved. 2 *Mod.* 260, 263; 3 *Lev.* 262; 2 *T. Jon.* 127. But such action must be brought against the principal, and not against the collector. 4 *Burr.* 1984, *Bul. M. P.* 133.

If the king grant the office of comptroller of the customs to A. and B. *durante beneplacito*, and A. dies, and afterwards the king grants the said office to C., and yet B. under pretence of survivorship, exercises the said office, and receives the profits thereof; C. may have an *indebitatus assumpsit* for so much money had and received to his use. 2 *Mod.* 260. See 2 *Lev.* to try the question of right.

So where a person is entitled to an office, with fees annexed, and a stranger intrudes into the office and receives the fees, this form of action lies to recover them; but they must be certain, known, and accustomed fees annexed to the office, and such as the legal officer could himself recover in a court of law from the persons of whom they are claimed and received. See 6 *T. R.* 681; *Peake's N. P. C.* 182. Where fees of office are demanded and received, but the party paying them disputes the receiver's right to them, or his own liability to be charged, an action of *indebitatus assumpsit* for money had and received will lie to try the question between them. See *Willes*, 536.

And in general, an action by a person claiming an office against the person in actual possession, and receives the fees, is now perhaps the most eligible method that can be pursued. 108; 1 *Mod.* 122.

The most usual remedy, however, for a party to be admitted or restored to an office is by *mandamus*. See that title; and *Quo Warranto*.

IV. It is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited. 11 *Ed. 4. 1 b*; 2 *Roll. Abr.* 155.

There are, says Lord Coke, three causes of forfeiture or seizure of offices by matter in deed. 1st. By abuser; 2dly. Non-user; 3dly. Refusal.

1st. Abuser; as by a marshal or other gaoler's permitting escapes.

2dly. By Non-user; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without request, there by non-user or non-attendance the office is forfeited; but where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there without such demand or request there can be no forfeiture; and herein also Lord Coke in a another place takes the following diversity, viz. that non-user, of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a public one, which concerns the administration of justice.

3dly. As to refusal, he says, that in all cases where an officer is bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture. 6 Co. 56; Co. Litt. 233 b.

But herein it will be necessary to consider more minutely what shall be said to be such acts as are contrary to the duty of his office; and how far the same (whether they are acts of omission or commission) amount to a forfeiture; wherein it hath been clearly agreed, that a gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after having been legally discharged and paid their just fees, forfeits his office; for that in the grant of every office it is implied that the grantees execute it faithfully and diligently. Co. Litt. 233; 3 Co. 59; 3 Mod. 143.

If a gaoler leave his prison door unlocked, and the prisoners escape, it is not only a negligent, but a voluntary escape. Cro. Car. 492.

But it is held, that one negligent escape is not a forfeiture, though a voluntary one is, but that two negligent escapes amount to a forfeiture. 39 Hen. 6. 33; 2 Roll. Abr. 195; 2 Vern. 173; and see 8 & 9 Wm. 3. c. 27; and tits. *Escape, Gaoler*.

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; therefore if the office of forester, &c. descend to an infant or feme-covert, (where by law they may so descend,) and these are not exercised by sufficient deputies, they become forfeited. Co. Litt. 233 b.; 8 Co. 44; Cro. Car. 556; Hard. 11.

Insufficiency is an original incapacity which creates the forfeiture of an office, so if a superior puts in a deputy into an office, which may be exercised by a deputy, who is ignorant and unskilful, this is a forfeiture of the office. 4 Mod. 29. *arguendo*.

If the king grants an office in any of the courts at Westminster, the judges may remove an officer for insufficiency, and they are the proper judges of his abilities. 4 Mod. 30. *arguendo*. Where an officer may be removed, but not abridged of his fee, see 1 Roll. Rep. 82, 83.

A filacer of C. B. being absent two years, and having farmed out his office from year to year, without licence of the court, was discharged by the chief justice, *ex assensu sociorum suorum*, by word, spoken openly in court; and though there was no record made of the discharge, nor legal summons for him to answer to any accusation, yet the discharge was held good. Dyer, 114 b. pl. 64; 1 Roll. Abr. 155.

The clerk of the papers, in the King's Bench prison, cannot act by deputy, but must himself reside within the prison. Clerk of the papers, and clerk of the day-rules in the King's Bench prison, was removed by the Court of K. B. for nonresidence. 4 T. R. 716; 5 T. R. 511.

An officer was turned out because that the *spoliavit quedam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shown what records: to which the court answered, that it would be prolix, and then he having spoiled the records, they are not perhaps to be had. 2dly, That it may be he did it by chance, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* includes that. 1 Keb. 597.

But if the king grants an office which concerns trust and diligence to two, and one is attainted, the entire office is forfeited to the king; for he cannot make one occupy in common with another. Plow. 180.

Wherever an officer, who holds his office by patent, commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature. But for this see Dyer, 155, 198, 211; 9 Co. 98; Co. Litt. 233; Cro. Car. 60, 61; 1 Sid. 81, 134; 8 Co. 44 b; 1 Roll. Abr. 580; 3 Mod. 335; 3 Lev. 238.

All officers are punishable for corruption and oppressive proceedings, according to the nature of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their office, &c. 6 Mod. 96.

But besides the punishment by indictment, &c. all courts of record have a discretionary power over their officers, and are to see that no abuses are committed by them, which may bring disgrace on the courts themselves: the

Court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior courts; and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice. *Dyer*, 218; *Palm.* 564; 1 *Salk.* 210.

As to extortion by officers, it is so odious, (being more heinous, as Lord Coke says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at common law by fine and imprisonment, and also by removal from the office in the execution whereof it was committed; and is defined to be, the taking of money by any officer, by colour of his office, either where none is due, or not so much is due, or where it is not yet due. *Co. Litt.* 368 b; 2 *Inst.* 209; 10 *Co.* 102; 2 *Roll. Abr.* 32, 57; *Cro. Car.* 438, 448; *Raym.* 315.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm.* 1. Therefore such fees may be legally demanded, without danger of extortion. 21 *Hen.* 7. 17; *Co. Litt.* 368. See further *Bribery, Extortion, Fees.*

In general, all wilful breaches of the duty of an office are forfeitures of it, and punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution; but the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that is needless to enumerate them. *Co. Litt.* 233, 234.

\* By the 50 *Geo.* 3. c. 85. and 52 *Geo.* 3. c. 66, all persons appointed to any office or commission civil or military, in any public department, or to any office of public trust under the crown, or wherein he shall be concerned in the receipt or disbursement of any public monies, shall give security by bond with sufficient surety to be approved of by the lords of the treasury, or the principal officer in the department, for due performance of his office, and for duly accounting for all public money received by him. These acts extend to Scotland, but not to Ireland. See 50 *Geo.* 3. c. 59, as to collectors and receivers, &c. in Ireland, and *ante*, I.

For further matter connected with this title, see *Mandamus, Quo Warranto, &c.*

**OFFICE FOUND.** Is where an inquisition is made to the king's use, of any thing by virtue of his office who inquireth, and it is found by the inquisition. In this signification it is used in 33 *H.* 8. c. 20; where to traverse and office, is to traverse an inquisition taken of office; and to return an office, is to return that which is found by virtue of the office. *Kitch.* 177.

There are two kinds of offices issuing out of the exchequer by commission, viz. an office to entitle the king in the thing inquired of, and an office of instruction. 6 *Rep.* 52. The office of entitling doth vest the estate and possession of the land, &c. in the king, who had therein before only a right or title; as where an alien purchases lands, a person is attaint of felony, or the like; and the other office is where land is vested and settled before in the king, but the particulars thereof do not appear upon record. 4 *Rep.* 58; *Plowd.* 484. The effect of this office is, that the king, from the time of finding, shall be answered the profits without entry, &c. 5 *Rep.* 32; 10 *Rep.* 115. If any office be wrongfully found those who are grieved may be relieved by a traverse, or *monstrans de droit*, by pleading or petition; for every office is in nature of a declaration, to which any man may plead, and either deny or confess, &c. *Plowd.* 448; *Bro.* 506. Where offices are found before the escheators, they must be delivered by indenture under the hands and seals of the jurors. *Dyer*, 170. See *Inquest of Office, Monstrans de droit*.

**OFFICIAL, officialis.** In the ancient civil law signifies him who is the minister of, or attendant upon, a magistrate. In the canon law, it is he to whom any bishop generally commits the charge of his spiritual jurisdiction; and in this sense there is one in every diocese called *officialis principalis*, whom the law styles chancellor; and the rest, if there are more, are by the canonists termed *officialis foranei*, but by us commissaries. In our statutes, this word signifies properly him whom the archdeacon substitutes for the executing his jurisdiction. The archdeacon hath an official or church lawyer to assist him, who is judge of the archdeacon's court. *Wood's Inst.* 30, 505.

**OFFICIIARIIS NON FACIENDIS VEL AMOVENDIS.** A writ directed to the magistrates of a corporation, requiring them not to make such a man an officer, or to put one out of the office he hath, until inquiry is made of his manners, &c. *Reg. Orig.* 126.

**OFFICIUM CURTAGII PANNORUM.** Granted to William Osborne, anno 2 *Ed.* 2. *Extract. Fin. Cancell.*

**OIL.** The lord mayor of London, and the



master and wardens of the tallow-chandlers' company, are to search all oils brought to London; and if any is deceitfully mixed, they may throw it away, and punish the offenders; and head officers in corporations have like power. 3 *Hen. 8. cap. 14.*

No lamps to be used in private houses but of fish oil. 8 *Ann. c. 9 § 18.* See *Candles.*

OLD JURY, *Vetus Judaismus.*] The place or street where the Jews lived in London. See *Jews.*

OLD STYLE. See *Year.*

OLERON LAWS, *Uliuenses Leges.*] Laws relating to maritime affairs, so called because said to be made by king Richard I. when he was at Oleron, an island lying in the bay of Aquitaine, at the mouth of the river Charent. *Co. Litt.* 260. These laws are recorded in the black book of the admiralty, and are accounted the most excellent composition of sea laws in the world. See *Selden's Mare Cluusum*, 222, 254; 1 *Comm.* 418; 4 *Comm.* 423; *Luder's Tracts.* See *Navy.*

OLYMPIAD, *Olympias*] An account of time among the Greeks, consisting of four complete years, having its name from the Olympic games, which were kept every fourth year, in honour of Jupiter Olympius, near the city of Olympia; when they entered the names of the conquerors on public records. The first Olympiad began in the year 3938 of the Julian period, 505 years after the taking of Troy, 776 before the birth of Christ, and 24 years before the founding of Rome. Æthelred, king of the English Saxons, computed his reign by Olympiads. *Spelm.*

OMISSIONS. Are placed among the crimes and offences; and omission to hold a court-leet, or not swearing officers therein, &c. is a cause of forfeiture. Omissions in law proceedings render them vicious and defective. See *Amendment, Office.*

OMNIUM. A term used at the Stock Exchange, to express the aggregate value of the different Stocks in which a loan is usually funded.

Thus in the loan of 36,000,000*l.* contracted for in June 1815, the omnium consisted of 130*l.* 3 per cent. reduced annuities 44*l.* 3 per cent. consols, and 10*l.* 4 per cent. annuities for each 100*l.* subscribed.

The loan was contracted for on the 14th June, when the prices of the above stocks were—3 per cents. reduced 54, 3 per cent. consols 55, 4 per cents. 70; hence the parcels of stock given for 100*l.* advanced, were worth—

	£	s.	d.
130 <i>l.</i> reduced at 54 - - -	70	4	0
44 <i>l.</i> consols at 55 - - -	24	4	0
10 <i>l.</i> 4 per cents. at 70 - - -	7	0	0

Together - - £101 8 0

which would be the value of the omnium, or 1*l.* 8*s.* per cent. premium, independently of any discount for prompt payment. *McCulloch's Comm. Dic.*

ONCUNNE, Sax. *On Cunnan, accusatus.*] *Leg. Alf. c. 29.*

ONERANDO PRO RATA PORTIONIS. A writ that lies for a joint-tenant, or tenant in common, who is distrained for more rent than his proportion of the land comes to. *Reg. Orig.* 182. See *Joint-tenants.*

ONEROUS CAUSE. The Scotch phrase for a good and legal consideration. See *Assumpsit.*

O. NI. It was the course of the exchequer as soon as the sheriff entered into and made up his account for issues, amerciaments, and mean profits, to mark upon each head O. Ni.; which denoted *oneratur nisi habeat sufficientem exonerationem*, and presently he became the king's debtor, and a *debet* was set upon his head; whereupon the parties *paravaile* became debtors to the sheriff, and were discharged against the king, &c. 4 *Inst.* 116.

By a recent act sheriffs are now to account to the commissioners for auditing the public accounts. See *Sheriff.*

ONUS EPISCOPALE. Ancient custom of any payments from the clergy to their diocesan bishop, of synodals, pentecostals, &c. See *Episcopalia.*

ONUS IMPORTANDI. The charge or burden of importing merchandise, mentioned in 13 *Car.* 2.

ONUS PROBANDI. The burden of proving: upon whom it shall be imposed. See *Evidence.*

OPEN LAW, *lex manifesta.*] The making or waging of law; which bailiffs might not put men to, upon the bare assertion, except they had witnesses to prove the truth of it. *Magna Charta, c. 21.*

OPEN THEFT, Sax. *Opentheof.*] A theft that is manifest. *Leg. Hen. 1. c. 13.*

OPEN TIDE. The time after corn is carried out of the common fields. *Brit.*

OPERARI. Such tenants, under feudal tenures, who had some little portions of land by the duty of performing many bodily labours and servile works for their lord, being no other than the *servi* and bondmen: they are mentioned in several ancient surveys of manors.

OPERATIO. One day's work performed by a tenant for his lord. *Paroch. Antiq.* 320.

OPPOSER. An officer formerly belonging to the Green Wax in the Exchequer. See *Exchequer.*

OPPRESSION. In a private sense, is the trampling upon or bearing down one, on pretence of law, which is unjust; but where the

law is known and clear, though it appear hard, *judgment of God*, presuming that he would deliver the innocent. *Terms de Ley*; 9 Rep. 32. or unequitable, the judges must determine according to that. *Vaugh.* 37. As to the remedy for the oppression of the crown, see *King*, V. 2.

**OPTION.** When a new suffragan bishop is consecrated by the archbishop of the province, by a customary prerogative the archbishop claims the collation of the first vacant dignity or benefice in that see, at his own choice; which is called his option. *Cowel. See Bishops.*

**OPTIONAL WRIT.** A *præcipe* was an optional writ, i. e. it was in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he had not done it. There was another species of original writ called peremptory or a *si fecerit te securum*, from the words of the writ, which directed the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute his claim. 3 *Comm.* 274. See *Original Writ.*

**ORA.** A Saxon money or coin, valued at sixteen pence, and sometimes according to variation of the standard, at twenty pence. The word often occurs in *Domesday*, and the laws of King *Canute*.

**ORANDO PRO REGE ET REGNO.** An ancient writ. Before the Reformation, while there was no standing collect for a sitting parliament, when the houses of parliament were met, they petitioned the king that he would require the bishops and clergy to pray for the peace and good government of the realm, and for a continuance of the good understanding between his majesty and the estates of the kingdom; and accordingly the writ *de orando pro rege et regno* was issued, which was common in the time of King *Edw.* III. *Nichols. Engl. Hist. par.* 3. p. 66.

**ORBIS.** A bonney; a swelling or knot in the flesh, caused by a blow. *Bract. lib.* 3. tit. *De Coronâ*, c. 23. num. 2.

**ORCHARDS.** See *Gardens*.

**ORCHEL or ORCHAL.** Mentioned in 1 *Rich.* 3. c. 8; 3 & 4 *Edw.* 6. c. 2. A kind of stone like alum, which dyers use in their colors. It is among the articles liable to a duty on importation.

**ORDEAL or ORDAL,** Sax. compounded of *or*, *magnum*, and *deal*, or *dele*, *judicium*; or as others, from *or*, privative, and *del*, part; that is, *expers criminis*, or not guilty.] See 4 *Comm.* 343. n. An ancient manner of trial in criminal cases; for when an offender, being arraigned, pleaded not guilty, he might choose whether he would put himself for trial upon God and the country, by twelve men, as at this day, or upon God only; and then it was called the

This trial, according to *Blackstone*, arose from the superstition of our Saxon ancestors, who, like other northern nations, were extremely addicted to divination; they therefore invented this among the methods of purgation or trial to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless. 4 *Comm.* 342.

According to Meyer, the word *ordeal* is from the same original as *ordeal* in Dutch, and *urtheil* in German, and signified judgment; so that the term was used to denominate the highest form of trial. He deduces the practice from a still earlier mode of trying offences by lots, which itself is referable to that partiality for *auspicia* and *sortes*, mentioned by Tacitus as remarkable among the ancient Germans, and which, with many other similar feelings and habits, they carried with them and retained, under a modified form, after their conversion to Christianity.

There were two sorts of ordeal; one by fire, another by water. Of these see *Lambard*, in his *Explication of Saxon Words*, verbo *Ordalium*; *Holingshed*, fol. 98, and *Hotoman*, especially *Disput. de Feud.* p. 41. See *Skene de verbor. Significat.* verbo *Machinum*.

This seems to have been in use in the time of Henry the Second, as appeareth by *Glanville*, lib. 14. c. 1, 2. See also *Verstegan*, c. 3. p. 63, &c. and *Hoveden*, 566. This ordalian law was condemned by Pope Stephen the Second, and afterwards totally abolished here by parliament, as appears by *Rot. Paten. de anno* 2 Hen. 3. membr. 5. *Cowell. Vide Leg. Edw. Confess.* c. 9. *Blackstone* says, Ordeal was abolished in our courts of justice by an act of parliament in 3 Hen. 3. according to Coke; or rather by an order of the king in council. See 4 *Comm.* 344, 345; and 9 *Rep.* 32; 1 *Rym. Fæd.* 288; *Spelm. Gloss.* 326; 2 *Pryn. Rec.* Ap. 20; *Seld. Eadm.* fol. 48. According to the record in *Spelman*, it appears that the order of council alluded to the trial by ordeal as condemned by the church of Rome, and substituted the punishment of imprisonment, abjuration of the realm, and security for good behaviour in the case of suspicion of certain crimes specified.

So late as King John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ et ignis*. *Spelm. Gloss.* 435. And both in England and in Sweden the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground. 4 *Comm.* 345.

The water ordeal was performed either in hot or cold; in cold water, the parties suspected were adjudged innocent if their bodies were not borne up by the water contrary to the course of nature: in hot water, they were to put their bare arms or legs into scalding water, which, if they brought out without hurt, they were taken to be innocent of the crime.

It is easy, says Blackstone, to trace out the traditional relics of this water ordeal in the ignorant barbarity still practised in many counties to discover witches by casting them into a pool of water and drowning them to prove their innocence. 4 *Comm.* 343.

Those that were tried by the fire ordeal passed barefooted and blindfolded over nine hot glowing ploughshares; or were to carry burning irons in their hands, usually of one pound weight, which was called *simple ordeal*; or of two pounds, which was *duplex*; or of three pounds' weight, which was *triplex ordalium*; and accordingly as they escaped they were judged innocent or guilty, acquitted or condemned. This fire ordeal was for freemen, and persons of better condition; and the water ordeal for bondmen and rusties. *Glanv. lib. 4. c. 1.*

And the horrible trial by fire ordeal, in the first degree, Queen Emma, mother of Edward the Confessor, is said to have undergone on a suspicion of her chastity; though the truth of the story is now, we believe, nearly exploded.

Both sorts of ordeal might be performed by deputy, but the principal was to answer for the success of the trial; the deputy only venturing some corporeal pain for hire, or perhaps for friendship. 4 *Comm.* 342, 343.

For another species of purgation, see *Corse-need Bread*.

**ORDEFTE, or ORDELFE,** *offossio metal- li*, from the Sax. *ore, metallum*, and *delfan, effodere*.] A word often used in charters of privileges; signifying a liberty whereby a man claims the ore found in his own ground; but properly is the ore lying under ground. A delfe of coal, is coal lying in veins under ground, before it is dug up. *Cowell*.

**ORDELS.** Oaths and ordels were part of the privileges and immunities granted in old charters; meaning the right of administering oaths and adjudging ordeal trials within such a precinct or liberty. *Consell*.

**ORDER FOR THE PAYMENT OF MONEY, &c.** See *Larceny, I.*

**ORDERS.** Are of several sorts, and by diverse courts; as of the Chancery, King's Bench, &c.

**ORDERS OF THE COURT OF CHANCERY.** Either of course or otherwise, are obtained on the petition or motion of one of the parties in a cause, or of some other interested

in or affected by it; and they are sometimes made on hearings, sometimes by consent of parties. They are to be pronounced in open court, and drawn up by the registrar from his notes; and if there be any difficulty in adjusting the notes, a summons is given by the registrar for the clerk or solicitor of the other side to attend, whereupon they are settled, or the court is applied to if it cannot be otherwise done. Before the orders are entered and passed by the registrar, the other side has four days allowed to object against them, for which purpose copies are delivered; and when they are perfected, they are to be served on the parties, or the clerk or solicitor employed by them. If an order is of course, the solicitor usually draws up the notes or minutes, and gives them to the registrar's clerk to draw up the order from; and when the order is drawn up, it is to be entered by the entering clerk, which must be within eight days from the pronouncing; then the registrar passes and signs it, after which is the service, &c. For not obeying an order, personally served, a party may be committed. See the Books of Practice.

A variety of orders have recently been issued by the lord chancellor, with the concurrence of the master of the rolls and the vice-chancellor, making extensive alterations in the practice of the Court of Chancery. See *Equity*.

**ORDERS OF THE COURT OF KING'S BENCH.** Rules made by the court in causes there depending, which, when drawn up and entered by the clerk of the rules, become orders of the court. 2 *Lill.* 261. See further, *Motion, Rules*.

**ORDERS OF JUSTICES OF PEACE, or of the Sessions.** See *Justices of the Peace, Sessions*.

**ORDERS of the Clergy, or HOLY ORDERS.** See *Clergy, Ordination*.

**ORDINALE.** A book which contains the manner of performing divine offices, *in quo ordinatur modus, &c.*

**ORDINANCE, ordinatio.]** A law, decree, or statute, variously used.

**ORDINANCE OF THE FOREST, ordinatio foresta.]** A statute made touching matters and causes of the forest. See 33 & 34 *Edw. 1.*

**ORDINANCE OF PARLIAMENT.** Acts of parliament are often called ordinances, and ordinances acts; but originally there seems to be this difference between them—that an ordinance was but a temporary act, not introducing any new law, but founded on acts formerly made; and such ordinances might be altered by subsequent ordinances; but an act of parliament is a perpetual law, not to be altered



but by king, lords and commons. *Rot. Parl.* 37 *Edw.* 3; *Pryn. on 4 Inst.* 13. See *Statute*.

**ORDINARY**, *ordinarius*.] A civil law term for any judge who hath authority to take cognizance of causes in his own right, and not by deputation: by the common law it is taken for him who hath ordinary or exempt and immediate jurisdiction in causes ecclesiastical. *Co. Litt.* 344; *Stat. Westm.* 2. 13 *Edw.* 1. st. 1. c. 19.

This name is applied to a bishop who hath original jurisdiction; and an archbishop is the ordinary of the whole province, to visit and receive appeals from inferior jurisdictions, &c. 2 *Inst.* 398; 9 *Rep.* 41; *Wood's Inst.* 25. The word ordinary is also used for every commissary or official of the bishop, or other ecclesiastical judge having judicial power: an archdeacon is an ordinary; and ordinaries may grant administration of intestates' estates, &c. 31 *Edw.* 3. c. 11; 9 *Rep.* 36. But the bishop of the diocese is the true and only ordinary to certify excommunications, lawfulness of marriage, and such ecclesiastical and spiritual acts, to the judges of the common law, for he is the person to whom the court is to write in such things. 2 *Shep. Abr.* 472.

For the ordinary's power, it is declared by many statutes: as relating to visiting hospitals, by 2 *Hen.* 5. st. 1. c. 1; the certifying of bastardy, &c. 9 *Hen.* 6. c. 11; concerning questions of tithes that shall come in debate before him, 27 *Hen.* 8. c. 20; allowance of school-masters, &c. 23 *Eliz.* c. 1; 1 *Jac.* 1. c. 4. If a man may keep a school without licence of the ordinary, see *Ld. Raym.* 603; and *post*, tit. *School-master*. And the authority of ordinaries in general is restored by the 13 *Car.* 2. st. 1. c. 12.

The ordinary's power and interest in a church is of admitting, instituting, and inducting parsons; of seeing and taking care that it be provided with a pastor by the patron who has the right of presenting; or in his default to bestow the church on some proper person to serve the cure, &c. 1 *Roll. Rep.* 453. Before presentation to a church, the ordinary may sequester the profits; and during the vacation, it is said, he may make a lease. 1 *Keb.* 370. When the ordinaries or their ministers have committed extortion or oppression, they may be indicted, putting the things in certain, and in what manner, &c. 25 *Edw.* 3. st. 3. c. 9.

Formerly clerks accused of crimes were delivered to the ordinary, and the bodies of such clerks kept in the ordinary's prison until tried before him by a jury of twelve clerks; and if condemned, they were liable to no greater punishment than degradation, loss of goods, and

the profits of their lands; unless they had been guilty of apostacy, &c. This was when they had the privilege of being tried only by ecclesiastical judges; which was so far indulged them, that after they had been once delivered to the ordinary, they could not be remanded to any temporal court, until the 8 *Eliz.* c. 4. See *Clergy, Benefit of*.

No ornaments can be set up in a church without the consent of the ordinary. 1 *Stran.* 576; see 9 *Co.* 36; and *Stats. Westm.* 2. c. 19; 31 *Edw.* 3. c. 11; 21 *Hen.* 8. c. 5; 2 *Inst.* c. 19. See further, *Brooke*, tit. *Ordinary*; *Lindewode* in *cap. de Constitutimibus* verbo *Ordinarii*; and *ante*, tits. *Administrator, Bishop, Clergy*.

**ORDINARY OF NEWGATE.** The clergyman who is attendant in ordinary upon condemned malefactors in that prison, to prepare them for death; and who records the behaviour of those unhappy culprits.

**ORDINATIONE CONTRA SERVIENTES.** A writ that lay against a servant for leaving his master contrary to the ordinance or statute 23 & 25 *Edw.* 3; *Reg. Orig.* 189.

**ORDINATION OF THE CLERGY.** By common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage; but now, by statute, no man is capable of taking any ecclesiastical benefice with cure, promotion, or dignity, unless he be ordained a priest, to qualify him for the same. A clerk is to be twenty-three years old, and have deacon's orders, before he can be admitted into any share of the ministry; and the priest must be twenty-four years of age before he shall be admitted into orders to preach, or to administer the sacraments, or to hold any ecclesiastical benefice; but the archbishop may dispense with one to be made deacon at what age he pleases, though he cannot with one who is to be made a priest. See 13 *Eliz.* c. 12; 13 & 14 *Car.* 2. c. 4. extended to Ireland by 44 *Geo.* 3. c. 43. By the latter statute, the granting faculties of dispensation appears to be confined to the archbishops of Canterbury and Armagh.

Deacons and priests are to be ordained only on the four Sundays immediately following the Ember Weeks, except on urgent occasions; and it is to be done in the cathedral or parish church where the bishop resides, in time of divine service, and in the presence of the archdeacon, dean, and two prebendaries, or of four other grave divines. And no bishop shall admit any person into orders without a title or assurance of being provided for; and before any are admitted, the bishop shall examine them in the presence of the ministers, who assist him at the imposition of hands; on pain, if he admits any not qualified, &c. of being

suspended by the archbishop from making a colonial bishop, not actually residing in his  
either deacons or priests for two years. Can one, shall be capable of holding any pre-  
31, 34. ferment, or officiating in any manner as a

If any impediment be objected, on just grounds, to any of the charges of England or Ireland, who is to be made either priest, or deacon, or sub-deacon, its *Clergy, Parson, Sonomy.*

the time lies to be ordered by the court. *CLINIS.* A general chapter or other bound to screen a from ordaining lay, and so in execution of the religious of such a he shall be found clear of that matter entirely. *Parish. Intq. p. 576.*

and it is generally held, that while the principal causes of deprivation are also various causes. The lay officers of priest, deacon, and sub-

to deny admission to orders; as *excommunicatus*, denegating which did carry for presentment-drunkenness, later done, perjury, &c., &c.; so that refusal of admission to an ecclesiastical dignity, money, heresy, outlawry, bestiality, &c., were called *crimina majores*; and the

*Inst.* 631; 5 *Rep.* A person who contracted another owners of charter, peasant, estate, priest must bring a testimony to our lords, viceroy, and people, were called *oid wes m-*

known to the bishop, or as a *clericus* or *clericus*, and with the permission had and be able to give an account of his life and his *bona* and *bona* from the *bona*

Latin; and a deacon is not to be made a priest *clericatus*. Cowell.

unless he produce to the bishop, as a title, either a licence, or a testimonial of his life, &c. and that he hath been a member of Rome half five others; viz. subdeacons, faithful and diligent in executing the censures, exorcists, readers, and osuaries.

A bishop shall not make any one deacon, subdeacon, or assist him in the altar and minister on the same day; for there must be assistance of the sacrament of the Lord's

be some time to try the battery of a word or two; 2. The acolyte is he who bears the cross in his office before he is admitted to the word of God; 3. The acolyte is he who reads the Gospel.

of priesthood, which takes place generally a year, or what I the priest consecrate the host; 3, but it is only by the altar on our Sunday consecration. The priest is one who strength and a soul

followed by the bishop. Priests and deacons are in the name of Almighty God, to go out of the sanctuary and come to the people, to preach the word of God, to comfort the troubled, to lead the penitent to the sacrament of the altar, to baptize the children of the church, to marry the young people, to bury the dead, and to administer the sacrament of the altar to the sick and the dying. The bishop, the priests, and the deacons are the ministers of the church, and they are the ones who are responsible for the spiritual well-being of the people. They are the ones who are called to serve the people, and they are the ones who are called to be the voice of God to the people. They are the ones who are called to be the light of the world, and they are the ones who are called to be the salt of the earth. They are the ones who are called to be the good news to the poor, the proclamation of liberty to the captives, the opening of the eyes to the blind, the sending of the lame to walk, the calling of the deaf to hear, the sending of the dead to life, and the sending of the living to the Father. They are the ones who are called to be the hands and feet of Christ, and they are the ones who are called to be the love of God to the world.

not only to subscribe to thirty-nine articles, but also troubled therewith; 4. The reader is but to take the oath of the King's supremacy, &c. he who readeth in the church of God, being

1, 8. A priest by his ordination receives a word of God to the people; 5. 'The ostrich is

thority to preach the word and administer he who keeps the doors of the church, and the holy sacraments, &c. But he may not tell the tale. These, though some of them

preach without licence from the bishop, arch-bishop, or one of the universities, were human institutions, and such as come under the annihilation which immediately

The 31 *Elizabeth*, c. 6, punishes corrupt ordination-proceeds (from the apostle's time); for which tution of priests, &c. (which, says *Blackstone*, reason, and because they were evidently in-

seems to be the true, though not the common, instituted for convenience only, and were not notion of simony.) If any person shall take immediately concerned in the sacred offices of

any reward or other profit to make and obtain the church, they were laid aside by our first  
a minister, or to licence him to preach, they reformers. *Gibbs, 92.*

ORDINUM FUGITIVI. Signified those

ecclesiastical preferment for seven years after-  
wards.

By 59 *Geo.* 3. c. 60, the archbishop of Canterbury, or York, or the bishop of London, or

any bishop specially authorized by either of them for the purpose, nor ordain any person

for the express purpose of offering in any of Geo. 3. c. 35, 65, 66; 44 Geo. 3. c. 78, 79.

his majesty's colonies or foreign possessions; 107, for transferring lands for the service of which shall be stated in the letters of ordina- the Board of Ordnance.

tion; but no person so ordained shall be capa- As to pens, on to the clerk of the ordinance  
ble of holding any living in Great Britain or, after ten years' service, see 4 & 5 Wm. 4. c. 24.

Ireland without the consent of the bishop of [s. 4. and *Offices*.  
the diocese; and the like restraint is offered to (ORDO). That rule which the monks were

persons ordained by the bishop of Quebec, obliged to observe. *Eudmer. Vita S. Anselmi*, 3. Nova Scotia, &c. See *Bishops*. It is also called ALBUS. The White Friars, or

expressly provided, that no person ordained by Augustines; the Cistercians also wore white.

**ORDO NIGER.** The Black Friars. *In gulphus*, p. 851. The Cluniacs likewise wore black. *Mat. Paris*, 321, 514.

**ORFGILD**, or **CHEAPGELD**, from Sax. *orf. pecus*, and, *gild, solutio vel redemptio*.] A delivery or restitution of cattle. But Lambard says, it is a restitution made by the hundred, or county, for any wrong done by one who was in pledge; or rather a penalty for taking away cattle. *Lamb. Arch.* 125.

**ORFRAIES**, *aurifrisium*.] A sort of cloth of gold, frizzled or embroidered, formerly made and used in England, worn by our kings and nobility; and the clothes of the king's guards were called orfraies, because adorned with such works of gold. Mention is made of these orfraies in the *Records of the Tower*.

**ORGEYS.** Mentioned in 31 E. 3. st. 3. c. 2. is the greatest sort of North-sea fish (for the statute says they are greater than lob-fish); which we call organ-ling, corruptly from Orkney-ling, because the best are near that island. *Cowell*.

**ORGILD**, *sine compensatione*.] Without recompense; as where no satisfaction was to be made for the death of a man killed, so that he was judged lawfully slain. *Spelman*.

**ORIGINAL CHARTER.** That which is granted first to the vassal by the superior. *Scotch Dict.*

**ORIGINAL**, or **ORIGINAL WRIT.** The beginning or foundation of a suit. When a person has received an injury, and think it worth his while to demand a satisfaction for it, he must apply for that specific remedy which he is advised or determined to pursue. To this end he is to sue out an original, or original writ, from the Court of Chancery, the *officina justitiæ*, wherein all the king's writs are framed.

This original writ is a mandatory letter from the king in Chancery, sealed with his great seal; and, until recently, it lay, in all personal actions, against every person not privileged as an attorney, officer, or prisoner of the court. Formerly, indeed, it was not usual to proceed in the King's Bench by original writ, in debt, detinue, or other action of a mere civil nature. But the modern practice was different; and where the defendant pleaded to the jurisdiction, in an action of debt commenced by original writ, the court gave judgment on demurrer for the plaintiff; and declared that if such a plea should come before them again they would inquire by whom it was signed. See *Hardw.* 317. On the other hand, an original writ was formerly the most common, if not the only ground of proceeding against peers, and members of the House of Commons; but by the 12 & 13 Wm. 3. c. 3,

§ 2. they might also be sued by original bill and summons, attachment and distress infinite. Still, however, an original writ was the only ground of proceeding against a corporation or hundredors on the statutes of hue and cry, &c.; or where, by reason of the defendant's being abroad, or by keeping out of the way, he would not be arrested, or served with process; (and it was intended to sue him to satisfaction.)

Original writs are calculated for the commencement or removal of actions. And they are either *de cursu*, or *magistralia*; the former were framed in the king's court, before the division of it; the latter were made out by the masters in Chancery, pursuant to stat. *Westm.* 2. 13 E. 1. st. 1. c. 24. In personal actions, they were *ex contractu*, vel *ex delicto*, upon contracts, or for wrongs immediate and consequential. See *Tidd's Pract.* and the authorities there cited.

In actions of covenant, debt, and detinue, the original writ was called a *præcipe*, by which the defendant had an option given him, either to do what he was required, or show cause to the contrary: but in *assumpsit*, and actions for wrongs, it was called a *pone*, or *si te fecerit securum*; by which the defendant was peremptorily required to show cause in the first instance. *Finch. L.* 357.

The use of the *præcipe* was, where something certain was demanded by the plaintiff, which it was incumbent on himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ was drawn up in the form of a command, to do thus, or show cause to the contrary; giving the defendant his choice to redress the injury, or to stand the suit. The other sort of original was in use where nothing is specifically demanded, but only a satisfaction in general; to obtain which, and administer complete redress, the intervention of some judicature is necessary. Such were writs of trespass, or on the case, wherein no debt or specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant was immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. 3 *Comm.* c. 18. p. 274.

In point of form, the original writ was special or general; *nominatim vel innominatim*. 1 *Bac. Abr.* 29; *Gilb. C. P.* 3. The former contained the time, place, and other circumstances of the demand, very particularly; the latter only a general complaint, without expressing the particulars, as the writ of trespass, *quare clausum fregit*, &c.

The original writ, issuing out of Chancery,



was teste'd, (that is witnessed) in the king's name at Westminster, or wherever else the Chancery was holden; and as that court is supposed to be always open, it might have been teste'd in vacation as well as in term-time. It was teste'd after the cause of action accrued, and made returnable on a general return day in term-time, *ubique*, i. e. wheresoever the king was then in England. There must have been fifteen days at least between the test and return of an original; the law requiring that distance of time, between the service and return of it, to enable the defendant to come from any part of the kingdom, though if there were less, it was aided by the defendant's appearing and pleading in chief.

Now, by the uniformity of process act, 2 Wm. 4. c. 39. the proceeding by original, in personal actions, is, in effect, abolished; and the only process, in all the courts, by and against all persons, and whether such persons have privilege of peerage or of parliament or otherwise, including corporations or hundredors, where the suit is not bailable, is a writ of summons, and in all actions where bail is required, a writ of capias. See the forms in the schedules of the act. Proceedings to outlawry may be had under the act in the same manner as formerly, on an original writ; and a filacer, exigenter, and clerk of outlawries, is for that purpose to be appointed in the Court of Exchequer. This alteration considerably simplifies and cheapens the produce of the courts at Westminster.

By the 3 & 4 Wm. 4. c. 27. s. 36. all real and mixed actions are abolished, except the writ of right of dower; writ of dower, under *nil habet, quare impedit*, and ejectment, which excepted actions may still be commenced by original writ.

Replevin, and other personal actions, commenced in inferior courts, and removed to the superior courts, do not seem within the 2 Wm. 4. c. 39.

See further titles *Latitat, Practice, Privilege, Process, &c.*

**ORIGINALIA.** In the treasurer's remembrancer's office in the Exchequer, the transcripts, &c. sent thither out of the Chancery are called by this name, and distinguished by *recorda*, which contain the judgments and pleadings in suits tried before the barons.

These transcripts contain extracts of all grants of the crown inrolled on the patent and other rolls in Chancery, wherein any rent is received, any salary payable, or any service to be performed. They commence *temp. Hen. 3.* and are continued to a late period. *Reports on Records, 1800.*

**ORPED.** Some orped knight, i. e. a knight whose clothes shone with gold. *Blount.*

**ORPHAN, orphanus.]** A fatherless child; and in the city of London there is a court of record established for the care and government of orphans. 4 *Inst.* 248.

The lord mayor and aldermen of London had the custody of orphans under age and unmarried, of freemen that died, and the keeping of their lands and goods; and if they committed the custody of an orphan to any man, he should have the writ of ravishment of ward, if the orphan was taken away; or the mayor and aldermen might imprison the offender until he produced the infant. 2 *Dann. Abr.* 311. If any one, without consent of the court of aldermen, marries such an orphan under the age of twenty-one years, though out of the city, they may fine, and imprison him until the fine is paid. 1 *Lev.* 32; 1 *Ventr.* 178. Executors and administrators of freemen dying, are to exhibit true inventories of the estates before the lord mayor and aldermen in the Court of Orphans, and must give security to the chamberlain of London, and his successors, by recognizance, for the orphan's part; which if they refuse to do, they may be committed to prison until they obey. *Wood's Inst.* 522. If any orphan who, by the custom of London, is under the government of the lord mayor and aldermen, sue in the spiritual court for any legacy, &c. a prohibition shall be granted: because the lord mayor and aldermen only have jurisdiction of them. 5 *Rep.* 73. But an orphan may waive the benefit of suing in the Court of Orphans, and file a bill in equity for discovery of the personal estates, &c.

The lord mayor and commonalty of London being answerable for the orphan's money paid into the chamber of the city, and having become indebted to the orphans and their creditors, in a greater sum than they should pay, it was enacted, by the 5 & 6 W. & M. c. 10, that the lands, markets, fairs, &c. belonging to the city of London, should be chargeable for raising 8,000*l.* per annum, to be appropriated for a perpetual fund for the orphans; and, towards raising such a fund, the mayor and commonalty might assess 2,000*l.* yearly upon the personal estates of inhabitants of the city, and levy the same by distress, &c. Also a duty was granted of 4*s.* per ton on wines imported, and on coals; and every apprentice should pay 2*s.* 6*d.* when bound, and 5*s.* when admitted a freeman, for raising the fund; the fund was to be applied for payment of the debts due to orphans, by interest, after the rate of 4*l.* per cent., &c. And by § 18. of the said statute, no person should be compelled, by virtue of any custom in the city, to pay into the chamber of London any sum of money, or personal estate, belonging to an orphan of any freeman, for the future. By the 21 *Geo.* 2. c.

29. the duty of 6*d.* per chaldron on coals, given by the 5 & 6 *W. & M. c.* 10. towards the orphan's debt, was continued for thirty-five years; and by the 7 *Geo. 3. c.* 37. for forty-six years more; and various provisions were made for the security and application of the orphan's fund. See also the local act, 39 *Geo. 3. c.* 69. and the several acts for improving the port of London.

**ORTELLI, Fr.]** A forest word, signifying the claws of a dog's foot. *Kitch.* See *Carta de Foresta*, c. 6.

**ORTOLAGIUM.** A garden plot, or hortilage. *Mon. Angl. tom. 1.*

**ORYAL, oriolum.]** A room, or cloister, of a monastery, priory, &c.; whence it is presumed that Oriel, or Oryel College, in Oxford took its name. *Matt. Paris, in Vit. Abb. St. Alb.*

**OSCULATORY.** Was a tablet or board, with the picture of Christ, or the blessed Virgin, or some saint; which, after the consecration of the elements in the eucharist, the priest first kissed himself, and then delivered to the people for the same purpose. 3 *Burn's Ecclesiast. Law*, 58.

**OSCULUM PACIS.** A custom formerly of the church, that in the celebration of the mass, after the priest had spoken these words, viz. *pax domini vobiscum*, the people kissed each other, was called *osculum pacis*; afterwards, when this custom was abrogated, another was introduced; which was, whilst the priest spoke the aforementioned words, a deacon offered an image to kiss, which was commonly called *pacem*. *Matt. Paris, anno 1100.*

**OSMONDS.** A kind of iron ore, anciently brought into England. See the 32 *H. 8. c.* 14, repealed by 3 *Geo. 4. c.* 41. § 2.

**OSTENSIO.** A tribute anciently paid by merchants, for leave to expose their goods for sale in markets. *Leg. Ethelred, c. 23.*

**OSTIARY.** See *Ordines Majores*.

**OSWALD'S LAW, Lex Oswaldi.]** The law by which was effected the ejecting married priests, and introducing monks into churches, by Oswald, bishop of Worcester, about the year 964.

**OSWALD'S LAW HUNDRED.** An ancient hundred in Worcestershire, so called from Bishop Oswald, who obtained it of King Edgar, to be given to St. Mary's church in Worcester; it is exempt from the jurisdiction of the sheriff, and comprehends 300 hides of land. *Camd. Brit.*

**OTHO.** Was a deacon cardinal of St. Nicholas, in *carcere Tulliano*, a legate for the pope here in England, 22 *Hen. 3.*, whose constitutions we have at this day. *Stowe's Annals* 303. *Cowell.*

**OTHOBONUS.** Was a deacon cardinal of St. Adrian, and the pope's legate here in

England, 15 *Hen. 3.*, as appeareth by the award made between the said king and his commons at Kenilworth. His constitutions we have at this day in use. *Cowell.*

**OUCH.** A collar of gold or such like ornament worn by women about their necks. See the old statute 24 *Hen. 8. c.* 13. *Cowell.*

**OVEALTY.** Equality. See *Owely*.

**OVER, Sax. ofer, ripa.]** In the beginning or ending of the names of places, signifies a situation near the bank of some river, as St. Maryover, in Southwark, Andover, in Hampshire, &c.

**OVERCYTED or OVERCYHSED, from the Sax. ofer, i. e. super and cythan, offendere.]** Proved guilty or convict. Is issued where a person is convicted of any crime; that it is found upon the offender; this word is mentioned in the laws of Edward, *apud Brompton. p.* 836. *Blount; Cowell.*

**OVERHERNISSA.** Contumacy, or contempt of court. In the laws of *Æthelstan, cap.* 25, it is used for contumacy; but in a council held at Winchester, anno 1027, it signifies a forfeiture paid to the bishop by one who came in after excommunication. See *Spelman*, and *ante, tit. Laghelite*.

**OVERSAMPNESSA.** Seems to have been an ancient fine before the statute for hue and cry, laid upon those who, hearing of a murder or robbery, did not pursue the malefactor. 3 *Inst.* 116; *Lib. Rub. cap.* 36. See *Cowell*, who says it is elsewhere written *oversegenesse* and *overse nesse*. It appears confounded with the preceding word *overhernissa*, and that all these terms signify a forfeiture for contempt or neglect.

**OVERSEERS OF THE POOR.** Public officers created by the 43 *Eliz. c.* 2, to provide for the poor of every parish, and are sometimes two, three, or four, according to the extent of parishes. Churchwardens by this statute are called overseers of the poor, and they join with the overseers in making a poor's-rate, &c.; but the churchwardens having distinct business of their own, usually leave the care of the poor to the overseers only, though anciently they were the sole overseers of the poor. *Dalt. ch.* 27; *Wood's Inst.* 93. See *Poor*.

**OVERSEWENESSE.** See *Overhernissa*.

**OVERT, Fr.; open, overture, an opening;** also a proposal. *Law. Fr. Dict.*

**OVERT-ACT, opertum factum.]** An open act, which by law must be manifestly proved. 3 *Inst.* 12. Some overt-act is to be alleged in every indictment for high treason; such as for treason in compassing the death of the king, the providing arms to effect it, &c. 3 *Inst.* 6, 12. And no evidence shall be admitted of any over-act, that is not expressly laid in the indictment, by 7 *Win. 3. c.* 3. See *Treason*.

**OVERT-WORD.** An open plain word, not to be mistaken. Stat. 1 Mar. sess. 2. c. 3.

**OVRES, Fr.]** Acts, deeds, or works; *ou-rages* or *ouvrages* are days' works. 8 Rep. 131.

**OURLOP.** The licrwite or fine paid to the lord by the inferior tenant, when his daughter was corrupted or debauched. *Petr. Bles. Contin. Hist. Croyland*, 115.

**OUSTED**, from the French *ouster*, to put out.] As ousted out of possession is where one is removed or put out of possession. 3 Cro. 349.

**OUSTER LE MAIN, amovere manum.]** A livery of land out of the king's hand, on a judgment given for him that sued a *monstrans de droit*; for when it appeared upon the matter that the king had no title to the land he seized, judgment was given in the chancery that the king's hands be amoved; and thereupon an *amoveas manus* was awarded to the escheator to restore the land, it being as much as if the judgment were given that the party should have his land again. *Staudf. Prærog. cap. 24*; see 28 Edw. 1. st. 3. c. 19. It was also taken from the writ granted upon a petition for this purpose. *F. N. B.* 257. But now all wardships, liveries, and ouster le mains, &c. are taken away by 12 Car. 2. c. 24. See *Monstrans de Droit, Tenures*.

**OUSTER LE MER, oultre, i. e. ultra and le mer, mare.]** One cause ofessoign or excuse, if a man appeared not in court on summons, for that he was then beyond the seas. See *Essaign*.

**OUTFANGTHIEF**, from the Saxon, *ut, i. e. extra, fang, captus, and theof, fur.*] A liberty or privilege, as used in the ancient common law, whereby a lord was enabled to call any man dwelling in his manor, and taken for felony in another place out of his fee, to judgment in his own court. *Rastal; Bract. lib. 2. tract. 2. cap. 35*; 1 & 2 P. & M. c. 15.

**OUTHEST or OUTHORN.** A calling men out to the army, by the sound of an horn.

**OUTHOUSES.** Are the buildings belonging and adjoining to dwelling-houses. See *Burglary, Curtilage, Larceny, II.*

**OUTLAND.** The Saxon thanes divided their hereditary lands into inland, such as lay nearest their dwelling, which they kept to their own use; and outland, which lay beyond the demesnes, and was granted out to tenants, at the will of the lord, like copyhold estates. This outland they sub-divided into two parts, one part they disposed amongst those who attended their persons, called *theadans* or lesser thanes; the other part they allotted to their husbandmen or churls. *Spelm. de Feud. cap. 5.*

**OUTLAW, Saxon, utlaghe; Latin, utlagatus.]** One deprived of the benefit of the law,

and out of the king's protection. *Fleta, lib. 1. cap. 47.* When a person is restored to the king's protection, he is inlawed again. See *Outlawry*.

## OUTLAWRY.

**UTLAGARIA.]** The being put out of the law. The loss of a benefit of a subject, that is, of the king's protection. *Cowell*.

Outlawry is a punishment inflicted for a contempt, in refusing to be amenable to the justice of that court, which hath authority to call a defendant before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so it subjects the party to forfeitures and disabilities; for he loseth his *liberam legem*, is out of the king's protection, &c. *Co. Lit.* 128; *Doct. & Stud. dial. 2. cap. 3*; 1 *Roll. Abr.* 802.

And as to forfeitures for refusing to appear, the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof, accounts him guilty of the fact, on which issues corruption of blood and forfeiture of his estate, real and personal. *Co. Lit.* 128; 3 *Inst.* 161. See further, *Forfeiture, II.*

But outlawry in personal actions does not occasion the party to be looked on as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found; forfeits his goods and chattels, and the profits of his lands, while the outlawry remains in force. *Plowd.* 541; 9 *Hen. 6.* 20 b; *Show. Parl. Ca.* 73.

Outlawry in civil actions is putting a man out of the protection of the law, so that he is not only incapable of suing for the redress of injuries, but may be imprisoned, and forfeits all his goods and chattels, and the profits of his lands; his *personal* chattels immediately upon the outlawry, and his chattels real, and the profits of his lands when found by inquisition. 1 *Salk.* 395.

So penal were the consequences of an outlawry, that until some time after the Conquest, no man could have been outlawed except for felony, the punishment whereof was death; but in *Bracton's* time, and somewhat earlier, process of outlawry was ordained to lie in all actions *vi et armis*. *Bract. lib. 5. p. 425.* And since, by a variety of statutes (the same as introduced the *capias*), process of outlawry lies in account, debt, detinue, and divers other common or civil actions. See *post, L.*



Anciently outlawry was looked upon as so horrid a crime, that any one might as lawfully kill a person outlawed, as he might a wolf or other noxious animal; but it is now holden that no man is entitled to kill an outlaw wantonly or wilfully, but in so doing is guilty of murder; 1 *Hale, P. C.* 497; unless it happens in the endeavour to apprehend him. *Bract. fol.* 125. See *post*, IV.

Also, from the heinousness of the offence, the sheriff may, on a *capias utlagatum*, break open the house of the person outlawed; for it would be unreasonable that the protection allowed in other cases should extend to him who is declared a contemner and violator of the law; therefore the seizing him as an outlaw implies the liberty of entering and seizing him wherever he lies hid. 2 *Hale's Hist. P. C.* 202; 9 *Co.* 91; 1 *Buls.* 146; *Cro. Eliz.* 908; *Moor.* 606, 686; *Yelv.* 28; *Cro. Car.* 537; 4 *Leon.* 41; 2 *Jon.* 233.

If the defendant be a woman, the proceeding is called a *wainer*; for as women were not sworn to the law by taking the oath of allegiance in the leet (as men anciently were when of the age of twelve years or upwards), they could not properly be outlawed or put out of the law, but were said to be waived, that is, *derelicta*, left out, or not regarded. *Litt.* § 186; *Co. Litt.* 122 b. And for this same reason an infant cannot be outlawed under the age of twelve years. *Co. Litt.* 128 a. See *post*, div. II.

I. In what Cases Process of Outlawry lies; and by what Jurisdiction such Processes are to issue.

II. Against whom Process of Outlawry may be awarded; whether it may be awarded against a Peer, an Infant, Feme Sole or Covert, several Defendants, and Principal and Accessory.

III. To what place Process of Outlawry is to issue; of the quinto exactus, and Proclamations on an Outlawry.

IV. Of the Effect of and Process consequent on Outlawry in criminal as well as civil Cases. See *Process*.

V. What the Party must do in order to entitle him to a Reversal; and of the Effects and Consequences of a Reversal.

I. WHERE the defendant is abroad, or keeps out of the way, so that he cannot be arrested or served with process, the plaintiff, on the return of *non est inventus* to the *pluries capias* (see *post*), may have a writ of *exigi facias* (see *post*, III.), and proceed to outlawry; or if there be several defendants in a joint action, and one of chattels, and taking of beasts by writ of *capias*

them be abroad or keep out of the way, the plaintiff may have a writ of *exigi facias* against that defendant, and must proceed to outlawry against him before he can go on against the others. 1 *Stra.* 173; 1 *Wils.* 78; 2 *Stra.* 1692; 1 *Bla. Rep.* 20.

Process of outlawry lay in all appeals until they were abolished, and it now lies in all indictments of conspiracy and deceit, or other crimes of a higher nature than trespass *vi et armis*; but it lies not in an action, nor, as some say, on an indictment on a statute, unless it be given by such statute, either expressly, as in case of *præmunire*; or impliedly, as in cases made treason or felony by statute; or where a recovery is given by an action in which such process lay before, as in case of forcible entry. *Staundf.* 192; *Bro. tit. Outlawry*, 26, 36, 59; *Co. Litt.* 128 b; *Dyer*, 213, 214; 2 *Hawk. P. C. c.* 27. § 113, and several authorities there cited.

So process of outlawry lies in replevin, and is given by the 25 *Edw. 3. st. 5. cap.* 17. which gives the *capias* in this manner; when on the *pluries replegiari facias* the sheriff return *averia elongata*, then a *capias in wilhernam* issues, and on that being returned *nulla bonâ*, a *capias* issues, and so to outlawry; but it does not lie on the original writ of replevin, which is *vi contiel* and determined; therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former, it must pursue the former, and cannot vary from it. 6 *Mod.* 84; 1 *Salk.* 5.

By the common law, in all actions of trespass *quare vi et armis*, and in which there is a fine to the king, a *capias* was the process; and herein process of outlawry lay by the common law. 35 *H. 6.* 6 b; 22 *H. 6.* 13; *Rast. Ent.* 239; 10 *Co.* 72; 2 *Roll. Abr.* 805.

But in account, debt, detinue, annuity, covenant, and such actions as are grounded upon negligence or laches merely, no *capias* lay at common law, but only summons and distress infinite; therefore the *capias* and outlawry in these actions were introduced by acts of parliament. *Co. Litt.* 128 b; 3 *Co.* 12; 2 *Bulst.* 63; 2 *Inst.* 143; *Cro. Jac.* 222, 261; *Yelv.* 158; *Raym.* 128; 1 *Keb.* 890, 908; 1 *Sid.* 248, 158; of detinue of charters, *Dyer*, 223 a, *dubitatur*.

By the statute of *Marlbridge*, (52 *H. 3.*) *cap.* 23. the writ of *monstravit de compto* was given, where before the process in account was summons, attachment, and distress infinite; and by *stat. West. 2.* (13 *Edw. 1. st. 1.*) *cap.* 11, process of outlawry is given in account. 2 *Inst.* 145, 380; *F. N. B.* 259.

By 25 *Edw. 3. stat. 5. c.* 17. such process shall be made in a writ of debt and detinue of



But justices of gaol delivery regularly cannot issue a *capias* or *exigent*; because their commission is to deliver the *gaol de prisonibus in eâ existentibus*; so that those whom they have to do with, are always intended in custody already. 2 *Hale's Hist. P. C.* 199.

Justices of the peace may make out process of outlawry upon indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of the peace, by the 1 *Edw. 4. c. 2*; but the power of the sheriff, to make any process upon indictments, taken before him, is taken away by that statute. 2 *Hale's Hist.* 199.

It is made a *quare* by *Hale*, whether a coroner can by law make out process of outlawry against a man indicted by inquisition before him. 2 *Hale's Hist. P. C.* 199. See 4 *T. R.* 521.

It hath been held, that though the process in inferior courts be a *capias*, yet they cannot proceed to outlaw the party. *Yelv.* 158; *Cro. Jac.* 222, 261; *Raym.* 128; 1 *Sid.* 248, 259; 1 *Keb.* 890, 908.

The process to the outlawry, viz. the *capias* and *exigent*, must be in the king's name, and under the judicial seal of the king, appointed to that court, which issues that process, and with the *teste* of the chief justice or chief judge of that court or sessions. 2 *Hale's Hist. P. C.* 199.

II. If a peer of the realm be indicted, and cannot be found, process of outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*. 2 *Inst.* 49; 3 *Inst.* 31; *Staundf.* 130; 2 *Hawk. P. C. c.* 44. § 16.

But in civil actions, between party and party, regularly a *capias* or *exigent* lies not against a peer; yet in case of an indictment for treason or felony, or for trespass *vi et armis*, as an assault or riot, process of outlawry shall issue against a peer; for the suit is for the king, and the offence a contempt against him; therefore, if a rescue be returned against a peer; or if a peer be convicted of a disseisin with force, or denies his deed, and it be found against him, a *capias pro fine* and *exigent* shall issue, for the king is to have a fine; and the same reason holds upon an indictment of trespass or riot, much more in the case of felony. 2 *Hale's Hist. P. C.* 199, 200; *Cro. Eliz.* 170, 503; 5 *Co.* 54; 1 *Rol. Abr.* 220.

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed; if he be, it is erroneous. 3 *Hen. 5. Ullagat.*; *Fitz. tit. Outlawry*, 11; 2 *Rol. Abr.* 805; *Dyer*, 104; 2 *Hale's Hist. P. C.* 207, 208. Lord Coke says, within the age of twelve years. 1 *Inst.* 128 a.

But the outlawry of such infant is not void, it being of record, but is voidable only by writ of error. *Dyer.* 239 a; 2 *Rol. Abr.* 805.

A woman, it has been already remarked, is aid to be waived and not outlawed; therefore where a *capias* and *exigent* were awarded against three men and two women, and the return was *outlagat. existunt*, where, as to the women, it ought to have been *waiviata existunt*, this was held to be error. *Cro. Jac.* 358; 1 *Rol. Rep.* 407; 1 *Rol. Abr.* 804.

If in an action against husband and wife, the husband is outlawed, and the wife waived, and she is taken upon the *capias outlagat.*, though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived, and when her husband is taken he must bring her in. See *Dyer*, 271 b; *Cro. Jac.* 445; *Cro. Eliz.* 370; *Hut.* 86; 1 *Sid.* 21; *Cro. Car.* 58, 59; *Hut.* 86.

If two are sued in a joint action, and neither of them will appear process of outlawry must be taken out against both. *Cro. Eliz.* 648.

If an *exigent* be awarded against two, and the return *primo exacti fuerunt et non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous. 2 *Rol. Abr.* 802.

As to outlawry in action of account, see 41 *Edw. 3. 3*; 1 *Rol. Abr.* 127; 1 *Brownl.* 25; 41 *Edw. 3. 13 b*; *Moor*, 188; 2 *Leon.* 76; *Dyer*, 239. pl. 203; *N. Bendl.* 148. pl. 205; *Moor*, 74. pl. 203; 1 *And.* 10; 1 *Sid.* 173; 1 *Keb.* 642.

As to awarding outlawry against principal and accessory, by the stat. of *Westm. 1. 3 Edw. 1. c. 14.* which was passed to remedy an abuse then prevailing of outlawing accessories on appeals of felony, it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he who is appealed of the deed be attainted, so that one like law be used therein through this realm; nevertheless he that will so appeal, shall not, by reason of this, intermit or leave off to commence his appeal at the next county, against them, no more than against their principals which he appealed of the deed; but their *exigent* shall remain, until such as be appealed of the deed be attainted of outlawry or otherwise.

For the construction of this statute, which has been held to extend to indictments as well as appeals, (the latter of which are now abolished,) see 2 *Hawk. P. C. c.* 27; 2 *Hale's Hist. P. C.* 220.

If one *exigent* be awarded against the principal and accessory together, it is error only as to the latter. 4 *T. R.* 521.

With respect to accessories, it was formerly



held, that as the guilt of the accessory was purely derivative, and no accessory could be convicted before the conviction of his principal, so, in no case could process of outlawry issue against any accessory either before or after the fact, previous to the outlawry of the principal. 1 *Star. Cr. Pl.* 260. But as the recent statutes of 7 *Geo. 4. c. 64. § 9.* and 7 & 8 *Geo. 4. c. 29. § 54, 55.* have enacted, that accessories before the fact and receivers of stolen goods may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted; it seems to follow that they may now also be outlawed, independently of any process of outlawry against the principal. Accessories after the fact however, except receivers of stolen goods, can still only be indicted either along with, or after the conviction of, the principal; and therefore in favour of these, the former practice of proceeding to outlawry against an accessory still prevails.

In treason all are principals; therefore process of outlawry may go against him who receives, at the same time, as against him that did the fact. 1 *Hale's Hist. P. C.* 238. See *Process.*

III. FORMERLY the *exigent* must have been sued in the county where the party really resided, for there all actions were originally laid; and because outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the *town*, which is the sheriff's criminal court; and this held not only before the sheriff, but before the coroners, who were ancient conservators of the peace, being the best men in each county, to preside with the sheriff in his court, and who pronounced the outlawry in the county court on the party's being *quinto exactus*; therefore anciently there was no occasion for any process to any other county than that in which the party actually resided. *Fitz. Exigent*, 26; *Dyer*, 295.

By the 6 *Hen. 6. c. 1.* "before any *exigents* be awarded against persons indicted in the King's Bench of treason or felony, writs of *capias* shall be directed as well to the sheriff of the county in which they are indicted, as to the sheriff of the county whereof they may be named in the indictments; the *capias* having at least six weeks before the return thereof."

And by the 8 *Hen. 6. c. 10.* "upon every indictment, before any *exigent* awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county, whereof he who is indicted is or was supposed to be conversant, by the same indictment, contain-

ing, according to the circumstances, three or four months from the date to the return; by which second writ of *capias*, the sheriff shall be commanded to take him, if he can be found within his bailiwick; and if he cannot, to make proclamation in two counties, before the return of the same writ; after which writ so served and returned, if he which is so indicted or appealed come not at the day of such writ returned, the *exigent* shall be awarded."

This statute not to extend to indictments taken within the county of Chester.

By the 10 *Hen. 6. c. 6.* "such second *capias* as is required by 8 *Hen. 6. c. 10.* shall be awarded upon indictments removed into the King's Bench, or elsewhere, by *certiorari*, or otherwise."

In the construction of these statutes, the following opinions have been held:—

That though the words are express, that any outlawry pronounced contrary to the directions of the statute shall be void; yet it is not to be taken as if such outlawries were absolutely void, but only voidable by writ of error. *Cro. Eliz.* 179; 3 *Co.* 59; *Plowd.* 137; *Hob.* 166.

If a defendant be expressly named of the same county wherein he is indicted, or appealed, and be also named under an *alias dictus* of another, it hath been adjudged that there is no need of any *capias*, with a command for proclamation according to 8 *Hen. 6. c. 10.* because that which comes under the *alias dictus* is not traversable nor material; also if a defendant be named of B. and late of D. there is no need of any *capias* to the sheriff of the county wherein D. lies; because it appears the defendant is at present conversant at B.; but if a defendant be named of no certain place at present, but only late of B. and late of D. and late of E., &c. being all in different counties from that in which the prosecution is commenced, a *capias* shall go to the sheriff of each county. 2 *Hawk. P. C. c. 27. § 126*; 2 *Hale's Hist. P. C.* 195, 196; *Cro. Jac.* 167.

Upon the issuing of the *exigent* before judgment or conviction, the 4 & 5 *W. & M. c. 22. § 4.* directs, that there shall also issue a writ of proclamation (bearing the same teste and return with the *exigent*) to the sheriff of the county where the defendant is mentioned to inhabit, according to the form of the 31 *Eliz. c. 3.* (see this statute, which relates to the proceedings in civil actions, *post*); which writ of proclamation must be delivered to the sheriff before the return.

The 4 & 5 *W. & M. c. 22.* does not apply to an outlaw after conviction. *Burr.* 2539; 3 *T. R.* 501.

The return of outlawry upon the *exigent* there issues an *exigent de novo*, grounded must be certain as to the time and place of upon the sheriff's return to the former writ exacting the defendant and other necessary particulars, with a clause (from whence it is called an *allocatur exigent*.) directing the sheriff to allow the several county courts at which the defendant has already been required. 1 *Plowd.* 371. In London the hustings are holden once every fortnight; on which account the action is generally laid there when the plaintiff intends to proceed to outlawry. See *Tidd's Pract.*

In the return to the writ of proclamation, it is not necessary that the sheriff should allege, that the person proclaimed did not render himself, though this is essential in his return to the *exigent*: but he must specially show how the proclamations were made, to enable the court to judge whether they were properly made or not. 4 *T. R.* 521; and see 3 *T. R.* 499, *post*.

The course of proceeding to outlaw a person indicted for a misdemeanor differs from the process in cases of felony. In cases of misdemeanor, the first step after the finding of the indictment is, to issue a *venire facias ad respondendum*. There must be fifteen days between the teste and return of this writ, on indictments before justices of peace at the sessions, or before justices of oyer and terminer. But before justices of oyer and terminer and gaol delivery, it may be made returnable immediately; and the like, where the indictment is before the Court of King's Bench for an offence done in Middlesex, that being the county in which the court sits: but not, where the offence is committed out of that county. 3 *Salk.* 371.

On the issuing of the *venire facias*, the defendant is summoned, and if he do not appear, and the sheriff return that he has land in the county whereby he may be restrained, a *distingas* is awarded, and is repeated from time to time, whereby he forfeits, on every default, the issues returned by the sheriff. But if upon the *venire*, the sheriff return, that the defendant has nothing whereby he can be distrained, a *capias* issues, and then an *alias*, and then a *pluries*, and afterwards the *exigent*; upon which the defendant may be outlawed. 2 *Hawk. c.* 27. § 10. But if the prosecutor proceed to outlawry after judgment, then only one *capias* is necessary. *Id.* § 11.

In civil cases, the writ of *exigi facias* (see *Exigent*) is a judicial writ made out by the filacer, as clerk of the *exigents*, and directed to the sheriff of the county where the action is laid, commanding him to cause the defendant to be required or exacted from county court to county court, or from husting to husting, if in London; that is a five successive county courts or hustings, until he be outlawed, if he do not appear; and if he appear, to take him, &c. This writ should be tested on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment; and if there be not five county courts between the teste and the return of it,

It hath been holden, that in London, where the holding of that hustings is uncertain, no *exigi facias* shall issue with an *allocato* hustings; because the court cannot take notice of the set times of holding it, as they may of the times of holding the county courts; but it is now agreed, that if an *exigent* issues in London, and they begin "husting de placito terra," (as they may,) they shall proceed along at that it tings to the outlawry, without mingling their husting de *communibus placitis*; but if an *allocato* husting comes, they shall proceed without omitting any husting. *Palm.* 287; *Leon.* 14; 2 *Hale's Hist. P. C.* 202.

In addition to the *exigent*, a writ of *proclamation* was introduced by 6 *Hen. 8. c.* 4<sup>th</sup> which requires it to be directed to the sheriff of the county of which the defendant is called, or described in the original; for there he was supposed to dwell; and if he did not in fact dwell there, he might have avoided the outlawry, by the statute of additions. *Dyer*, 214. See *Gillb. C. P.* 19; *Thes. Brev.* 88.

But the writ of *proclamation* is at present governed by 31 *Eliz. c.* 3. § 1. which enacts, that, "in every action personal, wherein any writ of *exigent* shall be awarded out of any court, a writ of *proclamation* shall be awarded and made out of the same court, having day of teste and return as the said writ of *exigent* shall have directed, and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling; which writ of *proclamation* shall contain the effect of the same action; and that the sheriff of the county unto whom any such writ of *proclamation* shall be delivered, shall make three proclamations, one in the open county court, another at the general quarter sessions of the peace, in those parts where the defendant at the time of the *exigent* awarded shall be dwelling, and the third, one month at the least before the *quinto exactus* by virtue of the said writ of *exigent*, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be so dwelling; and if the defendant shall be dwelling out of any parish (i. e. in any extra-parochial place,) then in such place as aforesaid of the next adjoining parish in the same county,

and upon a Sunday immediately after divine day, &c. wheresoever, &c. to do and receive service, and sermon, (if there be one,) and if there be no sermon, then forthwith after divine service; and that all outlawries had and pronounced, whereupon no writs of *proclamations* shall be awarded and returned according to the form of this statute, shall be utterly void and of none effect."

Outlawry in felony reversed because it appeared on the writ of *proclamation* and the return to it that the person indicted was outlawed after a day had been given him in court, and before such day arrived. 3 *T. R.* 499.

IV. Upon the defendant's being put in *exigent*, he is either taken by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest. Formerly, if the defendant had appeared voluntarily, at any time before the return of the *exigent*, he might have obtained a writ of *supersedeas* from the filacer, as clerk of the *supersedeas*, on entering a common appearance of the term in which the *exigent* issued, and he may still do so where the action does not require special bail. But upon a question, whether in a case originally requiring special bail, if the defendant stand out to an *exigent*, he can come in and appear to the *exigent* without putting in special bail; it was ruled by the Court of K. B. that there ought to be special bail. It would be very unreasonable, they said, that the defendant should gain an advantage, by standing out till process of outlawry; he certainly ought not to be in a better condition then than if he had appeared at first. And accordingly the direction given was, that the filacer should not issue a *supersedeas* till the defendant should put in special bail. 3 *Burr.* 1920.

If the defendant be neither arrested nor appear, but make default at five successive county courts or hustings, he is outlawed if a man, or if a woman, she is waived, by the judgment of the coroners, or of the recorder in London; and the judgment of outlawry being returned by the sheriff upon the *exigent*, the filacer, as clerk of the outlawries, will make out a writ of *capias utlagatum*, which is either general or special, and may be issued into any county, without a *testatum*; nor is there any occasion upon an outlawry after judgment, to revive the judgment by *scire facias*, after a year and a day.

By the general writ of *capias utlagatum*, the sheriff is commanded "that he do not omit by reason of any liberty of his county, but that he take the defendant, if he be found in his bailiwick, and him safely keep, so that he may have his body in court on a general return

what the court shall consider of him." The defendant, being taken by the sheriff on this writ, either gives bail to appear and reverse the outlawry, or remains in custody until he actually reverse it, or obtain a charter of pardon, or be relieved under an insolvent act.

At common law the defendant could not have been bailed when taken by the sheriff on a *capias utlagatum*. 3 *Burr.* 1484; 4 *Burr.* 2540. And this case is particularly excepted out of the 23 *H. 6. c. 9*; 13 *Car. 2. st. 2. c. 2. § 4*; by the latter of which statutes it is expressly declared that "no sheriff, &c. shall discharge any person or persons taken upon any writ of *capias utlagatum* out of custody without a lawful *supersedeas* first had and received for the same." But now by the 4 & 5 *W. & M. c. 18. § 4. 5.* if any person outlawed in the Court of King's Bench, other than for treason or felony, shall be arrested upon any *capias utlagatum* out of the said court, the sheriff making the arrest may, in all cases where special bail is not required by the said court, take an attorney's engagement under his hand to appear for the defendant, and reverse the outlawry, and discharge the defendant from such arrest; and in those cases where special bail is required by the said court, the said sheriff shall take security of the defendant by bond, with one or more sufficient surety or sureties in the penalty of double the sum for which special bail is required, and no more, for his appearance by attorney in court, at the return of the writ, and to perform such things as shall be required by the said court; and after such bond taken may discharge the defendant from the said arrest. Or in case the defendant shall not be able to give security as aforesaid, before the return of the writ, he shall be discharged, whenever he shall find sufficient security to the sheriff for his appearance by attorney in the said court, at some return in the ensuing term, to reverse the outlawry, and to do such other things as shall be required by the said court.

This statute has been construed not to extend to criminal cases, at least not to misdemeanors after conviction. 4 *Burr.* 2539. And even in civil cases the defendant cannot be bailed where he was not bailable upon the process to outlawry. *Id.* 2540. For it was the design of the statute to put him in the same condition as if he had not been outlawed; and therefore he is not bailable when taken upon an outlawry after judgment; neither upon this statute will the court restore goods taken upon a special *capias utlagatum*, but they will of course be restored upon the reversal of the outlawry. *Carth.* 459; 1 *Ld. Raym.* 349.

When there is no affidavit of a bailable



cause of action, the sheriff is authorised by the statute to discharge the defendant on an attorney's undertaking to appear and reverse the outlawry; but when an affidavit has been made, he ought not to be discharged without giving the security required by the statute; which is not a common bail bond, but a bond with one or more sufficient surety or sureties for appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the court, that is, to put in bail to a new action, plead within a limited time, put the plaintiff in the same condition, and such like matters. 3 *Burr.* 1483; 4 *Burr.* 2540. And it is not necessary that the affidavit should be made before the outlawry; 2 *Stra.* 1178, 9; 1 *Wils.* 3; *Fort.* 39; or the sum sworn to be indorsed on the *capias utlagatum*. 2 *Burr.* 1482. But it is sufficient if there be an affidavit before the defendant is discharged; the court having determined that process of outlawry is not within the statute for preventing frivolous and vexatious arrests. See 3 *Burr.* 1483. And see as to *Bail*, *post*, V.

By the special writ of *capias utlagatum*, the sheriff is commanded not only to take the defendant, as by the general writ, but also "to inquire by the oath of honest and lawful men of his county, what goods and chattles, lands and tenements, he hath or had on the day of his outlawry, or at any time afterwards; and by their oath to extend or appraise the same according to the true value, and to take them into the king's hands, and safely keep them, so that he may answer to the king for the true value and issues of the same, making known what he shall do thereupon to the court, on the return day." *Off. Brev.* 35; *Thess. Brev.* 59. Upon this writ the sheriff is to empanel a jury, who are to make inquiry of the goods and chattels of the defendant, including his debts. *Co.* 95; *Lane* 23; *Lutw.* 329, 1513; *Gillb. C. P.* 200. And also of his leasehold and freehold lands and tenements; to appraise the goods, and to extend or value the lands, &c. but they are not to inquire of his copyholds; *Parker*, 190; or trust property. *Cro. Jac.* 513; *Sty.* 41. But see the *Statute of Frauds*, 29 *Car. 2. c. 3. § 10*.

Witnesses may be subpoenaed to attend the execution of the inquiry, and when made, the sheriff is to take possession of the goods and chattels of the defendant, and of the leasehold tenements in his own occupation. 9 *Hen. 6. c. 20, 21*. But he must not oust or disturb the possession of his tenants. *Id.* 21 *H. 7. 7*. And can only take the issues or profits of his freehold tenements. *Id.* *Plowd.* 541; *Hardr.* 106, 176; *Bunb.* 103, 105. The inquisition should set forth, with convenient certainty, the appraised value of the goods; the particulars

of the debts; of what lands, &c. the defendant is seised or possessed; the different parcels; in whose tenure; and of what annual value beyond reprises. But the inquisition being merely an office of instruction or information, does not require so much certainty as an office of entitling. 2 *Salk.* 469; *Bunb.* 103. And if the lands, &c. be undervalued, there may be a *melius inquirendum*. *Hard.* 106. See that title and *Forfeiture*.

When the special writ of *capias utlagatum* is returned, it should be delivered, with the inquisition annexed, to the filacer, as clerk of exigents and outlawries, and afterwards filed in the office of the *custos brevium*, 3 *T. R.* 578, 9; from whence a transcript is sent into the Exchequer. *Gillb. C. P.* 16. Out of this court there issues a *renditioni exponas* to sell the goods, a *scire facias* to recover the debts, and a *levari facias* to levy the issues and profits; under which latter writ the sheriff may not only take the rent and moveables of the party outlawed, but also the cattle of a stranger *levant and couchant* on the lands extended. 1 *Ld. Raym.* 305, and the cases there cited in the last edition. In aid of these writs a bill may be exhibited in the Exchequer against the outlaw to compel a discovery of his real and personal estate, &c. either by the plaintiff to enable him to take out execution, or by the attorney-general on behalf of the crown. *Hardr.* 22. And it is said to be the course of that court, upon an outlawry, to prefer an information in the nature of an action of trover and conversion against him who hath the goods of the party outlawed. 1 *Mod.* 90.

The money raised by the sheriff under these writs belongs to the crown, but the plaintiff may have it paid to him in satisfaction of his debt and costs by applying to the Court of Exchequer, or lords of the treasury; and he may also obtain a lease or grant of the custody of the lands, &c. under the Exchequer seal; *Hardr.* 106, 422; *T. Raym.* 17; 1 *Lev.* 33; or a grant of the king's right to levy the profits. 9 *H. 6.* 20; 2 *Roll. Abr.* 808; *Gillb. C. P.* 17; 4 *Inst. c. 11*; and see title *Custodiam*.

If the money raised by the sheriff do not exceed the sum of fifty pounds, the Court or Exchequer, on motion, will order it to be paid to the plaintiff; but if it exceed that sum, the plaintiff must petition for it to the lords of the treasury, stating the amount of his debt, a short abstract of the proceedings, with the expenses he has been put to, and praying, in respect thereof, that the attorney-general may be authorized to consent, on behalf of the crown, that the money remaining in the sheriff's hands may be paid over to the petitioner. The petition is referred by the lords of the treasury to their solicitor, who should be fur-

nished with an affidavit, sworn before a baron, of the amount of the debt and costs, and a certificate of the proceedings from the clerk in court, whereupon he will make his report, which should be filed with the clerk of the treasury. A warrant is then issued under the king's sign manual for the attorney general to give his consent to an order pursuant to the prayer of the petition; upon which a motion is made in the Court of Exchequer, and the attorney general consenting, a writ is issued accordingly, this writ must be engrossed, and put under seal, with a subpoena annexed to perform it; and the sheriff being served therewith, must pay over the money, or will be liable to an attachment. 2 *Comp.* 47. See *Tidd's Pract. c. 4.* and the authorities there cited.

V. THERE are two ways of reversing an outlawry; first, by writ of error returned *coram nobis*. *Co. Litt.* 259 *b*; *Fort.* 38. 2dly. By motion founded on a plea, averment, or suggestion of some matter appearing; as in respect of a *superfluous*, omission of process, variance, or of other matter appearing on the record, and yet in these cases some have holden that in another term the defendant is driven to his writ of error. But for any matter of fact, as imprisonment beyond sea at the time of the exigent awarded (*Carth.* 259; 1 *Ld. Raym.* 462; 2 *Salk.* 496. 349; 2 *Str.* 1178; 1 *Wils.* 3), service of the king, &c. he is driven to his writ of error, unless it be in the case of felony, and there *in favorem vite* he may plead to it. It seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years they have gone farther than heretofore upon motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant. *Tidd's Pract. c. 4.*

By 5 & 6 *Ed. C. c. 11. § 7.* all process of outlawry against offenders in treason being *resant* or *inhabitant* out of the limits of the realm, or in any parts beyond the sea at the time of the outlawry pronounced against him, shall be good and effectual in law to all intents and purposes as if such offenders had been within the realm at the time of such process awarded and outlawry pronounced. But by § 8. if the party outlawed shall within one year next after outlawry pronounced or judgment given thereon, yield himself to the chief justice of England, and offer to traverse the indictment, or appeal whenever the said outlawry shall have been pronounced, he shall be received to such traverse, and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry, and of all penalties and for-

feitures by reason of the same, as fully as though no such outlawry had taken place.

A prisoner outlawed, and afterwards in custody thereon, shall be admitted to surrender and traverse at any time within the year. See the case of *Sir Thomas Armstrong*, where such traverse was denied, and he was executed, and the notes thereon. *Pharpp's State Trials reviewed*, ii. 153, 161. But *Armstrong's case* was declared an unfit declared to be followed, and his execution was, in 1689, resolved by the commons to be illegal, and a murder by pretence of justice. Sir Robert Sawyer, the attorney general who prosecuted him, was expelled the house of commons. The survivors of the judges who decided against him, and the executors of Jeffries, who was dead, were summoned to the bar of the house, and it was resolved that 5,000*l.* should be paid by the judges and prosecutors to Armstrong's lady and children for their losses by the attainder. The bill for reversing the attainder, however, did not pass, and it was only reversed on error. 6 *B. & M.* 4 *Mod.* 304; *Sta. Tr.* vol. v. 117, notes collected; and see *Buc. Abr. Treason*, E. edited by Graham and Dodd.

Regularly in all outlawries, as well personal as criminal, the party, in order to reverse the same, was to appear in person, and could not appear by attorney. 2 *Leon.* 22; *Cro. Jac.*

But by 4 & 5 *W. & M. c. 18.* already referred to, if a person outlawed in the court of *B. R.* for any crime whatsoever, (treason and felony only excepted), shall be compelled to appear in person in the said court to reverse such outlawry; but may appear by attorney and reverse the same without bail in all cases, except where special bail shall be ordered by the said court.

By *Westm. 1. (3 E. 1.) c. 9.* it is expressly provided, that those who are outlawed, have forfeited the realm, &c. shall be excluded the benefit of *relevin*; yet it has been always held that the Court of King's Bench may in their discretion, in special cases, bail a person upon an outlawry of felony: as where he pleads that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings. 2 *Hawk. P. C. c. 15. § 40.*

By the 31 *Eliz. c. 3. § 3.* before allowance of any writ of error, or reversing of any outlawry by plea or otherwise, through want of any proclamation made according to the statute, the defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall

begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry.

On reversing the outlawry for any other error in law, besides the want of proclamations, it was long unsettled whether the defendant should be obliged to put in special bail. In the earliest cases upon the subject, it was determined that he should. *Litt. Rep.* 301; *Carth.* 459; 1 *Ld. Raym.* 349; *Gilb. C. P.* 19. But there are cases to the contrary in the time of Holt, Chief Justice, 12 *Mod.* 545; 1 *Ld. Raym.* 605; 2 *Salk.* 496. And in one of them (2 *Salk.* 496) it is said that if the party outlawed come in *gratis*, upon the return of the *exigent*, &c. he may be admitted, by motion, to reverse the outlawry for any other cause but want of proclamations, without putting in bail; but if he come in by *cepi corpus*, he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of *cepi corpus*, and for doing what the court shall order. In two subsequent cases, however, special bail was put in upon reversing the outlawry for errors in law, though it does not appear the party came in *gratis*. *Wall v. Walton*. *E.* 12 *Geo.* 1. cited 1 *Wils.* 4; 2 *Stra.* 951; 2 *Barn. K. B.* 298. At length, in the case of *Serecoid v. Hampson*, the court, upon considering the words of 4 & 5 *W. & M. c.* 18. § 3. which empowers the outlaw to appear by attorney, and says, "the outlawry shall be reversed without bail in all cases, except where special bail shall be ordered by the court," declared they were of opinion they had a discretionary power to require it or not; and that the want of an affidavit before the outlawry was no objection, because that is only requisite to warrant an arrest; and though the 31 *Eliz. c.* 3. § 3. be the only act that expressly requires bail, it is not to be inferred from thence that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. 2 *Stra.* 1178, 9; 1 *Wils.* 3. And it is now settled, that on reversing an outlawry for any other error in law besides the want of proclamations, the bail is common or special, in like manner as upon the arrest. Where special bail is required, it need not be put in before the allowance of the writ of error, but it is well enough if put in at any time before the reversal. 1 *Ld. Raym.* 605; 2 *Stra.* 951; 2 *Barn. K. B.* 928. The recognizance, in such case, is usually taken in the common form; but see 12 *Mod.* 545, *per Holt*, and 2 *Salk.* 496. And it is settled that the bail may render the defendant, and are not, at all events, answerable for

the debt. *Tidd's Pract.* and the authorities there cited.

In general, an outlawry can only be reversed upon payment of costs; but if the process have been abused, and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit, or being at large did not abscond but appeared publicly, and might have been arrested or served with process, the court on motion will order the plaintiff to reverse the outlawry at his own expense. 2 *Vent.* 46; 2 *Salk.* 495; *Barnes*, 321; *T. Jon.* 221; *Comb.* 11; 12 *Mod.* 413.

Upon a writ of error prosecuted by the party in person, to reverse the outlawry in a civil action for a common-law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money, or to render the principal; and not absolutely to pay the condemnation money, as in case of reversal of outlawry upon 31 *Eliz. c.* 3. for want of proclamation; or upon 4 & 5 *W. & M. c.* 18. § 3. on appearance by attorney and by motion. *Havelock v. Gaddes*, 12 *East*, 622.

A bankrupt, who has been waved (or outlawed) and her person arrested, and goods taken by the sheriff under a writ of *capias utlagatum*, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance. 14 *East*. 536.

The court upon motion reversed the outlawry in a civil suit upon the defendant's putting in bail in the alternative to satisfy the condemnation money, or to render the principal, paying all costs, including those, if any, in the Court of Exchequer, without requiring the recognizance of bail to be for the payment of the condemnation money absolutely. 1 *M. & S.* 409.

The court of C. P. reversed an outlawry in a civil suit on motion, upon error in fact sworn to. 3 *Taunt.* 141.

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by a writ of error, without a *scire facias* against all the tenants and lords mediate and immediate; but it is settled, that such *scire facias* is not necessary in the case of high treason. *Dyer*, 34. pl. 20; *Cro. Eliz.* 235; 1 *Keb.* 141; 1 *Sid.* 316; 3 *Keb.* 39; 3 *Mod.* 42, 47; 4 *Mod.* 366; *Ld. Raym.* 154.

Also it is said, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney-general confesses it. 2 *Salk.* 495.



It is agreed, that after an outlawry of treason or felony is reversed, the party shall be put to plead to the indictment, for that still remains good, and he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below to proceed by the 6 *Hen. 6. c. 1*; *Cro. Jac.* 646; *Cro. Car.* 365; 3 *Mod.* 42; 6 *Mod.* 115; 2 *Hule's Hist. P. C.* 209.

So if a man be outlawed by process in an information, and comes in and reverses the outlawry, he must plead *instantly* to the information. 1 *Salk.* 371; 5 *Mod.* 141.

The law is the same in civil cases, and therefore, if an outlawry in a personal action be reversed, the original remains. *March.* 9; 3 *Lev.* 245.

Generally speaking, when the outlawry is reversed, or the defendant has obtained a charter of pardon, he may be discharged, if in custody, by writ of *supersedeas*. See 13 *Car. st.* 2. c. 2. § 4. And his property, if taken into the king's hands, shall be restored to him by writ of *amoveas manus*, or otherwise, according to the course of the exchequer. As to chattels real, see *Cro. Eliz.* 278; 2 *Vern.* 312; *Bunb.* 105; And as to chattels personal, see 5 *Mod.* 61, *post*.

Where he has obtained a charter of pardon he must sue out a *scire facias* to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper. See *Tidd's Prac. c.* 4.

It hath been adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be reversed, the party may enter on the patentee, and need neither sue a petition to the king, nor a *scire facias* against the patentee. 1 *And.* 188. A person shall, after outlawry reversed, be restored to his law, and be of ability to sue. *Co. Litt.* 288 b.

If the goods of a person outlawed are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by a writ of error, he shall be restored to the goods themselves; because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 *Co.* 90; 1 *Roll. Abr.* 778.

If an advowson come to the king, by forfeiture upon an outlawry, and the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson. *Moor.* 269.

But if the church be void at the time of the outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon reversal of the outlawry, the

party shall be restored to the presentation. *Cro. Eliz.* 170.

If a termor being outlawed for felony, grants over his term, after the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is as if no outlawry had been, and there is no record of it. *Cro. Eliz.* 170; 13 *Co.* 20, 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods are seized into the king's hands, and then the outlawry is reversed, there can be no restitution; the reason whereof is, for that the Court of King's Bench cannot send a writ to the treasurer; and the Court of Exchequer have no record before them to issue out a warrant for restitution. 5 *Mod.* 61. See 2 *Vern.* 2, 3; 2 *Lev.* 49.

For more learning on the subject, see 3 *New Abr.* and 22 *Vin. Abr.* title *Outlawry*.

OUTPARTERS, mentioned in 9 *H. 5. st. 1. c.* 7. A kind of thieves in Riddesdale, that stole cattle, or other things without that liberty. Some are of opinion, that those which in the fore-named statute are termed out-parters, are now called *outputers*, being such as set matches for the robbing any man or horse. *Cowell.* See *Intakers*.

OUTRIDERS. Bailiffs errant, employed by the sheriffs, or their deputies, to ride to the farthest place of their counties or hundreds, with the more speed to summon such as they thought good to their county or hundred courts. See 14 *E. 3. st. 1. c.* 9.

OUTSUCKEN MULTURES. Quantities of corn paid by persons voluntarily grinding corn at any mill, to which they are not thirled or bound by tenure. See *Thirlage, Multurers*. OWEL. An old French word for equal. *Law Fr. Dict.*

OWELTY, equality. *Co. Litt.* 169. When there is lord, mesne, and tenant, and the tenant holds the mesne by the same service that the mesne holds over the lord above him, this is called owelty of services. *F. N. B.* 136.

OWLERS. Persons that carried wool, &c. to the seaside by night, in order to be shipped off contrary to law. See *Wool*.

OWLING. Was the offence of exporting, &c. wool by night. See *Wool*.

OXEN. See *Cattle*.

OXFIELD. A restitution anciently made by a hundred or county, for any wrong done by any one that was within the same. *Lamb. Archaion.* 125.

OXGANG, from *Ox*, i. e. *box* and *gang*, or *gate*, *iter*.] Is commonly taken for fifteen acres of land, or as much as one ox can plough in a year. *Skene* says 13 acres. See *Spelman*.

Six oxgangs of land is so much as six oxen can plough. *Crompt. Jurisd.* 220. But an ox-

gang seemeth properly to be spoken of such *Salk.* 497; 6 *Mod.* 28; *Ld. Raym.* 970; 2 *land* as both in *gaynour. Old Nat. Br. fol.* 117. *Str.* 1186; 1 *Wils.* 16.

See *Co. Litt.* 69. *Cowell.*

OYER. This word was anciently used for what we now call assizes. *Anno.* 13 *Ed.* 1. See *Assizes, Oyer & Terminer.*

OYER, Fr.; *Audire*, Lat. To hear.] Previous and preparatory to pleading in bar, the defendant may crave oyer of the writ, or bond, or other specialty upon which the action is brought, that is, to hear it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves; whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. 3 *Comm. c.* 20. p. 299.

1. *By whom and how to be made, and of what demandable.*—Oyer of deeds, &c. is demanded by the plaintiff, or by the defendant. If the plaintiff in this declaration necessarily makes a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray oyer, and must have a copy thereof delivered to him, if demanded. 2 *Salk.* 497; *R. T.* 5 & 6 *Geo.* 2.

To demand oyer of an obligation, is not only to desire the plaintiff's attorney to read the same; but to have a copy thereof; that the defendant may consider what to plead to the action. *Hob.* 217.

So likewise if the defendant in his plea makes a necessary *profert in curia* of any deed, &c. the plaintiff may pray oyer, and shall have a copy. *Id.* 6 *Mod.* 122. And the party of whom oyer is demanded, is bound to carry it to the adverse party. 2 *T. R.* 40.

Although oyer can be only demanded where *profert* is made, yet if it be unnecessarily made, this does not entitle to oyer. On the other hand, if *profert* be omitted when it ought to have been made, the opposite party cannot have oyer, but must demur. 1 *Saund.* 9 a. n. (d.)

But though oyer be not in strictness demandable, yet, if it be given, the party demanding has a right to make use of it. *Dougl.* 476, 477. If the defendant would insist upon his demand of oyer, he should move the court to have it entered upon record. 6 *Mod.* 28. If the plaintiff, on the other hand, would contest the oyer, he may either counterplead it or strike out the rest of the pleading, and demur. 2 *Lev.* 142; 2 *Salk.* 497; and see *Ld. Raym.* 970. Upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it. 2 *Lev.* 142. On the latter judgment, the defendant may bring a writ of error, for to deny oyer where it ought to be granted in error, but not *à converso*. 2

Though oyer is not, in strictness, demandable of a record, (1 *Ld. Raym.* 347, 4th edit. note (a); *Dougl.* 476 477; 1 *T. R.* 149, 150), yet if a judgment or other matter of record in the same court be pleaded, the parties pleading it must give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; or in default thereof the plea is not to be received. *Kielho.* 96; *Carth.* 454; 1 *Ld. Raym.* 347; *Carth.* 517; 1 *Ld. Raym.* 550; 2 *Str.* 823; *R. T.* 5 & 6 *Geo.* 2 (b). And probably on this account the party was not anciently permitted to plead *nul tiel record*, of a judgment or matter of record in the same court. 5 *Hen.* 7, 24, per *Brian*; 3 *Keb.* 76. But where a judgment or matter of record is pleaded in a different court, the party not being entitled to an account of the term and number-roll, must plead *nul tiel record*. And it seems that oyer is not demandable of an act of parliament. *Dougl.* 476; *Godb.* 186, *contra*.

Formerly the defendant was allowed oyer of the original writ, in order to demur or plead in abatement, for any apparent insufficiency or variance. *Gillb. C. P.* 52; 12 *Mod.* 35, 189; 2 *Lutw.* 1644; 6 *Mod.* 27; 2 *Sulk.* 498; 2 *Ld. Raym.* 970; *R. T.* 5 & 6 *Geo.* 2 (b); 2 *Wils.* 97; *Co. Ent.* 320. But this indulgence having been abused and made an instrument of delay, the courts of B. R. and C. P. established a rule that oyer should not be granted of the original writ, which had the effect of abolishing pleas in abatement founded on facts that could only be ascertained by examination of the writ itself. And it was afterwards held, that if the defendant demanded oyer of the original writ, the plaintiff might proceed as if no such demand had been made. *Dougl.* 227, 228; *Barnes*, 340; and see *Bro. Abr. tit. Oyer.* pl. 19.

Where the plaintiff is entitled to have oyer of a deed, it cannot be dispensed with by the court, nor can the defendant be compelled to plead without it, even though the deed be lost. 2 *Lill. P. R.* title *Oyer*, 266; 2 *Keb.* 274; 6 *Mod.* 28; 2 *Str.* 1186; 1 *Wils.* 16. But where the deed is in the hands of a third person, the court will oblige him to give oyer, and produce it. 2 *Str.* 1198.

A party having a right to demand oyer, is not obliged in all cases to exercise that right, neither is he compelled in all cases, after demanding it, to notice it in the pleading, that he afterwards files and delivers. Sometimes, however, he is obliged to do both, viz. where he has occasion to found his answer upon any matter contained in the deed, of which *profert* is made, and not set forth by his adversary.

In these cases the only admissible method of the tenor of the deed, as it appears upon oyer, making such matter appear to the court is to demand oyer, and from the copy given set forth the whole deed in the pleading. *Steph. on Pleading*, 70, 3d edit.

The plaintiff may either set forth the oyer in his plea or not, at his election. 2 *Str.* 1241; 1 *Wils.* 97. If he set it forth, the court must adjudge upon it as parcel of the record, though it was not strictly demandable at the time of granting it. 3 *Salk.* 119; *Carth.* 513; 6 *Mod.* 27; *Dougl.* 460. But the defendant is not bound to set it forth in his plea. 2 *Str.* 1241; 1 *Wils.* 97; *Barnes*, 127, *contra*; and if he do not, the plaintiff may pray an inrolment, and so make it part of his replication.

But if the defendant, after craving oyer of a deed, set forth only a part, and not the whole of it, the plaintiff may sign judgment as for want of a plea. 4 *T. R.* 370.

By the rules of Hilary Term, 2 *Wm.* 4, if a defendant, after craving oyer of a deed, omit to insert at the head of his plea, the plaintiff, on making up the issue or demurrer-book, may, if he think fit, insert it for him: but the costs of such insertion shall be in the discretion of the taxing officer.

Where there may be oyer, the party demanding it is not bound to plead without it, but defendant may plead without it if he will, on taking upon him to remember the bond or deed; though if he plead without oyer, he cannot after waive his plea, and demand oyer. *Mod. Cas.* 28; 3 *Salk.* 119. After a plea in abatement, oyer may not be had the same term, to plead another dilatory plea. *Mod. Cas.* 27.

When an oyer of a deed it is entered, the whole case appears to the court as if the deed were in the plea, and the deed is become parcel of the record, though oyer of a deed can only be demanded during the time it is produced in court; and then it may be entered in *hæc verba*, and there may be a demurrer or issue upon it, &c. 5 *Rep.* 76; *Lutw.* 1644; 3 *Salk.* 119.

A defendant ought to crave oyer of the plaintiff's deed, on which he hath declared; and cannot set forth another to plead performance thereof. *Mod. Cas.* 154.

So where a deed is pleaded, the other party cannot allege that there is other matter contained in the deed, but must set it forth on oyer. *Str.* 227.

If there is misnomer in a bond, &c. the defendant is to plead the misnomer, and that he made no such deed without craving oyer; for if he doth, he admits his name to be right. 1 *Salk.* 7.

When oyer is demanded, and the deed set forth, the effect is as if it had been set forth in the first instance by the opposite party, and

is consequently considered as forming part of the preceding pleading. Therefore if the deed, when so set forth in the plea, be found to contain in itself matter of objection in answer to the plaintiff's case as stated in the declaration, the defendant's course is to demur; as for matter apparent on the face of the declaration; *Doug.* 475; 4 *B. & C.* 741; and it would be improper to make the objection the subject of plea. *Steph. on Pl.* 72, 3d. ed.

Formerly, all demands of oyer were made in court, (as it is now in case of criminal appeals,) where the deed is by intendment of law, when it is pleaded with a *profert in curiâ*. 12 *Mod.* 598; 3 *Salk.* 119. And therefore when oyer is craved, it is to be supposed to be of the court, and not of the party; and the words *ei legitur in hæc verba*, &c. are the act of the court. *Id.*; 1 *Sid.* 108. But see 2 *Lutw.* 1644, *contra*. In practice however, oyer is now usually demanded, and granted by the attornies. 6 *Mod.* 28.

2. When it must be demanded and granted.

—When a deed is shown in court, it remains there in contemplation of law, all the term in which it is shown; for all the term is considered in law but as one day; and at the end of the term, if the deed be not denied, the law doth adjudge it to be in the custody of the party to whom it belongs; but if it be denied, then it shall remain in court till the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. *Co. Litt.* 231, b; 5 *Co.* 74, b; 2 *Lutw.* 1644. But letters testamentary, or of administration, are not supposed to remain in court all the term, for the plaintiff may have occasion to produce them elsewhere. 2 *Salk.* 497; 12 *Mod.* 598. Hence it is, that oyer of a deed cannot, in strictness, be demanded but during the same term it is pleaded. 5 *Co.* 74, b; 2 *Lutw.* 1644; 1 *T. R.* 149. And as a general imparlance is always to a subsequent term (but see now *Imparlanca*), it follows that oyer of a deed cannot be demanded after such imparlance. 1 *Keb.* 32; 2 *Lev.* 142; *Freem.* 400; 3 *Keb.* 480, 491; 6 *Mod.* 28.

The demand of oyer is a kind of plea, and should regularly be made before the time of pleading is expired. If it be not made till after that time, the plaintiff may consider the demand as a nullity, and sign judgment. *Tidd's Prac.*

There is no settled time prescribed for the plaintiff to give oyer, though if not given when demanded, the defendant shall have the same time to plead after oyer given, as he had at the time of demanding it. 1 *Str.* 705; *R. T.* 5 & 6 *Geo.* 2 (b).

The time allowed for the defendant to give



oyer of a deed, &c. to the plaintiff, is two days exclusive after it is demanded. *Carth.* 454; 2 *T. R.* 40. And if it be not given in that time, the plaintiff may sign judgment as for want of a plea. 6 *Mod.* 122. If given, the plaintiff shall have the same time to reply after oyer given him by the defendant, as he had at the time of demanding it. *R. T.* 5 & 6 *Geo.* 2 (b).

**OYER DE RECORD**, *audire recordum.*] A petition made in court that the judges, for better proof sake, will hear or look upon any record. See the preceding title *Oyer*.

**OYER AND TERMINER**, *Fr. ouir et terminer*; Latin, *audiendo et terminando.*] A commission directed to the judges and other gentlemen of the county to which it is issued, by virtue whereof they have power to hear and determine treasons, and all manner of felonies and trespasses. *Crompt. Juris.* 121; 2 *Inst.* 419; 4 *Inst.* 152. In our statutes the term is often printed oyer and determiner. 4 *Inst.* 162. See *Justices of Oyer, &c.* and the references there.

The usual commission of oyer and terminer to the judges of assize is general; but when any sudden insurrection takes place, or any public outrage is committed, which requires speedy reformation, then a special commission is immediately granted. *F. N. B.* 110; and see stat. *West.* 2. 13 *Edw.* 1. c. 29.

A man may have a special commission of oyer and terminer (but this has long been obsolete) to inquire of extortions and oppressions of under-sheriffs, bailiffs, clerks of the markets, and all other officers, &c., on the complaint and suit of any one who will sue it out; and the king may make a writ of association unto the justices of oyer and terminer, to admit those into their company whom he hath associated unto them; also another writ may be sent to the judges to proceed, although all the justices do not come at the day of the sessions; and this writ is called the writ of *si non omnes*, &c. *New Nat. Brev.* See *Reg. Orig.* 126; *F. N. B.* 112.

As to these commissions it is said, that if a commission of oyer and terminer, &c. be awarded to certain persons to inquire at such a place, they can neither open their commission at another, nor adjourn it thither, or give judgment there; if they do, all their proceedings are as *coram non judice*. But it is held, that justices appointed *pro hac vice* may ad-

ourn their commission from one day to another, though there be no words in their commission to such purpose; for a general commission authorizing persons to do a thing, implicitly allows them convenient time for the doing it. 2 *Hawk. P. C. c.* 5. §. 14.

Upon the general commission of oyer and terminer, there should issue a precept to the sheriff in the name of the commissioners, bearing date fifteen days before their sessions, that he return twenty-four persons for a grand jury *ad inquirendum*, &c. on such a day, and the sheriff is to return his panel annexed to the precept.

As the same justices at the same time may execute the commission of oyer and terminer, and also that of gaol delivery, they may proceed, by virtue of the one, in those cases where they have no jurisdiction by the other, and make up their records accordingly. 2 *Hale, P. C.* 20; and see 2 *Hawk. P. C. c.* 5.

On indictments found before the justices of oyer and terminer, they may proceed the same day against the parties indicted. See further *Assize, Circuits, Justices, &c.*

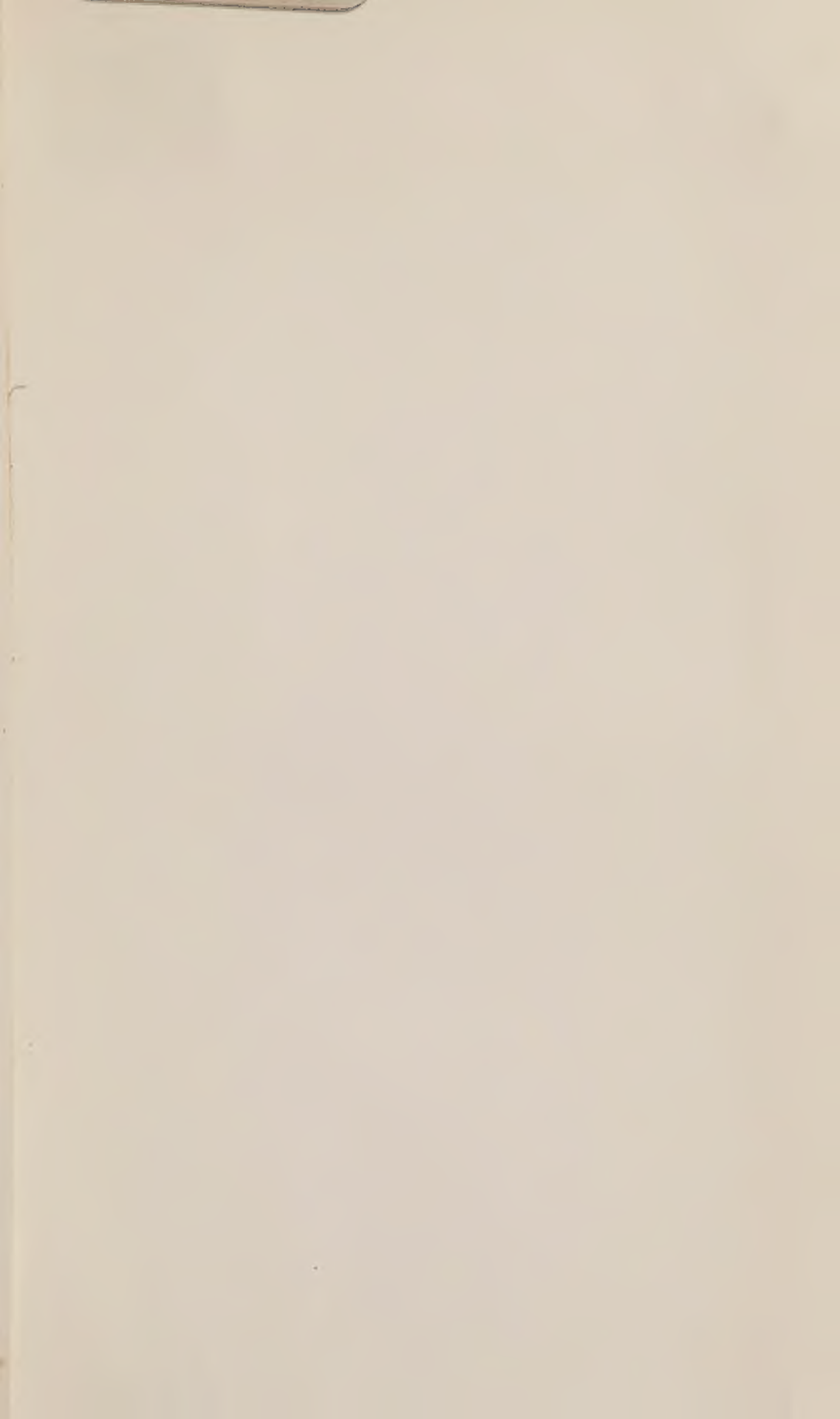
**O YES.** A corruption of the French *oyez*, i. e. *audite*, hear ye. The term used by a public crier to enjoin silence.

**OYSTER-FISHERY** (in the river Medway), is regulated by 2 *Geo.* 2. c. 19; and a court is kept for that purpose at Rochester yearly, where, by a jury of free dredgemen of the oyster-fishery, the same is to be inquired into; and they may make rules and orders when oysters shall be taken, what quantities in a day, and to preserve the brood of oysters, &c.; and may impose penalties not exceeding 5*l.*; also water-bailiffs shall be appointed to examine boats, &c.

By the 7 & 8 *Geo.* 4. c. 29. § 36, stealing oysters or oyster-brood from any oyster-bed laying, or fishery, being the property of any other person, and sufficiently marked out or known is declared to be a larceny; and persons unlawfully and wilfully using any dredge, net, instrument, or engine for taking oysters or oyster-brood, although none be actually taken, or with any net, instrument, or engine dragging on the ground of such fishery, are guilty of a misdemeanor, and may be fined not exceeding 20*l.* and imprisoned not exceeding three calendar months.

**OZE or OZY GROUND**, *solum uliginosum.*] Moist, wet, and marshy land. *Lit. Dict.*









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